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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

17, 18, 19, 20 HOWARD

BOOK 15.

LAWYERS' EDITION

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

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HON. ROGER BROOKS TANEY.

ASSOCIATE JUSTICES,

HON. JOHN MCLEAN,
HON. JAMES M. WAYNE,
HON. JOHN CATRON,
HON. PETER V. DANIEL,
HON. SAMUEL NELSON,
HON. ROBERT C. GRIER,
HON. BENJAMIN R. CURTIS,
HON. JAMES A. CAMPBELL,
HON. NATHAN CLIFFORD.

ATTORNEY GENERAL,

HON. CALEB CUSHING,
to Dec. Term, 1857; after that
HON. JEREMIAH S. BLACK.

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WILLIAM THOMAS CARROLL, ESQ.

REPORTER,

BENJAMIN C. HOWARD, ESQ.

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ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS IT STOOD DURING THE TERMS OF 1854-5-6-7, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

Name of Justice, and whence Appointed.	By whom Appointed.	Circuits, 1842–1862	Commissioned.	Sworn in.	Termination.
Chief Justice. ROGER BROOKS TANEY, Maryland.	President Jackson.	Fourth. Delaware, Maryland and Virginia.	1836. (Mar. 15.)	1836. (Mar. 23.)	Died. 1864. (Oct. 12.)
Associates. JOHN McLEAN, Ohio.	President Jackson.	Seventh. Ohio, Indiana, Illinois and Michigan.	1829. (Mar. 7.)	1830. (Jan. 11.)	Died. 1861. (Apr. 4.)
JAMES M. WAYNE, Georgia.	President Jackson.	Sixth. North Carolina, South Carolina and Georgia.	1835. (Jan. 9.)	1835. (Jan. 14.)	Died. 1867. (July 5.)
JOHN CATRON, Tennessee.	President Van Buren.	Eighth. Kentucky, Tennessee and Missouri.	1837. (Mar. 8.)	1838. (Jan. 10.)	Died. 1865. (May 30.)
PETER V. DANIEL, Virginia.	President Van Buren.	Ninth. Arkansas and Mississippi.	1841. (Mar. 3.)	1842. (Jan. 10.)	Died. 1860. (May 31.)
SAMUEL NELSON, New York.	President Tyler.	Second. Vermont, Connecticut and New York.	1845. (Feb. 14.)	1845. (Mar. 3.)	Resigned. 1872. (Dec. 1.)
ROBERT C. GRIER, Pennsylvania.	President Polk.	Third. New Jersey and Pennsylvania.	1846. (Aug. 4.)	1846. (Dec. 7.)	Resigned. 1870. (Jan. 31.)
BENJAMIN R. CURTIS, Massachusetts.	President Filmore.	First. Massachusetts, New Hampshire and Rhode Island.	1851. (Sept. 22.)	1851. (Dec. 1.)	Resigned. 1857. (Sept. 30.)
JOHN A. CAMPBELL, Alabama.	President Pierce.	Fifth. Alabama and Louisiana.	1853. (Mar. 22.)	1853. (Dec. 6.)	Resigned. 1861. (May 1.)
NATHAN CLIFFORD, Maine.	President Buchanan.	First. Massachusetts, New Hampshire and Rhode Island.	1858. (Jan. 12.)	1858. (Jan. 21.)	Died. 1881. (July 25.)

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GENERAL TABLE OF CASES REPORTED

IN THIS BOOK.

VOLUMES 58, 59, 60, 61.

A.

Abbott v. Essex Co. 352
Ableman v. Booth 465
Adams v. Law 149
Ahl v. Johnson 1005
Allen, Wilkins v. 396
Alford, Christy v. 256
Arguello v. U. S. 478
Arguello, U. S. v. 478
Arkansas, Bank of Washington v. 992
Arkansas, Beers v. 991
Ashley, Barnard v. 285
Arthurs, Nicholson & Co. v. Hart 30
Ayres v. Carver 179

B.

Babcock v. Wyman 644
Babin, Hipp v. 633
Babbage, Schuchardt v. 625
Bacon v. Howard 811
Bacon v. Robertson 499
Baker v. Nachtrieb 528
Ballance v. Papin 678
Ballard v. Thomas 690
B'k of Columbus, U. S. v. 662
B'k of Tenn. v. Horn 70
B'k of Washington v. Arkansas 992
Barnard v. Ashley 285
Barreda, Masters v. 466
Barribeau v. Brant 34
Barrow, Shields v. 158
Barton v. Forsyth 1012
Battin v. Hewes 37
Battin v. Radcliffe 37
Battin v. Taggert 37
Bayne, Graham v. 265
Bay State, The Steamboat Co. v. 42
Beauregard v. New Orleans 469
Beebe v. Russell 668
Beers v. Arkansas 991
Beers, People's Ferry Co. of Boston v. .. 961
Bell v. Hearne 614
Bell, Lewis v. 203
Bertram, Lyon v. 847
Betts v. Lewis 576
Bidwell, U. S. v. 822
Black, Ledoux v. 457
Blacksmith, Fellows v. 684
Bogart v. Steamb. John Jay 95
Bogert, Griffith v. 307
Boone v. Missouri Iron Co. 171
Booth, Ableman v. 465
Booth v. Clark 164
Booth, U. S. v. 464

B.

Boston, City of, v. Lecraw 118
Boston, City of, v. Richardson 639
Boyd, Mattingly v. 845
Boyle, Meegan v. 577
Branch B'k of Alabama, McRea v. 688
Brant, Barribeau v. 34
Breitling, U. S. v. 900
Brig Neura, U. S. v. 531
Brown v. Duchesne 595
Brown v. Shannon 826
Brown v. Wiley 965
Brown, Iasigi v. 208
Bruce v. U. S. 129
Bryan v. Forsyth 674
Buckingham, Schooner Freeman v. 341
Buckley, Withers v. 816
Buckner, Com'l B'k of Manchester v. 862
Bulkley v. Honold 261, 663
Burchell v. Marsh 96
Burgess, Converse v. 455
Burke v. Gaines 655
Burnley, White v. 886
Bush v. Person, Adm'r, etc. 273
Byers v. Surget 670

C.

Calcote v. Stanton 348
Calderwood, N. Y. & Va. S. S. Co. v. 612
Cambuston, U. S. v. 828
Carpenter v. Com. of Penna. 127
Carpenter, Doe v. 389
Carrington v. Pratt 267
Carroll v. Dorsey 803
Carryl, Taylor v. 1028
Carter, La Fayette v. 345
Carver, Ayres v. 179
Catherine, Schooner, v. Dickinson, ... 233
Cavazos, Mussina v. 878
Cavazos, Shannon, v. 929
Cervantes, U. S. v. 484
Chaffee v. Hayward, ...804, 851
Chapman, McCargo v. 1021
Christ Church v. Co. of Phila., ... 802
Christy v. Alford 256
City of N. Y., Ransom, Ex parte, v..... 1000
Clark, Booth v. 164
Clark v. Clark 77
Clapp, Providence City v. 72
Cochran, West v. 110
Coffman, Ure v. 567
Coggeshall v. Hartshorne 261
Coiron v. Millaudon 575
Coleman, Verden v. 272

Digitized by Google

C.

Com'l B'k of Manchester v. Buckner 862
Com'l Mut. Ins. Co. v. Union Mut. Ins. Co. 636
Conner v. Elliot 497
Connor v. Peugh's Lessee 432
Converse v. Burgess 455
Cooper v. Roberts 338
Cooper, Roberts v. 687, 969
Corcoran, Judson v. 231
Corp. of Washington, Smith v. 858
Co. of Phila., Christ Church v. 802
Cotton, Walton v. 658
Cousin v. Labatut 601
Covington Drawbridge Co. v. Shepherd... 896
Coxe, Mackey v. 299
Coxe, U. S. v. 76, 299
Coy v. Mason 125
Craighead v. Wilson 332
Crockett v. The Newton 492
Crommelin, Minter v. 279
Culbertson v. Stm'r Southern Belle, etc... 493
Curtenius, Morgan v. 576, 823
Curtis v. Petitpain 280

D.

Davis, Wood v. 400
Dawson, Ingraham v. 984
Day v. Hayward 805, 851
Day v. U. India Rubber Co. 883
Day, Hartshorn v. 272, 605
Dean v. Mason 876
Debolt, Mechanics' Tr's B'k v. 458
Den v. Hoboken Ld. Co. 372
Den v. Suckley 378
Den, Webb v. 35
Dennistoun v. Stewart 228, 489
Dickinson, Catharine, Schooner, v. 233
Dickson, Marks v. 1002
Dodge v. Woolsey 401
Doe v. Carpenter 389
Dorsey, Carroll v. 803
Doswell v. De La Lanzo 824
Dousman, Stinson v. 966
Duchesne, Brown v. 595
Dufresne, Haydel v. 115
Dupont v. Vance 584
Dynes v. Hoover 838

E.

Elliot, Conner v. 497
Emerson, Slater v. 626
Essex Co., Abbott v. 352
Eve, Wickliffe v. 163
Ex parte Secombe 565
Ex parte Wells 421

F.

Farmer, Rhodes v. 152
Farrelly v. Woodfolk 670
Fellows v. Blacksmith 684
Field v. Seabury 650, 655
Fisher v. Haldeman 879
Fisher, Hemmenway v. 799
Florida v. Georgia 181
Fontain v. Ravenel 80
Forsyth, Barton v. 1012
Forsyth, Bryan v. 674
Ford, Stockton v. 395
Foote, Silsby v. 822, 953
Fossat, U. S. v. 944
Fouvergne v. New Orleans 399
Freeman, Schooner, v. Buckingham 341
Frémont v. U. S. 241

F.

Frémont, U. S. v. 302
French, La Fayette Ins. Co. v. 451
Frontin, Guild v. 290

G.

Gaines, Burke v. 655
Galliote Venelia, The, Mayer v. 41
Garland v. Wynn 801
Garrison v. Memphis Ins. Co. 656
Garrison, Savignac v. 290
Gazzam v. Phillips 958
Georgia, Florida v. 181
Gibbes, Gooding v. 148
Gibbes v. Whyte 1016
Gibbes v. Williams 1013
Gibbes, McBlair v. 132
Gibbes, Whyte v. 1016
Gibbes, Williams v. 135, 1013
Gladding, Stevens v. 155, 569
Gooding v. Gibbes 148
Goodman v. Simonds 934
Goslee v. Shute 462
Graham v. Bayne 265
Graham, Strader v. 464
Grant v. Poillon 871
Greene, Moore v. 533
Greenaux, Prevost v. 572
Griffin v. Reynolds 229
Griffith v. Bogert 307
Guild v. Frontin 290
Guthrie, U. S. v. 102

H.

Haldeman, Fisher v. 879
Hall, Little v. 328
Ham v. St. of Missouri 334
Hart, Arthurs, Nicholson & Co. v. 30
Hartshorn v. Day 272, 605
Hartshorne, Coggeshall v. 261
Haydel v. Dufresne 115
Hays v. Pacific Mail S. S. Co. 254
Hayward, Chaffee v. 804, 851
Hayward, Day v. 805, 851
Hearne, Bell v. 614
Hemmenway v. Fisher 799
Hendrickson v. Hinckley 123
Henshaw v. Miller 222
Hensley, U. S. v. 822
Herndon v. Ridgway 100
Hewes, Battin v. 137
Hill, Snow v. 1017
Hill, Williams v. 570
Hinckley, Hendrickson v. 123
Hinkle v. Wanzer 173
Hipp v. Babin 633
Hoboken Ld. Co., Den v. 372
Holcombe v. McKusick 1020
Holmes, Richards v. 304
Holroyd v. Pumphrey 264
Honold, Bulkley v. 261, 663
Honold, Sturgis v. 261, 666
Hoover, Dynes v. 838
Horn, B'k of Tenn. v. 70
Howard, Bacon v. 811
Hudgins v. Kemp 511, 514, 853, 856
Hungerford v. Sigerson 869
Hyde v. Stone 874

I.

Iasigi v. Brown 208
Ingraham v. Dawson 984
Irvine v. Marshall 994

Digitized by Google

J.

Jackson v. The Magnolia 909
Jecker v. Montgomery 311
Jerome, Platt v. 623
Johnson, Ahl v. 1005
Johnston, Jones v. 320
Jones v. Johnston 320
Jones v. League 263
Jones v. McMasters 805
Jones, Post v. 618
Jones, U. S. v. 274
Judson v. Corcoran 231
Judson, Lathrop v. 553

K.

Kemp, Hudgins v. 511, 514, 853, 856
Kenton, La Fayette v. 345
Kinsman v. Parkhurst 385
Kissell v. St. Louis Pub. Schools 324
Knox Ins Co., Ogilvie v. 490

L.

Labatut, Cousin v. 601
La Fayette v. Carter 345
La Fayette v. Kenton 345
La Fayette Ins. Co. v. French 451
Lanzo, De La Doswell v. 824
Lapsley, Spencer v. 902
Larkin, U. S. v. 485
Lathrop v. Judson 553
Law, Adams v. 149
Lawrence v. Minturn 58
League, Jones v. 263
LeBaron, U. S. v. 525
Lecraw, Boston, City of, v. 118
Ledoux v. Black 457
Leitensdorfer v. Webb 891
LeRoy, Wade v. 813
Lewis v. Bell 203
Lewis Betts v 576
Lewis, Wolfe v. 643
Lindsay, Mordecai v. 624
Little v. Hall 328
Long v. O'Fallon 550
Lord v. The Newton 493
Lyon v. Bertram 847

M.

McBlair v. Gibbes 132
McCargo v. Chapman 1021
McCormick v. Talcott 930
McCormick, Seymour v. 557
McCready v. Wells 288
McCullough v. Roots 681
McFaul v. Ramsey 1010
McGavock v. Woodlief 884
McKinney v. Saviego 365
McKusick, Holcombe v 1020
McLaughlin v. Swann 357
McLean v. Meek 277
McMasters, Jones v. 805
McMicken v. Perin 504, 857
McRea v. Branch B'k of Alabama..... 688
Mackey v. Coxe 299
Magnolia, The, Jackson v. 909
Marks v. Dickson 1002
Marsh, Burchell v. 96
Marshall, Irvine v. 994
Maryland, South v. 433
Maryland St., Smith v. 269
Mason, Coy v. 125
Mason, Dean v. 876
Masters v. Barreda 466

M.

Mattison, Wright v. 280
Matthews, Sigerson v. 989
Mattingly v. Boyd 845
Maxwell v. Newbold 506
Maxwell, Ring v. 25
Maynard, Minturn v. 235
Mayer, The v. The Galliote Venelia 41
Mech's & Tr's B'k v. Debolt..... 458
Mech's & Tr's B'k v. Thomas 460
Meegan v. Boyle 577
Meek, McLean v. 277
Memphis Ins. Co., Garrison v. 656
Mich. C. R. R. Co. v. Mich. S. R. R. Co... 689
Mich. S. R. R. Co., Mich. C. R. R. Co. v. .. 689
Millaudon, Coiron v. 575
Miller, Henshaw v. 222
Mills, Vandewater v. 554
Minn. & N. W. R. R. Co., U. S. v. 347
Minor, Nutt v. 378
Minter v. Crommelin 279
Minturn v. Maynard 235
Minturn, Lawrence v. 58
Missouri Iron Co., Boone v. 171
Missouri, State of, Ham v..... 334
Mollison, Propeller Monticello v. 68
Montgomery, Jecker v. 311
Moore v. Greene 533
Mordecai v. Lindsay 624
Moreland v. Page 1009
Morgan v. Curtenius 576, 823
Morris, Wynn v. 800
Mussina v. Cavazos 878
Myers, Selden v. 976
Myers, York & Cumberland R. R. Co. v. 380

N.

Nachtrieb, Baker v. 528
Newbold, Maxwell v. 506
New Orleans, Beauregard v. 469
New Orleans, Fouvergne v. 399
New Orleans Canal & Banking Co., Stafford v. 102
Newton, The, Crockett v. 492
Newton, The, Lord v. 493
N. Y. & Va. S. S. Co. v. Calderwood.... 612
Niagara, The, v. Van Pelt 152
Nickerson, U. S. v. 219
Niles, Payne v. 895
Nine Cases of Hats, U. S. v. 57
Norton, Warner v. 950
Nutt v. Minor 378

O.

Odiorne, Troy Iron & Nail Factory v..... 37
O'Fallon, Long v. 550
Ogilvie v. Knox Ins. Co. 490
Olney v. The S. S. Falcon 43
One Case of Clocks, U. S. v. 58
One P'k'ge of Mdse., U. S. v. 58
Oregon, Steamer, v. Rocca 515
Oregon, Steamer, v. Turner 515
Orton v. Smith 393
Osborne, Pulliam v. 154
Osborn, Thomas v. 534
Overman, Parker v. 318
Owings, Wickliffe v. 44

P.

Pacheco, U. S. v. 820
Pacific Mail & S. S. Co., Hays v. 254
Page, Moreland v. 1009
Papin, Ballance v. 678

Digitized by Google

P.

Parker v. Overman 318
Parkhurst, Kinsman v. 385
Patten, Teller v. 831
Payne v. Niles 895
Payne, Watterston v. 899
Pease v. Peck 518
Peaslee, Sampson v. 1022
Peaslee, Stairs v. 474
Peck v. Sanderson 205, 262
Peck, Pease v. 518
Peck, Ward v. 383
Penna v. Wheeling, etc., Bridge Co. ..435, 449
Penna. Com. of, Carpenter v. 127
Peoples' Ferry Co. of Boston v. Beers.... 961
Peralta, U. S. v. 678
Perin, McMicken v. 504, 857
Person, Adm'r, etc., Bush v. 273
Petitpain, Curtis v. 280
Peugh's Lessee, Connor v. 432
Phillips, Gazzam v. 958
Pintard, Sessions v. 298
Platt v. Jerome 623
Poillon, Grant v. 871
Post v. Jones 618
Poydras v. Treas. of La. 93, 350
Pratt v. Reed 660
Pratt, Carrington v. 267
Pratt, Tod v. 662
Prevost v. Greenaux 572
Propeller Monticello v. Mollison 68
Providence City v. Clapp 72
Pulliam v. Osborne 154
Pumphrey, Holroyd v. 264

R.

Radcliffe, Battin v. 37
Ramsey, McFaul v. 1010
Ransom, ex parte, v. City of N. Y. 1000
Ranson v. Winn, Adm'r, etc. 388
Ravenel, Fontain v. 80
Raymond v. Tyson 47
Reading, U. S. v. 291
Rea, Steamboat N. Y. v. 359
Reed, Pratt v. 660
Reynolds, Griffin v. 229
Rhodes v. Farmer 152
Richards v. Holmes 304
Richardson v. City of Boston 639
Ridgway, Herndon v. 100
Ring v. Maxwell 25
Ritchie, U. S. v. 236
Roberts v. Cooper 687, 969
Roberts, Cooper v. 338
Robertson, Bacon v. 499
Rocca, Steamer Oregon v. 515
Rogers v. Steamer St. Charles 563
Roots, McCullough v. 681
Russell, Beebe v. 668

S.

St. Louis Pub. Schools, Kissell v. 324
Sampson v. Peaslee 1022
Sanderson, Peck v. 205, 262
Sandford, Scott v. 691
Sandford, Willot v. 549
Saviego, McKinney v. 365
Savignac v. Garrison 290
Scott v. Sandford 691
Schuchardt v. Babbage 625
Scudday, Shaffer v. 592
Seabury, Field v. 650, 655

S.

Seaman, U. S., ex rel. Tucker, v. 226
Secombe, Ex parte 565
Secombe v. Steele 833
Selden v. Myers 976
Selden, Thompson v. 1001
Sessions v. Pintard 298
Seymour v. McCormick 557
Shackleford, U. S. v. 495
Shaffer v. Scudday 592
Shannon, Brown v. 826
Shannon v. Cavazos 929
Shepherd, Covington Drawbridge Co. v... 896
Shields v. Barrow 158
Shields v. Thomas 93, 368
Ship Howard v. Wissman 363
Shute, Goslee v. 462
Sigerson, Hungerford v. 869
Sigerson v. Mathews 989
Silsby v. Foote 822, 953
Simonds, Goodman v. 934
Sixty-seven Packages Dry Goods, U. S. v. 54
Slater v. Emerson 626
Smith v. Corp. of Washington 858
Smith v. Maryland St. 269
Smith, Orton v. 393
Snow v. Hill 1017
South v. Maryland 433
Spencer v. Lapsley 902
Stafford v. New Orleans Canal & Banking Co. 102
Stafford v. Union B'k of La. 101
Stairs v. Peaslee 474
Stanford v. Taylor 453
Stanton, Calcote v. 348
State of Missouri, Ham v. 334
Steamboat Co. v. The Bay State 42
Steamboat John Jay, Bogart v. 95
Steamboat N. Y. v. Rea 359
Steamer Oregon v. Rocca 515
Steamer Oregon v. Turner 515
Steamer Southern Belle, Culbertson v. .. 493
Steamer Virginia v. West 594
S. S. Falcon, Olney v. 43
Steamer St. Charles, Rogers v. 563
S. S. Ohio, Udall v. 42
Steele, Secombe v. 833
Stevens v. Gladding 155, 569
Stewart v. U. S. 65, 528
Stewart, Dennistoun v. 228, 489
Stinson v. Dousman 966
Stockton v. Ford 395
Stone, Hyde v. 874
Strader v. Graham 464
Sturgess v. Honold 261, 666
Suckley, Den v. 378
Sunot, U. S. v. 822
Surget, Byers v. 670
Sutherland, U. S. v. 666
Suydam v. Williamson 978
Swann, McLaughlin v. 357

T.

Taggert, Battin v. 37
Talcott, McCormick v. 930
Tarpley, Watson v. 509
Taylor v. Carryl 1028
Taylor, Stanford v. 453
Teller v. Patten 831
Thomas, v. Osborn 534
Thomas, Ballard v. 690
Thomas, Mech's & Tr's B'k v. 460
Thomas, Shields v. 93, 368

Digitized by Google

T.

Thompson v. Selden 1001
Tod v. Pratt 662
Treas. of La., Poydras v. 93, 350
Troy Iron & Nail Factory v. Odiorne.... 37
Truly, Wanzer v. 216
Turner, Oregon Steamer v. 515
Tyson, Raymond v. 47

U.

Udall v. S. S. Ohio 42
Union B'k of La., Stafford v. 101
Union B'k of Tenn. v. Vaiden 472
U. India Rubber Co., Day v. 883
Union Mut. Ins. Co., Com'l Mut. Ins. Co. v. 636
Ure v. Coffman 567
U. S., Arguello, v. 478
U. S. v. Arguello 478
U. S. v. B'k of Columbus 662
U. S. v. Bidwell 822
U. S. v. Booth 464
U. S. v. Breitling 900
U. S. v. Brig Neurea 531
U. S., Bruce v. 129
U. S. v. Cambuston 828
U. S. v. Cervantes 484
U. S. v. Coxe 76, 299
U. S. v. Fossat 944
U. S. v. Frémont 302
U. S., Frémont v. 241
U. S. v. Guthrie 102
U. S. v. Hensley 822
U. S. v. Jones 274
U. S. v. Larkin 485
U. S. v. LeBaron 525
U. S. v. Minn. & N. W. R. R. Co. 347
U. S. v. Nickerson 219
U. S. v. Nine Cases of Hats 57
U. S. v. One Case of Clocks 58
U. S. v. One P'k'ge of Mdse. 58
U. S. v. Pacheco 820
U. S. v. Peralta 678
U. S. v. Reading 291
U. S. v. Ritchie 236
U. S. ex rel. Tucker v. Seaman..... 226
U. S. v. Shackleford 495
U. S. v. Sixty-seven Packages Dry Goods 54
U. S., Stewart v. 65, 528
U. S. v. Sunot .....
U. S. v. Sutherland 666
U. S. v. Vaca 485

V.

Vaca, U. S. v. 485
Vaiden, Union B'k of Tenn. v. 472
Vance, Dupont v. 584
Vandewater v. Mills 554
Van Pelt, The Niagara v. 152
Verden v. Coleman 272

W.

Wade v. LeRoy 813
Walton v. Cotton 658
Wanzer v. Truly 216
Wanzer, Hinkle v. 173
Ward v. Peck 383
Warner v. Norton 950
Watson v. Tarpley 509
Watterston v. Payne 899
Webb v. Den 35
Webb, Leitensdorfer v. 891
Wells, Ex parte 421
Wells, McCready v. 288
Wheeling, etc., Bridge Co., Penna. v. 435, 449
West v. Cochran 110
West, Steamer Virginia v. 594
Withers v. Buckley 816
White v. Burnley 886
Whyte v. Gibbes 1016
Whyte, Gibbes v. 1016
Wickliffe v. Eve 163
Wickliffe v. Owings 44
Wilkins v. Allen 396
Wiley, Brown v. 965
Williams v. Gibbes 135, 1013
Williams, Gibbes v. 1013
Williams v. Hill 570
Williamson, Suydam v. 978
Willot v. Sandford 549
Wilson, Craighead, v. 332
Winans, York & Md. R. R. Co. v. 27
Winn, Ranson v. 388
Wissman, Ship Howard v. 363
Wolfe v. Lewis 643
Wood v. Davis 460
Woodfolk, Farrelly v. 670
Woodlief, McGavock v. 884
Woolsey, Dodge v. 401
Wright v. Mattison 280
Wyman, Babcock v. 644
Wynn, Garland v. 801
Wynn v. Morris 800

Y.

York & Cumberland R. R. Co. v. Myers.. 380
York & Md. R. R., Co. v. Winans..... 27

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

DECEMBER TERM, 1854,

Vol. 58.

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REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

DECEMBER TERM, 1854,

AND REPORTED HEREIN,

VOLUME 58,

AS HAVE ALSO BEEN REPORTED IN

17 HOWARD AND IN 21 CURTIS' DECISIONS.

17 How.	Title.	21 Curt.	Here in.
1	Poydras v. Treas. of La.,	333	93
2–3	" "		93
3	Shields v. Thomas,	335	93
3–6	" "		94
6	Arthurs v. Hart,	338	30
11	" "		31
11–13	" "		32
13–15	" "		33
15–16	" "		34
17–18	Udall v. Steamship Ohio,	344	42
18–19	" " "		43
19	Olney v. Steamship Falcon,	346	43
21–22	" " "		43
23	Haydel v. Dufresne,	347	115
27	" "		116
28–30	" "		117
30	" "		118
30	York & Md. L. R. R. Co. v. Winans,	350	27
38–39	" " "		29
39–41	" " "		30
41	U. S. v. Coxe,	353	76
43	" "		77
43–44	Barribeau v. Brant,	354	34
44–46	" "		35
47–48	Wickliffe v. Owings,	357	44
48–50	" "		45
50–52	" "		46
53	Raymond v. Tyson,	362	47
57–59	" "		48
59–61	" "		49
61–63	" "		50
63–66	" "		51
66–68	" "		52
68–70	" "		53
70–71	" "		54
72–73	Troy I. & N. Ft'y v. Odiorne,	376	37
74	Battin v. Taggert,	378	37
80–81	" "		39
81–83	" "		40
84–85	" "		41
85	U. S. v. 67 P'k'gs of Dry G'ds.	383	54
90–93	" "		55
93–95	" "		56
95–96	" "		57
97	U. S. v. 9 Cases Silk Hats,	390	57
98	U. S. v. 1 P'k'ge of Mdse.,	390	58
99	U. S. v. 1 Case of Clocks	391	58
100	Lawrence v. Minturn,	392	58
105–106	" "		60
106–108	" "		61
108–111	" "		62
111–113	" "		63
113–115	" "		64
115–116	" "		65
116	Stewart v. U. S.,	402	65
124–125	" "		66
125–128	" "		67
128–130	" "		68
130	Shields v. Barrow,	409	158
137–138	" "		159
138–140	" "		160
140–143	"		161
143–145	" "		162
145–146	" "		163
147–148	Ring v. Maxwell,	418	25
148–150	" "		26
150–151	" "		27
152	Propeller Monticello v. Mollison,	423	68
153–154	" " "		69
154–156	" " "		70
157	B'k of Tenn. v. Horn,	427	70
159–160	" "		71
160–161	" "		72
161	City of Providence v. Clapp,	429	72
165–166	" "		74
166–169	" "		75
169–170	" "		76
170–174	Schooner Catharine v. Dickinson,	434	233

Digitized by Google

17 How.	Title.	21 Curt.	Here in.
174–176	Schooner Catharine v. Dickinson,		234
176–178	" "		235
178	Peck v. Sanderson,	439	205
178–180	" "		206
180–183	" "		207
183	Iasigi v. Brown,	445	208
189–190	" "		210
190–193	" "		211
193–195	" "		212
195–198	" "		213
198–200	" "		214
200–203	" "		215
203	" "		216
204	U. S. v. Nickerson	458	219
208	" "		220
208–211	" "		221
211–212	" "		222
212	Henshaw v. Miller,	463	222
217–218	" "		223
218–220	" "		224
220–223	" "		225
223–224	" "		226
225	U. S. v. Seaman,	470	226
229–230	" "		227
230–231	" "		228
232	McBlair v. Gibbes,	473	132
233–234	" "		133
234–237	" "		134
237–239	" "		135
239	Williams v. Gibbes,	479	135
249–250	" "		138
250–252	" "		139
252–255	" "		140
255–257	" "		141
257–260	" "		142
260–262	" "		143
262–265	" "		144
265–267	" "		145
267–269	" "		146
269–272	" "		147
272–273	" "		148
274–275	Gooding v. Oliver,	504	148
275–279	Stafford v. Union B'k of La.	505	101
279–280	" "		102
283	Stafford v. New Orleans C. & B'k Co.,	506	102
284	U. S. v. Guthrie,	506	102
301–303	" "		105
303–305	" "		106
305–307	" "		107
307–310	" "		108
310–312	" "		109
312–314	" "		110
315	Clark v. Clark,	520	77
318–319	" "		78
319–321	" "		79
321–322	" "		80
322	Booth v. Clark,	524	164
327–329	" "		166
329–331	" "		167
331–333	" "		168
333–336	" "		169
336–338	" "		170
338–340	" "		171
340	Boone v. Mo. Iron Co.,	537	171
341–342	" "		172
342–344	" "		173
344	Burchell v. Marsh,	540	96
349–351	" "		99
351–352	" "		100
353	Hinkle v. Wanzer,	544	173
358–359	" "		174
359–361	" "		175
361–364	" "		176
364–366	" "		177
366–369	" "		178
369	Fontain v. Ravenel,	555	80
382	" "		85
382–385	" "		86
385–387	" "		87
387–389	" "		88
389–392	" "		89
392–394	" "		90
394–397	" "		91
397–399	" "		92
399–401	Bogart v. S. S. John Jay,	572	95
401–403	" "		96
403	West v. Cochran,	575	110
408–409	" "		112
409–412	" "		113
412–414	" "		114
414–416	" "		115
417	Adams v. Law	584	149
419–420	" "		150
420–423	" "		151
423	" "		152
424–425	Herndon v. Ridgway,	588	100
425	" "		101
426	City of Boston v. Lecraw,	590	118
431–433	" "		121
433–436	" "		122
436–437	" "		123
437	Bruce v. U. S.,	596	129
438–439	" "		130
439–442	" "		131
442–443	" "		132
443	Hendrickson v. Hinckley,	601	123
445–446	" "		124
446–447	" "		125
447	Stevens v. Gladding,	604	155
450–451	" "		156
451–453	" "		157
453–455	" "		158
456	Carpenter v. Com. of Pa.	610	127
461–462	" "		128
462–464	" "		129
464–465	Rhodes v. Farmer,	613	152
465–468	" "		153
468	" "		154
468	Wickliffe v. Eve,	616	163
469–470	" "		164
471–475	Pulliam v. Osborne,	618	154
475–476	" "		155
477	Minturn v. Maynard,	620	235
477	" "		236
478	Florida v. Georgia,	621	181
490–491	" "		188
491–493	" "		189
493–495	" "		190
495–496	" "		191
496–497	" "		195
497–499	" "		196
499–502	" "		197
502–504	" "		198
504–506	" "		199

Digitized by Google

17 How.	Title.	21 Curt.	Here in.
506–509	Florida v. Georgia,		200
509–511	" "		201
511–513	" "		202
513–515	" "		191
515–517	" "		192
517–519	" "		193
519–522	" "		194
522–523	" "		195
523–524	" "		202
524–525	" "		203
525	U. S. v. Ritchie,	656	236
531–532	" "		237
532–535	" "		238
535–537	" "		239
537–540	" "		240
540–541	" "		241
542	Fremont v. U. S.,	667	241
552–554	" "		244
554–557	" "		245
557–559	" "		246
559–562	" "		247
562–564	" "		248
564–566	" "		249
566–569	" "		250
569–571	" "		251
571–573	" "		252
573–576	" "		253
576	" "		254
576	Webb v. Den,	694	25
577–579	" "		26

17 How.	Title.	21 Curt.	Here in.
579	Webb v. Den,		27
580–581	Coy v. Mason,	697	125
581–583	" "		126
583–584	" "		127
584–585	Wanzer v. Truly,	701	216
585–587	" "		217
587–590	" "		218
590–591	" "		219
591–592	Ayres v. Carver,	708	179
592–595	" "		180
595–596	" "		181
596–597	Hays v. Pacific Mail S. S. Co.,	712	254
597–600	" "		255
600	" "		256
601–602	Christy v. Alford,	717	256
602–604	" "		257
604–606	" "		258
606–607	Dennistoun v. Stewart,	722	226
607–609	" "		230
609	Griffin v. Reynolds,	725	225
610–611	" "		230
611–612	" "		231
612–613	Judson v. Corcoran,	727	231
613–615	" "		232
615–616	" "		233
616	Lewis v. Bell,	781	203
616–617	" "		204
617–618	" "		205

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

DECEMBER TERM, 1854.

*147] *ZEBEDEE RING, David A. Bokee, Robert S. Hone, and John P. Hone, Executors of Philip Hone, Deceased, and Cornell S. Franklin, Complainants,

v.

HUGH MAXWELL.

(See S. C. 17 How. 147-152.)

Duties—when not distributable to custom officers,

One moiety of the additional duties, imposed by the 8th section of the Tariff Act of July 30, 1846, is not distributable among the custom-house officers as a penalty.

Section 3 of the Act of Feb. 11, 1846, controls this.

ON A certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

James J. Ring, for complainants:

Section 8, of the private Act of July 30, 1846, must be construed as a penal provision, and the "additional duties" of 20 per cent. must be treated as penalties levied for an offense against the revenue laws. They have always been treated and designated in all the revenue laws since 1799, as penalties levied as a punishment for the undervaluation of goods, which has been uniformly regarded as an offense, and in some instances punished by a forfeiture of the goods.

Greeley v. Thompson, 10 How, 225.

These penalties, like all other penalties, are distributable among the officers of the customs as to one moiety thereof, in the manner prescribed in the 91st section of the Act passed March 2, 1799.

Mr. C. Cushing, Atty.-Gen., for the defendant:

The 20 per cent. additional duty authorized to be levied and collected under the 8th section of the Tariff Act of July 30, 1846, is not a penalty to be distributed to the complainants. Stevens, Com. Vol. I. p. 68; Bouvier Law Dic. Vol. II. p. 307. There is nothing in the Act of July 30, 1846, that indicates an intention that they meant "penalty" when they said "duty."

There is no statute authorizing these duties, if held to be a penalty, to be distributed to the complainants.

Mr. Justice Curtis delivered the opinion of the court:

This case comes before us upon a certificate of division of opinion of the Judges of the Circuit Court of the United States for the Southern District of New York. The certificate shows that a suit in equity pending in that court, wherein persons who were the naval officer and surveyor of the port of New York, are complainants, and Hugh Maxwell, who was the Collector of that port, is respondent, and that the scope of the bill is to recover one moiety of a large sum of money levied and collected as additional duties, under the 8th section of the Tariff Act of July 30, 1846, 9 Stat. at L. 43, during the time while the complainants held the offices above mentioned. Upon the hearing of this cause, the judges were opposed in opinion upon the following questions:

"Whether, upon a true construction of the revenue laws of the United States, the additional duties of 20 per cent. which have been levied and collected by and paid to the defendant, as Collector of the port of New York, at the port of New York, as *stated in his [*148 answer, under and by virtue of the 8th section of the Act entitled 'An Act for reducing the duties on imports, and for other purposes,' passed July 30, in the year 1846, were to be treated as penalties, and one moiety thereof divided between and paid in equal proportions to and among the Collector, naval officer and surveyor of the port of New York, holding said officers at the time of the levying, collection and payment thereof, in the said port of New York, as claimed by the plaintiffs in their bill in this cause."

The 8th section of the Act of July 30, 1846, after requiring the collector to cause the dutiable value of the imports therein referred to, to be appraised, estimated and ascertained, in accordance with the provisions of existing laws, goes on to enact, "and if the appraised value thereof shall exceed, by ten per cent. or more, the value so declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected and paid, a duty of twenty per centum, ad valorem, on such appraised value." The question is, whether the sums levied, collected and paid under this clause were by law distributable as penalties, one moiety to the Treasury of the United States, and the other moiety among the Collector, naval officer and surveyor.

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To render any sum of money collected for the government thus distributable, it is not doubted that some Act of Congress, directing that distribution, must be found; and the complainant's counsel has sought for such a law, by arguing that these additional duties must be treated as penalties, levied for the offense of undervalution, against the directions and in contravention of the requirements of the revenue laws; and that if they are penalties, they are required to be distributed by different collection laws, to which he has referred, and which he urges has been made applicable by Congress to the sums of money now in question. We do not find it necessary to determine whether these additional duties might have been deemed penalties, so as to come under the terms of either of the collection laws which have directed the distribution of penalties among certain officers of the customs; nor do we deem it important to examine, in detail, the provisions of those collection laws, and the manner in which they have been, from time to time, rendered applicable, in part or in whole, to the different Acts levying duties and penalties.

Because we are all of opinion that whatever may be the nature of the sum levied as additional duties, under the 8th section of the Tariff Act of 1846, they are not distributable as penalties.

To exhibit the reasons on which this opinion is founded, it is necessary to refer first to the Tariff Act of August 30, 1842. The 26th *149] *section of that Act, provided that the laws existing on the first day of June, 1842, shall extend to and be in force for the collection of the duties imposed by this Act, etc., and for the recovery, collection, distribution and remission of all fines, penalties and forfeitures, and for the allowance of the drawbacks by this Act authorized, as fully and effectually as if every regulation, restriction, penalty, forfeiture, provision, clause, matter and thing in the said laws contained had been inserted in and re-enacted by this Act.

The 16th and 17th sections of the same Act prescribe the manner in which merchandise subject to ad valorem rates of duty shall be appraised, and its dutiable value ascertained; and then the 17th section enacts: "That in all cases where the actual value to be appraised, estimated and ascertained, as hereinbefore stated, of any goods, wares and merchandise, imported into the United States, and subject to any ad valorem duty, or whereon the duty is regulated by or directed to be imposed or levied on the value of the square yard, or other parcel, or quantity thereof, shall exceed, by ten per centum or more, the invoice value, then in addition to the duty imposed by law on the same, there shall be levied and collected on the same goods, wares and merchandise, fifty per centum of the duty imposed on the same where fairly invoiced."

These being provisions of the Tariff Act of 1842, the complainants' argument is that the additional duties leveied under its 17th section were made distributable by its 26th section; that the 8th section of the Act of 1846 only changed the amount of the penalty in the cases it reached; that whereas by the 17th section of the Act of 1842, if the appraisement should exceed the invoice value ten per centum, fifty per centum of the duty was the penalty; by the Act of 1846, twenty per centum of the appraised value was to be the penalty; that this was the only change made; although the 26th section of the Act of 1842, which made penalties distributable under the then existing laws, applied, in terms, only to the penalties levied by that Act, yet those laws of distribution are applicable to this penalty under the Act of 1846, which must be considered as substituted in place of the penalty levied by the Act of 1842 and to be governed by the same provisions of law as were applicable to the additional duty, by way of penalty, under that Act of 1842.

There is great force in this argument. The Tariff Act of 1846 is an Act fixing new rates of duty on imports. It does not contain any provisions for the collection of those duties, nor for the collection or distribution of any penalties. It does not, in terms, adopt the existing laws on those subjects, nor declare that they shall be deemed applicable to the duties and penalties which it *levies: yet it is ob- [*150 vious that it must have been intended that those existing laws should be thus applied; and this can only be effected by considering the duties and penalties levied by the Act of 1846, as substitutes for, and to be governed by, the same rules as the corresponding duties and penalties levied by the Act of 1842, which did, in terms, adopt and apply the existing laws for the recovery, collection and distribution of duties and penalties.

We accede, therefore, to the positions that the additional duty levied by the Act of 1846 is only a substitute for that levied under the Act of 1842, and that whatever rule was in force when the Act of 1846 was passed, concerning the distribution of the additional duty levied by the 17th section of the Act of 1842, is also in force, and is to be applied to the additional duty under the 8th section of the Act of 1846, which is here in question. So that the only remaining inquiry is, what was that rule?

We think this question is answered by the 3d section of the Act of February 11, 1846, 9 Stat. at L. 3, "that no portion of the additional duties provided for by the 17th section of the Act of August 30, 1842, entitled, etc., shall be deemed a fine, penalty or forfeiture, for the purpose of being distributed to any officer of the customs; but the whole amount thereof, when received, shall be paid directly into the Treasury."

This enacts a rule concerning the distribution of the additional duties under the Act of 1842; and as the additional duties under the Act of 1846 are substitutes for, and to be governed by, the same rules as to distribution as those levied under the former law, it necessarily follows that they are not distributable.

It has been argued that this 3d section of the Act of February 11, 1846, is expressly limited to the additional duties levied under the 17th section of the Act of 1842; and therefore cannot govern the distribution of those levied under the Act of 1846. But so the 26th section of the Act of 1842, which adopts former laws, applies them only to the duties and penalties levied under that Act; and this is the only authority for applying any laws to the distribution of the penal duties now in question.

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The complainant is obliged to argue, that though limited in terms to that Act, it applies to rates of penal duty afterwards substituted by the Act of 1846, in place of those prescribed by the Act of 1842. We have declared the argument sound; but it must be allowed its full and just effect. The implication is not that the laws for the collection and distribution of penalties, as they had existed at some prior period, or as they had been applicable to other penalties, were silently adopted by the Act of 1846; but that the laws for the collection and distribution of additional duties by the way of penalty, as those laws existed when the Act 151*] *of 1846 was passed, must be deemed applicable to the new additional duty by way of penalty prescribed by that Act; and when the Act of 1846 was passed, the previous general law for the distribution of penalties had been modified, and the additional duty for which that in question is substituted had been declared not distributable. The consequence is, that though the Act of 1846 may be considered as providing for both duties and penalties, subject, as to their collection and distribution, to existing laws, yet as there was no law in force by which additional duties, levied for undervaluation, were made distributable, there can be no adoption of any existing law on that particular subject, and no distribution can take place.

Perhaps this may be illustrated by supposing that the substance of the 3d section of the Act of February 11, 1846, had been incorporated into the 26th section of the Act of 1842, by way of proviso. So that at the same time when the Act of 1842 adopted all existing laws concerning the distribution of penalties, it had declared that the additional duties to be levied under the 17th section should not be distributable as penalties, but should be paid into the Treasury. Certainly it could not then have been argued that the Act of 1846 had merely changed the rate of additional duty, and had silently adopted the existing laws concerning its distribution, and still that it was distributable. Yet the effect of this subsequent enactment, of February 11, 1846, when made, upon the Act of 1842, is the same as if it had been incorporated therein. It is in eadem materia, and both are to be construed as one law, the last controlling and modifying the first, as if it made a part of it,

The fallacy of the argument, on the part of the complainants, consists in going back to former laws concerning the distribution of other penalties, and considering them to be applicable to this penalty, when the existing law, applicable in terms to a penalty ejusdem generis, and for which this penalty is a substitute, declares that it is not distributable.

Our opinion is, that the first question certified by the Circuit Court must be answered in the negative.

There are other questions certified, but as the one above decided necessarily disposes of the case, we do not deem it needful to consider and respond to them.

Whereupon the court made the following order, to wit:

152*] *On consideration whereof, it is the opinion of this court *that the first question* certified by the Circuit Court in this case must be answered in the negative, to wit: "That upon a true construction of the revenue laws of the United States, the additional duties of 20 per cent. which have been levied and collected by, and paid to, the defendant, as collector of the port of New York, at the port of New York, as stated in his answer, under and by virtue of the 8th section of the Act entitled "An Act for reducing the duties on imports, and for other purposes," passed July 30, in the year 1846, were not to be treated as penalties, and one moiety thereof divided between and paid in equal proportions to and among the Collector, naval officer and surveyor of the port of New York, holding said officers at the time of the levying, collection and payment thereof, in the said port of New York, as claimed by the plaintiffs in their bill in this cause.

And this court is further of opinion that as the decision of the first question in the negative necessarily disposes of the case, it is unnecessary to consider and respond to the other questions certified; whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

THE YORK AND MARYLAND LINE R. R. CO., Plaintiff in Error,
v.
ROSS WINANS.

(See S. C. 17 How. 31-40,)

Patents—liability of railroad company—patent, evidence without proof of title to office, of acting commissioner signing it.

A Pennsylvania railroad corporation, whose stock is owned by a Maryland railroad corporation, the road of the former being managed by the latter company, which appoints the officers and agents and furnishes the rolling stock upon it, and the directors of the former company being selected by the latter company and qualified by a transfer of one or more shares of its stock to them before an election which they return on vacating their office, and which makes annual statements to the Legislature, in which its gross profits for the year are nominally divided between the companies, is liable for the infringement of a patent right respecting cars used thereon.

Objection to a letters patent, that it is signed by an "acting commissioner of patents," where there is no averment or proof of his title to the office, is untenable.

The court will take judical notice of the persons who permanently or transiently preside over the Patent Office. Production of their commission is not necessary.

Argued Dec. 5, 1854. Decided Dec. 18, 1854.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Messrs. Reverdy Johnson and J. M. Campbell, for the plaintiff in error, after stating the facts, made the following points:

NOTE.—Presumption of regularity of appointment and due qualification of an officer, and that he acted within his jurisdiction; certificate, evidence of authority. See note to Fenwick v. Sears, 2 L. ed. U. S. 101.

Grant by an officer presumed authorized. See note to U. S. v. Percheman, 8 L. ed. U. S. 604.

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1. As to the liability of the plaintiff in error. The cars, which were assumed to be made in violation of the patent of the defendants in error, were not built by, and did not belong to the plaintiff in error. It is not liable, therefore, for their construction, nor is it pretended that it has sold any. If liable at all, it is for the use of the cars.

Now, in point of fact, it did not run the cars in question over its road.

The whole transportation was done by the Baltimore and Susquehanna Railroad Company; the subject of the agency being the running of the cars, and the plaintiff in error having nothing to do with the running, it can hardly be deemed an agent, from the fact that it does nothing in the agency. With still less plausibility can it be regarded as a principal.

The power to form a partnership is one which corporations do not possess, unless it is given in express terms, or by necessary implication.

Sharon Canal Co. v. Fulton Bank, 7 Wend. 412; Canal Bridge v. Gordon, 1 Pick. 305.

There are neither such words nor implication in the present instance, and of consequence no partnership can be deduced where the power to create that relation is wanting.

If, however, the power be conceded, and no partnership has been in terms formed, it is only to be implied, in law, from the division of the net profits of transportation between the two corporations, provided for by their agreement.

But the reception of a part of the profit is not always attended with this consequence. The test seems to be in the animus of the parties as to the reservation of profits, and not in the reservation itself. If their purpose be compensation merely, to one furnishing some necessary to the business, a partnership is not held to be created. Such is the present case, where it is plain that the object was merely to compensate the plaintiff in error for the use of its road, and to make the rent therefor commensurate with the use.

Story on Part. secs. 36, 38; Kent's Com. 33; Perrine v. Hankenson, 6 Halst. 181; Hermstreet v. Howland, 5 Den. 68; Heckert & Fegely, 6 Watts & S. 143; Boyer v. Anderson, 2 Leigh. 550; Loomis v. Marshall, 12 Comm. 69; Coll. on Part. sec. 44, and note.

Conceding, however, argumenti gratia, that the relation of principal and agent, or of partners, existed between the two corporations, it cannot be denied that the infringements complained of were not committed by the plaintiff in error, but by the Baltimore and Susquehanna Railroad Company.

Now, the tortious acts of the Company last named cannot be considered as acts done in the ordinary course of the business between it and the plaintiff in error, whatever be the relation between these parties; and to make the plaintiff in error responsible, it must be shown to be privy to their commission before or after.

Story on Agency, sec. 455; Coll. on Part. sec. 457; Keplinger v. De Young, 10 Wh. 358, 363.

2. The charge below is also erroneous as to the amount of damages recoverable.

3. The suit being only for infringement committed during the extension of the patent, it is further submitted, that the extension being by the acting Commissioner of Patents, is unavailing to give the defendant in error any rights.

If this court, in 4 How. 646, meant to affirm the validity of the acts of such a functionary, as is supposed by Mr. Justice Woodbury, in 1 Wood. & M. 248, this point is not now open; but if it be open, the plaintiff in error relies on the 1st and 2d sections of the Patent Act of 1846, as governing the Patent Office, to the exclusion of the Acts of 1792 and 1795.

1 Stat. at L. 281, 415.

Messrs. J. H. B. Le Trobe and St. George T. Campbell, for defendant in error:

No question or point not presented in the court below, and no exception to the charge not specifically designated on the record, can be heard in this court as the ground of reversal.

Rule 38, Carver v. Jackson, 4 Pet. 80; Ex parte Crane, 5 Pet. 198; 10 Wheat. 366; 9 Pet. 418; Moore v. Bank of Metropolis, 13 Pet. 302; 4 How. 380; 9 How. 366.

It is contended by the plaintiffs in error, that the extension of the patent by H. H. Sylvester, as acting commissioner, is invalid.

This point was not presented to the court below. The extension now averred to be invalid was admitted in evidence without objection.

An infringement of the patent, as an existing valid grant, was admitted, the sole question being whether it was infringed by the defendant.

Even if now to be considered, the law is not as the plaintiff in error contended.

Woodworth v. Hall, 1 Wood. & M. 392; Wilson v. Rousseau, 4 How. 686.

We now proceed to consider the exceptions to the charge of the judge. The 1st is: that the York and Maryland Line Railroad Company, and the Baltimore and Susquehanna Railroad Company, were two distinct Companies as to third persons.

The second exception to the charge is:

In charging, further, that whether the relation between them was that of agency or partnership, the liability of defendants was the same.

As a legal proposition, standing singly, this can hardly be questioned.

One of two partners is liable to an action for an infringement, as for any other tort committed by his authority, or participated in by him. This was all the judge said. He was not asked to charge,

1. That two corporations cannot form a contract of partnership.

2. Or that, under the evidence in the cause, there was no proof of partnership.

3. Or that there was no evidene of agency by which the defendants could be held liable.

If they participated in the use of the patented thing, no matter how, whether under a lawful or unlawful contract, they are liable. It is the doing of the thing, and not the mode in which it is done, that is complained of.

There was evidence of a direct and independent use by the defendant below, to the prejudice of the patentee.

The defendant was a Pennsylvania Company, fully organized, and having possession of its road.

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The uses made of its road, were its own uses. The road and the cars upon it are a single machine, the use of a part of which involves the use of all the parts. The cars are useless without the road. The road is useless without the cars. The terms upon which the cars are permitted to be used are immaterial. The injury complained of is the use.

It is this which distinguishes this case from that of Keplinger v. De Young, in 10 Wh. 358. There De Young was held not to be liable, because he only purchased the product of a machine; but it would have been different, had he taken the machine into his own keeping, and used it.

If it were needful, it might be well contended that the relation of the Companies was that of partnership. Corporations may form partnerships under circumstances, so far, at least, as to preclude them from setting up separate rights to the prejudice of third persons.

Canal Bridge v. Gordon, 1 Pick. 297; 4 Law and Equity Reports, 171; 2 Id. 319.

In the present case, there was every element required to form a partnership contract.

It is not a case where a portion of the gross receipts was used as a mode of calculating rent as in 5 Den. 68, cited by plaintiff in error, but a right to a share of the net profits, as such, which that case decides to be a criterion of partnerships. Nor is it the case in 17 Wend. 412, where it was held that two corporations cannot sue jointly, as corporations, on contract; but where it was not held that if, in fact, such copartnership existed, either could escape liability for a tort arising in that relation, by alleging its unlawfulness.

The law of New York, on this question of partnership liability to third persons, is clearly settled in Bostwick v. Champion, 11 Wend. 571, where it was held that A, B & C run a line of coaches, the route being divided between them into sections, each furnishes horses and coaches, and hiring drivers, and paying the expenses of his own section, the fare, less the tolls, being divided in proportion to the number of miles run, that a passenger injured by the negligence of the drivers of A's coach might sue them all.

The court is referred to the opinion of Judge Nelson, at page 584, and to same case, Chancellor Walworth's opinion, 18 Wend. 175.

A division of profits, as profits, and a right to file a bill for an account, may be regarded as conclusive evidence of a partnership contract. Both, it is submitted, concur here.

The distinction which it is believed will reconcile all these cases, is between a stipulation for a compensation proportionate to the profits, and one for an interest in such profits.

See Carey on Part. 9; Sto. Part. 36; Biss. Part. 4; Coll. Part. 44.

But it is suggested that the tortious act of one Company not being in the ordinary course of business between the two Companies, the plaintiff in error cannot be responsible without proof of privity.

To this it is answered:

1. That any tortious act is out of the ordinary course of business, but that a subsequent reception of the results of such act will be conclusive evidence of privity and liability.

2. No exception was taken to the charge upon the ground of any such error or omission in it.

3. Knowledge of the existence of the patented improvement is presumed.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiff is a Corporation existing under a Charter from the States of Pennsylvania, and authorized to construct a railroad from the Town of York to the Maryland line. Its stock was subscribed for by the Baltimore and Susquehanna Railroad Company, a Maryland Corporation, and their joint capital is vested in a continuous railroad from the City of Baltimore to York. The management of the road is committed to the Maryland Company, which appoints the officer and agents upon it, and furnishes the necessary rolling stock for its operation. The President and Secretary of the two Companies are the same. The directors of the Pennsylvania Corporation (plaintiff) are selected by the Maryland Company, and are qualified by a transfer of one or more shares of its stock to them, shortly before an election, and which they return on vacating their office. This nominal organization is made necessary by the Charter, which requires that the majority of the officers shall be citizens of Pennsylvania, and that annual reports of the condition and business of the Company shall be rendered to the Legislature. To preserve appearances with the Legislature an annual statement is made.

*In this, the gross receipts of the en- [*39
tire road for the year are ascertained and the expenses deducted; the balance is then divided, one third being assigned to the plaintiff, but no money passes between the Corporations. In these expense accounts the salaries of officers, conductors and engineers, the cost of locomotives and fuel, of the repairs and insurance of cars, and the losses of business enter as constituent items. It was admitted upon the trial of the cause, that a number of cars made according to the specification of the patent of the defendant had been used upon the road without his license, and for which he brought this suit. A verdict was rendered in his favor, and the judgment thereon is brought to this court upon exceptions to the instructions of the Circuit Court to the jury.

The court charged the jury, that the road on which the infraction was committed was held under a Pennsylvania charter to the defendant in that court; that the transportation on the road was carried on by the Maryland Corporation; and that the profits accruing from the use of the cars upon the road, that is, the profits of the infraction, are nominally divided between the two Companies. That, upon these facts, the plaintiff is entitled to recover against the present defendants, whether they are to be regarded as partners, or as principal or agent of the Maryland Corporation.

The plaintiff complains here of this charge, for that the cars employed were not built by, and did not belong to the Company; that they were the exclusive property of the Maryland Corporation; and that the agreement to divide the profits did not constitute a partnership, nor evince a relation of principal or agent to impose a liability. This conclusion implies, that the duties imposed upon the plaintiff by the

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charter, are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision it may avoid further responsibility. But those acts involve an overturn of the relations which the Charter has arranged between the Corporation and the community. Important franchises were conferred upon the Corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The Corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature. Beman v. Rufford, 1 Simon, N. S. 550; Winch v. B. & L. Railway Co. 13 L. & E. 506.

If, then, the case had terminated with the facts that the infringement of the defendant's 40*] patent had taken place, by the *acts of persons using the corporate name of the plaintiff, with the assent of the corporate authorities, their liability would have been fixed.

But the case before us is, that the motive power on the road partly belongs to the plaintiff; that the agents and officers employed are in its service and are paid by it; and that the cars are fitted and repaired at the common expense of the two Corporations. It follows therefore, that the plaintiff is a principal, co-operating with another Corporation in the infliction of a wrong, and is directly responsible for the resulting damage.

Nor will the plea that the corporation has no independent nor responsible existence, as regards the Maryland Company, and that its display of a president and directors, of conductors, engineers, and agents, of annual elections and annual statements, import only a formal and illusive representation before the Legislature of Pennsylvania, or their constituents, of a compliance with the conditions of the Charter, avail the plaintiff. It is certainly true that the law will strip a corporation or individual of every disguise, and enforce a responsibility according to the very right, in despite of their artifices. And it is equally certain that in favor of the right it will hold them to maintain the truth of the representations to which the public has trusted, and estop them from using their simulation as a covering or defense. Welland Canal Co. v. Hathaway, 8 Wend. 480.

The Supreme Court of Pennsylvania, in Peters v. Ryland, 8 Harris, 497, has announced principles decisive of this case.

The court held that the owner of a passenger car employed on a railroad belonging to the State, and the motive power and the superintendence of which is furnished by the State, is responsible for the misconduct of the public agents. It says: "The case before them is sui generis; but it comes much nearer to that class of decisions in which it had been held, that several parties engaged in carrying over different portions of the same line of conveyance, each sharing in the profits of the whole route, and of course of each section of it, are all responsible for the faithful discharge of their duty, and liable to respond in damages for any injury which results from the negligence or unskillfulness of any of the proprietors and servants." 11 Wend. 571; 18 Wend. 175; 19 Wend. 534.

"The State as well as the carrier is paid for every passenger transported on this railroad, which shows their community of interest, and if there be a common liability, that of the State cannot be enforced by action; and this circumstance does not diminish that of the carrier; because they have a common interest, however, and share the business of transportation, it is apparent that in holding the party before us to answer for the *negligence of the State's [*41 agents, we do not punish one man for the misfeasance of another's servants."

The objection to the patent, that it is signed by "an acting Commissioner of Patents," and that the records contain no averment nor proof of his title to the office, is not tenable. The court will take notice judicially of the persons who from time to time preside over the Patent Office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts. Wilson v. Rousseau, 4 How. 686.

The judgment of the Circuit Court is affirmed.

Affirmed with costs.

JOHN ARTHURS, John Nicholson, Jonas R. McClintock, and William Stewart, carrying on business under the firm name of Arthurs, Nicholson & Co., plaintiffs in Error,

v.

JESSE HART.

(See S. C. 17 How. 6–16.)

Writ of error—evidence to be returned—that not returned, presumed not applicable—exclusion thereof, when error—state practice in Louisiana not applicable—when facts are to be considered—manner of raising the points and taking exceptions—defense against holder of bill of exchange.

On writ of error, where jury trial was waived, only so much of the evidence should be returned as is necessary to present the legal questions sought to be reviewed.

Evidence not returned will be presumed not applicable to those questions.

The improper exclusion of testimony, on trial by court, where jury has been dispensed with, is error reviewable on bill of exceptions.

If, however, the testimony excluded is merely cumulative, upon a question of fact, its exclusion may be immaterial, as the decision of the judge may be well warranted upon the evidence already in.

The state practice in Louisiana, regulating appeals, requiring all the evidence to be returned, where trial by jury has been waived, does not apply to writs of error from this court to the circuit courts.

It will be assumed that the bill of exceptions contains all the testimony material to raise the point of law involved.

Where the judge states the facts before him, and these facts will sustain his judgment upon one view of the law only, and that an incorrect one, this court has jurisdiction to entertain the appeal.

Counsel, after the close of the evidence, should present the propositions of law, which it is claimed should govern the decision, and the court should state the rulings.

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In the return to the writ of error, so much of the evidence, and no more, should be incorporated in the bill of exceptions as is necessary to present the points of law determined against the party bringing the writ.

No technical exception need be stated, except in the case of the rejection or admission of evidence.

In action by bona fide holder, for value of a bill of exchange, not an original party thereto, against an acceptor, it is not a good defense that the plaintiffs knew at the time they took the paper, that it was given as part of the price for building a sugar mill which had been defectively constructed, if they also knew that defendant, upon the promise of the builders to make the necessary repairs, had agreed to accept the bill unconditionally, and had accepted it accordingly.

Argued Dec. 5, 1854. Decided Dec. 19, 1854.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

This was a petition under the Louisiana practice in the Circuit Court of the United States for the Eastern District of Louisiana, against Hart, the defendant in error, as acceptor of a bill of exchange, drawn by Nicholson & Armstrong to the order of Arthur & Brother, and by them indorsed to the present plaintiffs in error.

The bill in question, as stated in the petition, was dated at Pittsburg, Pa. March 1st, 1848, payable 12 months after date, drawn to the order of James Arthur & Brothers, and indorsed to them by petitioner, and drawn by Nicholson & Armstrong upon, and accepted by, Jesse Hart, for the sum of $2,540.65.

The case was tried without a jury.

Judgment was rendered by the court below for the sum of $1,743.50, with interest at five per cent. from March 3, 1849.

A motion for a new trial was made and refused, and the petitioner brought the case to this court by writ of error.

Mr. Andrew Wylie, for the plaintiff in error, made the following points:

First. The court below ought to have entered a judgment in favor of plaintiffs, for the whole sum expressed upon the face of the bill, with interest, etc.

The decision of the court was erroneous on this point. In Townsley v. Sumrall, 2 Pet. 170—183, it was held by this court that "if the holder of a bill of exchange, at the time of taking the bill, knew that the drawee had not funds in his hands belonging to the drawer, and took the bill on the promise of the drawee to accept it, expecting to receive funds from the drawer; the promise of the drawee to accept the bill constitutes a valid contract between the parties. The acceptance of the drawee of the bill binds him, although it is known to the holder that he has no funds in his hands. It is sufficient that the holder trusts to such acceptance." And in Grant v. Elliott, 7 Wend. 327, it was held: "In an action by the payee against the acceptor, it is no defense that the bill was accepted without the consideration, and that fact known to the payee."

See, also, U. S. v. Bank of Metropolis, 15 Pet. 377; 7 Johns. 361; 7 Smedes & M. 244; Byles on Bills, 250; 2 Wh. 385; 9 Man. 6; Civil Code, La. 2256; D'Aguir v. Barbour, 4 La. Ann. 441; Henderson v. Stone, 1 M. S. 641.

Second. This case having been submitted to and tried by the court without a jury, a question arises, whether, under the recent decisions of this court, the erroneous judgments of the court below can be corrected.

Weems v. George, 13 How. 190–197; Bond v. Brown, 12 How. 254.

In Weems v. George Mr. Justice Grier, in delivering the opinion of the court, says: "When the case is submitted to the judge to find the facts without the intervention of a jury, he acts as a referee by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony, nor to his judgment of the law."

The plaintiffs do not rely upon the bill of exceptions to the admissions of Francis Armtrong as a witness, but contend that upon the face of the pleadings and the whole record, the judgment of the court below was erroneous, and may be reversed by this court. Field v. U. S. 9 Pet. 202; In Garland v. Davis, 4 How. 131, it was decided: "This court can notice a material and incurable defect in the pleadings and verdict, as they are represented in the pleadings to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here."

Mr. A. H. Lawrence, for the defendants in error, after stating the facts, made the following points:

1. That the judge having determined both the facts and the law, this writ of error cannot be sustained upon the ground that improper testimony has been admitted. There was other testimony in the case, and upon that alone the judgment may here be founded.

Field v. U. S. 9 Pet. 202; U. S. v. King, 7 How. 833; Weems v. George, 13 How. 195, 196.

2. The testimony was admissible for the purpose of showing downright fraud on the part of the plaintiffs in error, in procuring the acceptance.

Bayley on Bills, 528; Ledger v. Ewen, Peake, 216.

3. The evidence was admissible for the purpose of showing the consideration on which the bill was accepted, in order to prove a failure of consideration.

Conpy's Heirs v. Dufan, 13 Martin, 90; Le Blanc v. Sanglier, 12 Martin, 402; Russell v. Hall, 20 Martin, 558; 13 Johns. 54; 2 Stark. 166, 204.

4. The evidence was admissible under a plea in reconvention. This is a Louisiana contract. The bill was drawn, indorsed and accepted in Louisiana. Both the lex loci contractus and the lex fori are to be regarded in any action upon it.

By the law of Louisiana the plaintiff may plead in reconvention any damages, even unliquidated damages, if they are necessarily connected with the same transaction. Here, the bill was accepted in payment of the mill and engine; and the damages arose from the defects in this very mill and engine.

Code of Prac. 374–377; Boyd v. Warfield, 6 N. S. 671; Orleans Nav. Co. v. Bingay, 6 N. S. 688; 2 N. S. 73, 122.

*Mr. Justice Nelson delivered the opinion of the court: [*11

This is a writ of error to the Circuit Court of

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the United States for the Eastern District of Louisiana. The plaintiffs seek to recover the amount of a bill of exchange drawn by the firm of Nicholson & Armstrong upon the defendant for $2,540.65, and accepted by him in favor of James Arthurs & Brothers, dated March 1, 1848, and payable twelve months from date and indorsed by the payees to the plaintiffs. The bill of exchange is set forth in the petition according to the practice in the State of Louisiana, with a prayer that the defendant be condemned to pay the amount due.

The defendant in his answer denies the allegations in the petition; and also sets up, that the bill was accepted for the balance of the price of sugar-mill constructed by the drawers, for his plantation in West Baton Rouge; that the mill was badly constructed, and defective both in the workmanship and materials, and had failed in its operation to do the work intended; that on making known the defects to the drawers, they promised to sent competent workmen before the next ensuing season for grinding sugar, to make the necessary repairs, and put the mill in complete working order at their own expense; that confiding in this promise, the defendant accepted unconditionally the bill in question. The answer also sets forth that the drawers had failed to send hands to repair the mill as agreed, whereby the defendant has suffered damages to the amount of $1,835.65, which sum he demands in reconvention, and asks judgment against the plaintiffs.

The defendant further sets forth that the payees and indorsees had notice of the defects in the mill and of the undertaking of the drawers at the time of the acceptance before the negotiation or transfer of the same.

The cause was tried without a jury; and on the trial the defendant admitted the signatures to the bill; and also gave evidence which was admitted but excepted to, of the facts set up in the answer.

The court gave judgment for the plaintiffs for $1,743.50. The case is now before us on a writ of error brought by the plaintiffs claiming that they were entitled to judgment for the full amount of the bill.

Two preliminary objections have been taken by the counsel for the defendant in error: 1st. That, inasmuch as other evidence was given on the trial in the court below than that which has been brought on the record, or is found in the bill of exceptions, for aught that appears, the judgment may have been founded upon that evidence. 2d. That the cause having been tried without a jury, and the judge having deter- 12*] mined the *case upon both the facts and the law, error will not lie for the admission of improper testimony.

It was decided in Phillips v. Preston, 5 How. 278, in the case of a writ of error to the Circuit Court of the United States in Louisiana, and where the trial by jury had been waived, that the state practice regulating appeals for reviewing the decisions of the inferior courts, which required the return of all the evidence to the appellate court, did not apply: and, that only so much of it need be returned, and, indeed, no more should be returned than was necessary to present the legal questions decided *by the court, and which* were sought to be reviewed. Evidence bearing exclusively upon questions of fact involved in the cases only encumbers the record and embarrasses the hearing in this court, as these questions are not the subject of review on error. The mere fact, therefore, that other evidence was given on the trial besides that which is found in the bill of exceptions furnishes no objection to an examination of the questions of law presented by it.

If that evidence bore upon these questions, and might influence our decisions upon them, the defendant in error should have brought it upon the record, or incorporated it in the bill of exceptions. His neglect to do so implies that it could properly have no such effect, if returned.

As to the other objection. It was held in Field v. The U. S. 9 Pet. 182, and recognized in several subsequent cases, that in a cause where the trial by jury had been waived, the objection to the admission of evidence was not properly the subject of a bill of exception; and the reason given is, that if the evidence was improperly admitted this court would reject it and proceed to decide the cause as if it were not in the record. This, perhaps, is unobjectionable; it certainly is so, as far as the evidence improperly admitted bears upon a question of fact in the cause; for, when rejected, if there is still any proper evidence tending to support the judgment of the court below, the decision cannot be reviewed on a writ of error. The error in this aspect would be unimportant, because not the subject of an exception, the question involved being one of fact.

If, upon the rejection of the evidence, no testimony would remain necessary to support the judgment of the court, then the mistake would be one of law, and the proper subject of a writ of error.

The case of the refusal of proper evidence on the trial is subject to very different considerations from those applicable to the improper admission of it. The exclusion of the evidence might change the legal features of the cause, and lead to a determination of it upon principles wholly inapplicable, in case the evidence *had been admitted; nor, can we assume [*13 that the testimony offered, and rejected, would have been proved, if it had not been excluded, and revise the judgment of the court upon that assumption, because the offer of evidence to prove a fact, and the ability to make the proof, are very different matters. If the court instead of rejecting had allowed the evidence, the party might have failed in the proof, and the case in the result remain the same as before the improper exclusion.

We think, therefore, that the improper rejection of testimony on the trial before the judge where the jury has been dispensed with, should constitute the subject of review on the writ of error, as in the case of a trial before the jury.

There is one qualification applicable to this peculiar mode of trial, that should be noticed. If the testimony rejected is but cumulative, and relates exclusively to a question of fact involved in the case, the rejection may be immaterial, as the decision of that question upon the evidence already in by the judge may be regarded as well warranted.

This principle is sometimes applied in cases of writs of error where the trial below has been

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before a jury, if it be seen that the admission of the testimony could not have properly influenced the jury to a different conclusion on the question of fact. The cases will be found collected in Cowen and Hill's notes, vol. 4, pp. 775-6, 3d ed.; see, also, 1 Duer. Sup. C. R. pp. 431-4. It must be admitted that the courts which have adopted this principle apply it with great caution where the trial has been had before a jury, and require a clear case to be made out that the rejection has worked no prejudice to the party. Other courts have denied its application altogether, and refused to look into the record to see whether the evidence might or might not have influenced the jury.

In cases where the trial by jury has been waived, and the facts as well as the law submitted to the judgment of the court, a more liberal application may be safely indulged; though, if the determination of the question of fact be against the party offering the evidence, we do not perceive why the rejection should not be regarded as error, reviewable on a bill of exceptions.

A more difficult question arises in these cases where the facts as well as the law are submitted to the court in reviewing on exceptions the correctness of the ruling of the law involved in rendering the judgment.

In trials before a jury these come up on the instructions prayed for, or by exceptions to the charge. The questions of law are thus separated from the questions of fact, the former to be determined by the court, the latter by the jury. But, where both questions are submitted to 14*] the court, and both determined *at the same time, and by the same tribunal, the separation is more difficult. The principles of law applicable to the case are so dependent upon the facts, and the finding of these in the case supposed exclusively within the province of the judge who is substituted for the jury, it would seem, as a general proposition, nearly impracticable for the appellate court to ascertain from the case the principles of law that had governed the decision; especially in the absence of his opinion in the case.

But these principles must be ascertained, to enable the court to review them on a writ of error, as the bill of exceptions lies only upon some point arising either upon the admission or refusal of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. 4 How. 297; 8 Johns. 495; 2 Cai. 168.

As an illustration of the difficulty, and to aid us in the solution of it, we may refer to a late Act on England, and the decision of the common bench under it. It is the Act of 13 and 14 Victoria, ch. 61, which conferred upon the county courts a limited jurisdiction in civil cases, and gave an appeal from their determination "in a point of law or upon the admission or rejection of evidence,"—"to any of the superior courts of common law at Westminster."

It will be seen that an appeal is given here upon the same ground that a bill of exceptions was given by the Statute of Edward I, ch. 31. The parties were at liberty to waive a trial by jury, and submit the facts, as well as the law, to the judge of the County Court. A case came up before the common bench, that had been thus submitted, involving a question upon the Statute of Limitations, and which presented the difficulty we are now considering.

Maule, J., who delivered the opinion of the court, in endeavoring to overcome it, observed: "It may be, that, if upon the case stated by the parties or by the judge, it appears to the court of appeal that the decision which has been come to can be sustained by a particular view of the facts which does not render it necessary to arrive at the conclusion that he has erroneously decided the point of law before him, this court may have no power to review the judgment; yet that, where it is manifest from the facts stated, that in order to arrive at the conclusion he has arrived at, the judge must have decided a matter of law in a certain way, that will be a determination in point of law, with respect to which an appeal will lie. So, that, supposing there be a judgment which can be sustained, consistently with the law, by any view that can be taken of the facts stated, such a judgment probably cannot be reversed; yet, still, where the judge states the facts which were before him, and these facts will sustain *his judgment upon one view of the law [*15 only, and that an incorrect one, this court may have jurisdiction to entertain the appeal."

This view is directly applicable to the case of a bill of exceptions where the jury has been dispensed with, and the judge substituted in its place, to pass upon the facts as well as the law, and furnishes the rule by which the point of law may be ascertained that was decided in rendering the judgments intended to be reviewed.

In order, however, to disembarrass the proceedings as far as practicable in this peculiar mode of the trial of a common law case, and to enable the appellate court to re-examine the point or points of law involved, the counsel, after the close of the evidence, should present the propositions of law which, it is claimed, should govern the decision; and the court should state the rulings thereon, or in coming to its determination. And, in return to the writ of error so much of the evidence, and no more, should be incorporated in the bill of exceptions as was deemed necessary to present the points of law determined against the party bringing the writ. No technical exception need be stated except in the case of the rejection or admission of evidence. As the rulings in the final determination do not take place upon the trial, or need not, the exception would be impracticable.

We have stated more at large, the proper practice in bringing up for review cases of this peculiar character, than was necessary to the disposition of the one before us, as they are frequently occurring, and the practice governing them not very well settled.

As it respects the case in hand, we have already shown that the state practice of Louisiana in appeals does not apply to the case of writs of error from this court to the circuit courts; and hence the circumstance, that other evidence had been given and was before the court than what appeared in the bill of exceptions, furnished no objection to the re-examination of the point of law there presented; and that if the other evidence was deemed

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material it should have been brought upon the record by the defendant in error. We must assume, therefore, that the bill of exceptions contains all the testimony deemed material to raise the point of law involved.

That shows the admission of the proof of a state of facts, as a special defense to the bill of exchange which had been set up, and the only one set up, in the answer, namely: that the bill had been accepted for the balance of the price of a sugar mill constructed and sold to the defendant by the drawers that the mill was badly constructed, and defective in workmanship and materials, that at the time of the ac- 16* ceptance, the drawers promised *at some future day to make the necessary repairs; that they had failed to make them, by which the defendant had suffered damage to the amount of $1,835.60, which he claimed in abatement of the face of the acceptance, and that the plaintiffs had notice of these facts before the transfer of the paper to them.

The court below reduced the recovery to $1,743.50, which must have been on the ground of this special defense, as no other appears in the record.

Now, we agree, that if this suit had been between the original parties, the defense would have been unobjectionable. 9 How. 213; Code of Prac. 374, 377; 6 N. S. 671, 688. But, the plaintiffs are bona fide holders of the paper, for value, and therefore not subject to this defense, or to any abatement of the face of the bill, arising out of the transaction between the original parties.

It is true, the plaintiffs knew, at the time they took the paper, that it was given as part of the price for the sugar mill, and that the mill had been defectively constructed; but they also knew that the defendant, upon the promise of the builders to make the necessary repairs, had agreed to accept the bill unconditionally and had accepted it accordingly. They knew, therefore, that he looked to this undertaking for indemnity, and not to any conditional liability upon the acceptance.

The transaction, therefore, which is brought home to the plaintiffs, lays no foundation, in law or equity, to impeach the paper in their hands.

The ruling of the court below, in this respect, was consequently erroneous, and the judgment must be reversed

Judgment reversed and cause remanded.

PIERRE BARRIBEAU and Euphrasie T. Perry, Appellants,

v.

JOSHUA B. BRANT.

(See S. C. 17 How. 43-46.)

Trusts—substitution of representatives of deceased party—abatement.

NOTE.—Deed, when void for fraud, insanity, drunkenness, duress, undue influence, imbecility, infancy, or fraud on marriage, from ward to guardian, cestui que trust to trustee, from heir to executor—see note to Harding v. Handy, 6 L. ed. U. S. 429.

Death of parties, effect on suit—see note to Green v. Watkins, 5 L. ed. U. S. 256; and note to Weeks v. Russell, 3 L.R.A. 212.

A deeded land to B, in trust for A during life, and after his death for his two sons and a daughter; held that an equitable interest, as tenants in common, in fee simple, was secured to the three children by the deed; and that, after A's death, their conveyances, and that of the trustee, passed the whole interest, legal and equitable, to the purchaser.

Upon the facts, held that fraud in the conveyances was not sustained.

Where, soon after the action was commenced, a plaintiff conveyed his interest to a trustee, and died after appeal to this court, held, the trustee acquired no new interest by his death, and could not be substituted as his representative, on the appeal. The only persons who can appear, in his stead, are those, who, upon his death, succeed to the interest he then had.

Where the death of a party was suggested at December Term, 1851, and his legal representatives did not appear by December 10, Term, 1854, held, that under rule 61, the bill must as to him be entered abated.

Argued Dec. 14, 1854. Decided Dec. 19, 1854.

APPEAL from the District Court of the United States for the District of Missouri.

The case is stated by the court,

Mr. Worthington and Mr. Snethen for appellants. Mr. A. H. Lawrence for appellee.

Mr. Chief Justice Taney delivered the opinion of the court:

*This is an appeal from the decree of [*44 the Circuit Court of the United States for the District of Missouri, sitting as a court of equity.

The case is this: Pierre Barribeau was seised in fee simple of a lot of ground in the Town of St. Louis; and by deed dated May 8, 1829, conveyed it to Joseph White, in trust for the grantor during his life, and after his death for his two sons, Adrian and Pierre, and his adopted daughter, Euphrasie, who had grown up in his family.

After the death of the grantor, his sons, Adrian and Pierre, and White, the trustee, joined in a deed to Brant, the appellee, for all the interest of the two sons in the lot. But at the time this deed was made, Pierre had not attained the age of twenty-one years. Subsequently, however, he executed a deed of confirmation, and in that deed professed to convey two undivided third parts of the premises.

Euphrasie, the adopted daughter, executed a deed to Amarinth Loiselle, purporting to convey the whole of this lot. And afterwards she and Amarinth made separate deeds, on the same day, to Samuel Merry, for her third part of the premises; and Merry afterwards conveyed to Brant. If, therefore, the several deeds above mentioned are valid, Brant is entitled to the whole lot.

Adrian died intestate and without issue. And after his death Pierre and Euphrasie filed this bill, charging that all of the deeds made by them respectively, and by Adrian in his lifetime, were obtained by misrepresentation and fraud; that they were illiterate and did not understand the object and effect of these instruments when they were executed; and that the consideration paid was far below the real value of the property. The bill further charged that Pierre was still under the age of twenty-one when he made the deed of confirmation.

The answer of Brant denies all fraud and misrepresentation, and avers that the parties were perfectly aware of the contents of the

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several instruments when they were executed, and that the price was a fair one according to the value of the property at that time; and that Pierre was of full age when he made the deed of confirmation.

Many witnesses were examined by the parties in support of their respective allegations, and at the final hearing, the bill of the complainants was dismissed by the Circuit Court. And from this decree the complainants have brought this appeal.

It would be tedious and useless in this opinion, to go into an examination of the testimony given by the different witnesses. Much of it has very little if any bearing upon the question in dispute. It is very evident indeed that the 45*] complainants were *illiterate and weak-minded. But there is abundant proof that they were perfectly aware of the contents of the several instruments, and of the objects and purpose for which they were executed. And although the prices paid for the different interests were undoubtedly very moderate, yet they were not so inadequate as to authorize the court to declare the deeds void on that ground. The inadequacy must be tested by the value of the property at the time of the sales, and not by its present value. The first deed from the two Barribeaus and White to the respondents was made September 3, 1833. The deed of confirmation from Pierre, August 7, 1836; and the deeds from Euphrasie, and Amarinth Loiselle to Merry, February 1, 1836. The complainants did not seek to disturb these conveyances or take any measures to impeach them, until March 20, 1849, when this bill was filed, and when property in St. Louis was greatly enhanced in value as compared with its value in 1833 and 1836. It is perhaps the great increase in the value of this property between the time of the several sales and the time of filing this bill that has led to this controversy. But upon the evidence in the record we think the charge of fraud and misrepresentation is not sustained, and that there is sufficient proof that Pierre was of full age at the time the deed of confirmation was executed.

It has been contended on the part of the complainants, that under the deed from Pierre Barribeau the elder, to White, the three cestuis que trust took a joint interest, and that upon the death of one or more of them without lawful issue, the share of the deceased was limited over to the survivors or survivor. And as Adrian died before the filing of the bill, and Pierre has died pending this appeal; and both of them without lawful issue, Euphrasie, the surviving complainant, claims the entire lot, by virtue of the limitations over in the deed of trust. And if this be the construction of the deed, she is entitled to a decree for the shares of the two sons, although she has sold and conveyed her own one-third as above stated.

But this construction cannot be maintained. The trust deed, it is true, is unskillfully drawn. But it is very clear, upon the whole instrument that an equitable interest as tenants in common in fee simple was secured to them by the deed; and that their conveyances, together with that of the trustee, passed the whole interest, legal and equitable, to the respective purchasers.

It appears that shortly after this bill was filed, Pierre, the complainant, conveyed all his interest in the property to Benjamin A. Massey, in trust for a natural daughter, born of an Indian mother and living in the Indian country; and a motion has been made to make him a party in this court, as the representative of Pierre.

*The decision of this motion either way [*46 could have no influence upon the rights of the parties. For as the court is of the opinion that the deed of confirmation made by Pierre was valid and conveyed his one-third to the appellee, the decree in the court below dismissing the bill must be affirmed, even if Massey was permitted to appear.

But in this stage of the proceedings he cannot be permitted to become a party, as the representative of Pierre. The bill was filed by Pierre, and this appeal taken by him. He has died pending this appeal; and the only persons who, upon principles of law and and the rules of this court, can be permitted to appear in his stead, are those who, upon his death, succeed to the interest he then had, and upon whom the estate then devolves.

But the interest of Massey was acquired in the lifetime of Pierre; and no new interest accrued to him upon Pierre's death; and if he desired to become a party in order to maintain his rights as trustee, he should have applied for leave to become a complainant while the case was pending in the Circuit Court. The estate has not devolved upon him by the death of Pierre, and he has the same interest now which he had upon the execution of the deed; and has no greater right to become a party here after Pierre's death than he had before.

In the opinion of the court, therefore, as Pierre's death was suggested at December Term, 1851, and his legal representatives have not appeared by the 10th day of this term, the bill must, as to him, be entered abated under the 61st rule of this court. And as regards Euphrasie, the other complainant, it must be dismissed with costs.

Appeal, as to Pierre Barribeau, abated, under 61st rule, and dismissed with costs as to Euphrasie S. Perry.

GREY P. WEBB et al., Plaintiffs in Error,
v.
JOHN DEN, Lessee of Polly Weatherhead.

(See S. C. 17 How. 577-580.)

Deed—informal acknowledgment by a Tennesse law, after twenty years' registry, does not invalidate deed—deed containing only "release and quitclaim forever" is valid—deed to "the devisees of A" sufficiently describes grantees—release of title, when valid, without words of inheritance—record, evidence as to title.

(An Act of Tennessee, that a deed, registered twenty years or more, shall be presumed to be on lawful authority, though the certificate of acknowledgment was informal or not registered, is not a retrospective law, and justified the admission in evidence of a certified copy of deed, with imperfect acknowledgment, registered more than twenty years.

✓A deed, not containing the words give, grant, bargain sell, etc., but only "a release and quitclaim

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forever unto the legatees and devisees of A B, deceased," is valid and contains a sufficient description of the grantees.

Being a release of the bare legal title to equitable owners in fee, on partition between them as tenants in common, it is no objection that it has no words of inheritance.

The common law requirement of words of inheritance in a release between tenants in common, is founded on feudal reasons, which have no application when the release is to the equitable owner in fee.

A record of partition as a muniment of plaintiffs title, is evidence. It is not objectionable because it is res inter alios acta.

(Mr. Justice Catron did not sit in this cause.)

Argued Dec. 1854, Decided Dec. 19, 1854,

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee. The case is stated by the court.

Messrs, **Francis D. Fogg** and **Gillett** for plaintiff in error. Mr. **Meigs** for defendant in error.

Mr. Justice Grier delivered the opinion of the court:

On the trial of this case, the plaintiff below having shown that the lessor of plaintiff was one of the children of Anthony Bledsoe—also the will of Anthony Bledsoe, and a grant of five thousand acres of land, by the State of North Carolina to Nicholas Lang—offered in evidence a copy of a paper writing purporting to be a deed from John J. Lang, Basset Stith, and Mary his wife, and others, devisees of the legal estate, to the "legatees and devisees of the late Anthony Bledsoe," for the one-fourth part of said tract, or 1,250 acres, by certain metes and bounds. This copy is certified by the register of Maury County, Tennessee, as there recorded on the 11th of January, 1809. The defendants objected to the admission of this copy as evidence, "because it was not duly proved, acknowledged or authenticated, so as to entitle the same to registration, and there was no proof of the acknowledgment or privy examination of Mary Stith, the feme covert, and that the registration of said deed being unauthorized, a copy would not be read." The court overruled the objection, and permitted the deed to be read and the exception to this ruling is chiefly relied on as a ground for reversing the judgment of the court below.

The acknowledgment certified by this deed, which reports to have been taken in open court, in Halifax County, North Carolina, at November Sessions, 1807, is admitted not to have been such as the Registration Acts then required, nor was it certified under the seal of the court, as required by law. But an Act was passed in 1839, by the Legislature of Tennessee, the 9th section of which contains the following provi-
578*] sion: That whenever *a deed has been registered "twenty years or more, the same shall be presumed to be upon lawful authority, and the probate shall be good and effectual, though the certificate on which the same has been registered has not been transferred to the register's books, and no matter what has been the form of the certificate of probate or acknowledgment."

In the early settlement of most of our States, the forms of conveyances of land were very simple; and they were usually drawn either by the parties themselves, or by persons equally ignorant of the proper forms of certificates of acknowledgment required by law,

In some states, the statutes concerning acknowledgments and registry were stringent, while the practice was loose and careless. And, in some, the courts, by unnecessary strictness in their construction of the statutes, added to the insecurity of titles, in a country where too many have acted on the supposition that everyone who can write is fit for a conveyancer. The great evils likely to arise from a strict construction applied to the bona fide conveyances of an age so careless of form, have compelled legislatures to quiet titles by confirmatory acts. in order to prevent the most gross injustice.

The Act in question is one of these; it is a wise and just Act; it governs this case, and justifies the court in admitting this deed in evidence. It was registered in 1809, and some of the grantees have been in possession under it ever since. After such a length of time, the law presumes it to have been registered on lawful authority, without regard to the form of certificate of probate or acknowledgment. As a legal presumption it is conclusive that the deed was properly acknowledged, although the contrary may appear on the face of the papers.

It is not a "retrospective law" under the Constitution of Tennessee, which the Legislature is forbidden to pass. It is prospective; declaring what should thereafter be received in courts as legal evidence of the authenticity of ancient deeds. It makes no exception as to the rights of married women, and the courts can make none. Informalities and errors in the acknowledgment of femes covert, are those which the carelessness and ignorance of conveyancers were most liable to make, and which, most required such curative legislation.

The registration being thus validated, copies of such deeds stand on the same footing with other legally registered deeds, of which copies are made evidence by the law.

The objections to the form of this deed, that it has no effective words of grant to convey a fee, nor states a consideration, nor sufficiently describes the grantees, cannot be supported. It is true, it is a very informal conveyance, but it contains *enough within it to show its [*579 validity. It appears that Anthony Bledsoe, as locator of the land for Lang, was entitled by their contract, to one fourth. The whole legal title was in Lang's devisees, the equitable title to one fourth in Bledsoe's devisees. The deed does not contain the words give, grant, bargain and sell, etc., but only "a release and quitclaim forever, unto the legatees and devisees of Anthony Bledsoe, deceased." The will of Bledsoe is in evidence. The deed, by this description, necessarily refers to that instrument to ascertain the persons who are such "legatees and devisees," and thus far incorporates it. It contains, therefore, a sufficient description of the grantees.

It has no words of inheritance, because it is a release of the bare legal title to equitable owners in fee, on partition between them as tenants in common. This appears on the face of the deed. The consideration of the conveyance is stated to be a release, on behalf of the grantees, "of all claims under a certain contract," etc. By the common law, there is a dis-

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tinction between a release by one joint tenant to another, and the same as between tenants in common; the first requires no words of inheritance, but the latter does. But this technical distinction is founded on feudal reasons with respect to livery of seisin, which have no application where the release is to the equitable owner in fee. By the Statutes of Tennessee, registering the deed is the only livery of seisin required.

But whether the deed passed the legal estate in fee or not, was a question not arising in the case, as the lessor of plaintiff was one of the devisees of Anthony Bledsoe, and therefore one of the original grantees in the deed, and had a legal as well as equitable estate.

The objection to the record of partition between the heirs or devisees of Nicholas Lang, because it was res inter alios acta, ought not to have been made. The authenticity of the record was not disputed, and if it had any legal bearing whatever on the title of the plaintiff, the defendants, who had as yet shown no title, cannot object to the muniments of plaintiffs' title, when offered in evidence, whether they be deeds, wills or partitions, "because they are res inter alios acta."

The judgment of the Circuit Court is therefore affirmed.

72*] *THE TROY IRON AND NAIL FACTORY, Appellants,

v.

GEORGE ODIORNE, Jr., and Francis Odiorne.

(See S. C. 17 How. 72-74.)

Patents—machine constructed before patent applied for, no infringement.

Where a machine is constructed by one, before the application for a patent by another, the former machine is no infringement of the patent of the latter.

(Mr. Justice Curtis, having been of counsel, did not sit in this cause.)

Argued Dec. 8, 1854. Decided Dec. 20, 1854.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The Troy Iron and Nail Factory filed their bill in the Circuit Court of the United States for the District of Massachusetts, for the purpose of restraining the respondents from infringing certain letters patent, granted to Henry Burden, September 2, 1840, and by him assigned to the complainants.

The court rendered a decree, dismissing the bill, from which decree the present appeal is taken.

The case is stated by the court.

Mr. George T. Curtis for the appellant.

73*] *Mr. Justice Catron delivered the opinion of the court:

Henry Burden obtained a patent in 1840 for a machine to make hook-headed spikes. He applied for the patent on the 18th of April, 1839. It was assigned to the Troy Iron and Nail Company, who filed a bill against the Odiornes to enjoin them, and for an account for using a machine to make similar spikes; and which machine it is alleged infringed the monopoly secured to Burden by his patent of 1840. The case was brought to a hearing on the following stipulation:

"The defendants agree not to deny the validity of the complainant's patent, provided they make out their title to the said letters patent to be good.

They also agree not to deny that the machine complained of in the complainant's bill is an infringement on the patent granted to H. Burden, on August 4, 1840.

"If the complainants shall establish their title to the letters patent aforesaid, the proper decree may be entered for the complainants, unless the defendants shall prove that the spike machine used by them, and complained of in the bill aforesaid, was constructed prior to the alleged application of H. Burden, made April 18, 1839, for letters patent therefor, according to the provisions of the Statute of the United States, 1839, chap. 88, sec. 7; or was the result of an independent, original invention, prior in time to the invention of the said Burden; in either of which cases the proper decree shall be entered for defendants.

The only question presented for our consideration on the stipulation is, whether the machine employed by the appellees was constructed prior to April 18, 1839, when Burden made application at the Patent Office for his patent.

The machine complained of was built by Richard Savary, for the Boston Iron Company, in the spring of 1839, and obtained, by the appellees, by assignment. Savary was the patentee of a machine to make ship and boat spikes, and at the suggestion of the agents of the Boston Iron Company added an attachment of an apparatus to make a hook head to spikes; the process for making which Savary deposes he discovered in August, 1838. The time at which this apparatus was attached to the machine (substantially complete in its operative parts) is the time when the machine complained of was "constructed," in the sense of the stipulation; it not being necessary that the machine should be geared and doing work. We are satisfied that it was set up and substantially finished before the 18th of April, 1839, and therefore order the decree below to be affirmed.

Affirmed with costs.

JOSEPH BATTIN, Patentee, and Samuel Battin, Assignee, Plaintiffs in Error,

v.

JAMES TAGGERT, Deft. in Er.

SAME

v.

ROBERT RADCLIFFE et al., Defts. in Er.

SAME

v.

JOHN G. HEWES, Deft. in Er.

(See S. C. 17 How. 74-86.)

Patents—reissue of, must be for same invention—questions for jury.

Where there is a defect in the specifications, or claim, for a patent, the patentee may surrender it.

NOTE.—What constitutes infringement of patent, —see notes, 36 L. ed. U. S. 1073; 40 L. ed. U. S. 1025.

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and by amended specification or claim, cure the defect.

The re-issued patent must be for the same invention substantially; a new and different invention cannot be claimed.

Whether the specifications, including the claim, are so precise as to enable any person skilled in the structure of machines, to make the one described, is a question for the jury. The novelty of the invention: whether the renewed patent is for same invention; whether the invention has been abandoned to the public; the identity of the machine used by defendant with that of plaintiffs, and whether they have been constructed and act on same principle; are also questions of fact for the jury.

Argued Dec. 8, 1854. Decided Dec. 18, 1854.

IN EROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The following is the statement of the facts in the case, as given by the counsel for the defendants:

On the 6th of October, 1843, Joseph Battin, alleging that he had "invented a new and useful machine for effecting simultaneously the breaking and screening of coal," received letters patent therefor.

The specification describes with equal particularity the breaking and the screening part of the machine; the former consisting of two iron rollers, revolving in opposite directions and armed with teeth, so that the teeth upon each shall stand opposite to the spaces formed by the teeth on the opposite roller; the latter consisting of an inclined screen with meshes of different sizes, suspended in such manner as to have a vibrating motion. The claim is as follows: "Having thus fully described the nature and operation of my machine for breaking and screening coal, what I claim is new therein, and desire to secure by letters patent, is the manner in which I have arranged and combined with each other the breaking rollers and the screen; the respective parts being formed and operating substantially as herein set forth and made known."

January 20, 1844, a schedule of additional improvements by the patentee was annexed to said letters patent; the improvement consisting in a third or auxiliary roller placed above the two rollers as described in the original patent. This is described as an improvement "in the machine for effecting simultaneously the breaking and screening of coal," and refers to the "original invention" as consisting "in the combination of the breaking and sifting apparatus with each other."

February 12, 1844, the patentee took out distinct letters patent for rollers of the kind described in the first patent of Oct, 6, 1843. He alleges therein that in the said patent of Oct. 6, 1843, "The manner of arranging and combining the toothed rollers was not made in the subject of a claim, the said patent having been obtained for the combining of a roller breaking machine with a screen for separating the coal into different sizes required; but as the breaking rollers so formed, arranged and combined, are applicable to the ordinary cylinder breaking machine, when not used in combination with a screen; and as I have found by continued experiment that such rollers constitute a real improvement in any breaking machine, I have determined to secure to myself the benefit of such improvement in a distinct and separate patent therefor." He therefore makes claim to the rollers and takes out this patent therefor.

Suit was brought upon the patent of Oct. 6, 1843, in the Circuit Court from which these proceedings have been brought up, and it was then decided by the court that said patent was for the combination of the breaking and screening apparatus and could not be supported or assailed by proof of the novelty or want of novelty of the parts. The patentee thereupon surrendered the patent of Oct. 6, 1843, together with the additional improvement of January 20, 1844, and received a re-issued patent dated September 4, 1849; and at the same time he surrendered the patent of February 12, 1844, which was canceled and not re-issued.

The re-issued patent described, but with greater prolixity, rollers similar to those described in the original patent of October 6, 1843 (and in the patent of February 12, 1844), and instead of claiming the combination of the breaking rollers and the screen for effecting simultaneously the breaking and screening of coal claims "the arrangement of the teeth on the two rollers substantially as herein described, so that in their rotation, the teeth of one shall come opposite the space between the teeth of the other, with sufficient space between to hold lumps of the required size; the rollers being so combined by gearing as to make them rotate in opposite directions and with the required velocities to retain the relative position of the teeth of the two rollers as described."

This suit is brought for an alleged infringement of the re-issued patent. Two trials were had, at first of which the plaintiff obtained a verdict; after a full argument a rule by the defendants for a new trial was made absolute by the court, and on the second trial, verdict was found for defendant, to the judgment entered upon which this writ of error was taken.

Messrs. C. M. Keeler and George M. Dallas, for the plaintiffs in error:

It is a presumption of law that an inventor does not design to dedicate his invention to the public, and his acts will be construed liberally to accord with such presumption.

Grant v. Raymond, 6 Pet. 243; Woolwich on Ways, 4 Law Lib. 12.

Applying for, and obtaining letters patent is presumptive evidence of an intention on the part of the patentee to secure to himself the exclusive right of every part of such invention, bona fide invented by him.

Morris v. Huntington, 1 Paine, 355; Grant v. Raymond, 6 Pet. 220; Sloat v. Spring et al., Harding, 377; Shaw v. Cooper, 7 Pet. 315; P. & T. R. R. Co. v. Stimpson, 14 Pet. 448.

The omission to claim a material part or element of an invention, fully described in letters patent, is not a dedication to the public, and the same may be subsequently covered by a re-issue of such patent.

Stimpson v. Westchester R. R. Co., 4 How. 380–401; Act of July 4, 1836, sec. 13; 5 Stat. 117.

The court erred in determining judicially by the construction of the surrendered and canceled patents, that the re-issued patent of September, 1849, is not for the same invention intended to have been patented by the patent of October, 1843, instead of submitting the

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question, as matter of fact, to be determined by the jury.

The surrender and reissue of letters patent for amendment of errors was recognized as a common law right before the enactment of any statute on the subject.

Morris v. Huntington, 1 Paine, 355; Grant v. Raymond, 6 Pet. 220; Shaw v. Cooper, 7 Pet. 292-314.

These authorities hold that in the exercise of this common law right, the reissue reverts back to the date of the original from which it emanates.

See, also, Woodworth v. Stone, 3 Story, 749; Allen v. Blunt, 3 Story, 742; Woodworth v. Hall, 1 Wood. & M. 248.

The court erred in ruling, as matter of law, that the patentee had dedicated or abandoned his invention to the public, instead of submitting it as a question of fact, to be determined by the jury.

P. & T. R. R. Co. v. Stimpson, 14 Pet. 458; Stimpson v. Westchester R. R. Co. 4 How. 380-401; Sloat v. Spring et al. Harding, 369, 377.

Messrs. Garrack, Mallery and Furman Sheppard, for the defendants in error:

If the patentee described the rollers and the screen, but did not claim them, it was a waiver of his right (if any he had) therein, as inventor and an abandonment of them, by operation of law, to public use.

It is a publication of the invention and in the most effectual manner, and not being claimed, they constitute no part of the patent privilege, and are not protected by the patent.

Even where it is conceded that novel features are described in the specification, courts refuse to extend the privilege of the patent to such features, unless they are claimed by the patentee.

Bramah v. Hardcastle, Holroyd on Patents, Saunders v. Aston, 3 Barn. & A. 886. See, also, Cornish v. Keen, Webb's Pat. Cas. 510; Huddart v. Grimshaw, Webb's Pat. Cas. 86; Lewis v. Marling, 4 C. & P. 52; Pennock v. Sileers, 2 Pet. 1; Shaw v. Cooper, 7 Pet. 292; Pennock v. Dialogue, 3 Pet. 1; Whittemore v. Cutter, 1 Gall. 482; Mellus v. Silsbee, 4 Mason, 108; Wood v. Zimmer, Holt, N. P. 60; Wilson v. Rousseau, 4 How. 674; Gayler v. Wilder, 10 How. 491; Wheaton v. Peters. 8 Pet. 591; Dudley v. Mayhew, 3 Comstock, 9.

And if the patentee, by describing the rollers, without claiming them, allowed them to go into public use, with a waiver of his rights, if he had any, it is submitted that he cannot, in 1849, reclaim the rollers.

The want of sameness is evident on the face of the patents, and the repugnancy is manifest upon inspection and comparison.

It is submitted that a pair of breaking rollers with peculiarly arranged teeth, is a different thing from the combination of "the roller breaking machine with a screen for separating the coal into the different sizes required;" that they are mechanically distinct machines, different inventions—constituting distinct patentable subject matter.

The reissued patent is not a corrected description and specification of the manner in which the patentee arranged and combined with each other the breaking rollers and the screen; it is not for the combination at all, in any shape, but it is for something else; the arrangement of the teeth on the two rollers. It is a change in the essential character of the claim itself—a substitution of one thing for another, and not an amended description of the same thing.

Mr. Justice McLean delivered the opinion of the court:

This case is before us on a writ of error, to the Circuit Court for the Eastern District of Pennsylvania.

The action was brought for the infringement of a patent. The jury, under the instructions of the court, found a verdict for the defendant. Exceptions were taken to the rulings of the court, which present the points of law for consideration.

On the 6th of October, 1843, Joseph Battin obtained a patent for the invention of a new and useful improvement in the machine of breaking and screening coal.

After describing the different parts of the machine, he sums up by saying; having thus fully described the nature and operation of my machine for breaking and screening coal, what I claim as new therein, and desire to secure by letters patent is, the manner in which I have arranged and combined with each other the breaking rollers and the screen; the respective parts being formed and operating substantially as herein set forth and made known.

An improvement to the above machine, by adding an auxiliary roller, was patented to Battin, 20th January, 1844. And on the 12th of February, 1844, another patent was granted to *him, for a new and useful improve- [*81 ment in the machine for breaking coal.

In his specification, he says that he had made a new and useful improvement, in the manner of combining and arranging the toothed rollers used in the machine for breaking coal, which rollers, as combined and arranged by me, are described as follows: in the specification attached to letters patent for a machine for the effecting simultaneously the breaking and screening of coal, granted to me under date of the 6th of October, 1843. The breaking part of my machine consists of two rollers of cast iron, the peripheries of which are provided with teeth, so placed as that, in the revolution of the rollers, the teeth of each of them shall stand opposite to the spaces formed by two contiguous teeth on the opposite roller. These rollers are geared together, in order to preserve the same relative position.

In the above-named letters he says, the manner of arranging and combining the toothed rollers was made the subject of a claim, the said patent having been obtained for the combining of a roller breaking machine, with a screen for separating the coal into the different sizes required; but as the breaking rollers, so formed to and arranged, and combined, are applicable to the ordinary cylinder breaking machine, when not used in combination with a screen; and as I have found, by continued experiment that such rollers constitute a real improvement in any breaking machine, I have determined to secure to myself the benefit of such improvement, in a distinct and separate patent therefor. Rollers for the breaking of stone, of ores, of coal, of corn and of other

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substances, have been frequently constructed, and are well known, etc.

And, he adds, having thus fully described the nature of my improvement, in the manner of combining and arranging the toothed rollers used in the machine for breaking coal, what I claim therein as new, and desire to secure by letters patent is, the so forming and gearing of such rollers, as that the teeth of one of them shall always be opposite to a space between the teeth in the other, whenever they are operating upon the article to be broken; the same being effected substantially in the manner herein set forth.

And, afterwards, on the 4th of September, 1849, the said Joseph Battin obtained a patent, in which it is stated that he had invented a new and useful machine for breaking coal, for which letters patent were granted to him, dated October 6, 1843, to which was added an additional improvement, dated 20th January, 1844, and said letters having been surrendered by him, the same have been canceled, and new letters patent have been ordered to issue to him, on an amend-
82*] ed specification. *He also surrendered the patent granted to him on the 12th of February, 1844, for an improved machine for breaking coal, which patent is hereby canceled, but not reissued, etc.

After describing the invention, he sums up by saying: "What I claim, therefore, as my invention, and desire to receive (sic.) by letters patent, is the arrangement of the teeth on the two rollers substantially as herein described, so that in their relation the teeth of one shall come opposite the spaces, between the teeth of the other, with sufficient space between to hold lumps of the required size, the rollers being so combined in gearing as to make them rotate in opposite directions, and, with the required velocities, to retain the relative position of the teeth of the two rollers as described."

In the 6th section of the Patent Act of 1836, it is declared that, "before any inventor shall receive a patent he shall deliver a written description of his invention, in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains, to make and construct the same; and in case of any machine, he shall fully explain the principle, and the several modes of the application of the machine, so that it may be distinguished from other inventions; and shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention or discovery."

And by the 13th section of the same act, it is provided, "that when a patent shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, etc., to cause a new patent to be issued to the said inventor for the same invention, for the residue of the period then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specification. And the patent so issued shall have the same effect and operation in law on the trial of all actions hereafter commenced, for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing of the original patent."

In his charge to the jury, the district judge said: "The case of Battin v. Clayton, which was before us some time ago, grew out of an alleged infraction of this patent, of 1843. We held, on the trial of that case, that the patent being merely for the combination of machinery, it could neither be supported nor *as- [*83
sailed by proof of the novelty, or want of novelty, of the parts. The patent was thereupon surrendered, and a new one issued, on the 4th of September, 1849, under an amended specification, which described essentially the same machine as the former one did, but claimed, as the thing invented, the breaking apparatus only."

And, he remarks: "It is said that the present defendants are using the apparatus described in this reissued patent, and that they should be mulcted in damages accordingly." But there are two legal positions, of a general character, which appear to me to bar the plaintiff's right of recovery. They are these:—

1. That a description by the applicant for a patents of a machine or a part of a machine, in his specification, unaccompanied by notice that he has rights in it as inventor, or that he desires to secure title to it as patentee, is a dedication of it to the public.

2. That such a dedication cannot be revoked, after the machine has passed into public use, either by surrender and re-issue, or otherwise."

The above instructions, we think, were erroneous.

Whether the defect be in the specifications or in the claim, under the 13th section above cited, the patentee may surrender his patent, and, by an amended specification or claim, cure the defect. The reissued patent must be for the same invention, substantially, though it be described in terms more precise and accurate, than in the first patent. Under such circumstances, a new and different invention cannot be claimed. But where the specification or claim is made so vaguely as to be inoperative and invalid, yet an amendment may give to it validity, and protect the rights of the patentee against all subsequent infringements.

So strongly was this remedy of the patentee recommended, by a sense of justice and of policy, that this court, in the case of Grant v. Raymond, 6 Pet. 218, sustained a reissued and corrected patent before any legislative provision was made on the subject. In that case, the Chief Justice said: "It will not be pretended that this question is free from difficulty. But the Executive Departments, it is understood, have acted on the construction adopted by the circuit court, and have considered it as settled. We would not willingly disregard the settled practice, in a case where we are not satisfied it is contrary to law, and where we are satisfied it is required by justice and good faith." The same principle was sanctioned in the case of Shaw v. Cooper, 7 Pet. 310.

How much stronger is a case under the statute, which secures the rights of the patentee by a surrender, and declares the effect *of [*84

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the reissued and corrected patent. By the defects provided for in the statute, nothing passes to the public from the specifications or claims, within the scope of the patentee's invention. And this may be ascertained by the language he uses.

In the case of Stimpson v. The West Chester Railroad Co. 4 How. 380, it was held, that "where a defective patent had been surrendered, and a new one taken out, and the patentee brought an action for a violation of his patent right, laying the infringement at a date subsequent to that of the reissued patent, proof of the use of the thing patented, during the interval between the original and renewed patents, will not defeat the action." In the same case it was also held, that the proceedings before the commissioner, in the surrender and reissue of a patent, is not open for investigation except on the ground of fraud.

The patent of 1843 was not surrendered on the obtainment of the patent of 1844. That was intended to be a new invention of arranging and combining the toothed rollers, which, the patentee says, was not made the subject of a claim in the patent of 1843. The patent of 1844 was canceled, but not reissued, when the patent of 1849 was issued. At that time, the patent of 1843, and the improvement thereon, dated January 20, 1844, were surrendered and canceled, and new letters patent were issued on an amended specification.

The cause of the surrender of the patent of 1843, as stated in the charge to the jury, was the ruling of the court in the case of Battin v. Clayton, and that the amended patent of 1849 was consequently obtained. The ruling is not now before us, nor is it necessary to inquire whether the patent of 1843, on the specifications and claim, was sustainable. The plaintiff, by a surrender of that patent, and the procurement of the patent of 1849, with amended specifications, abandoned his first patent and relied wholly on the one reissued. The claim and specifications in this patent, as amendatory of the first, were within the 13th section of the Act of 1836. It is said with entire accuracy in the charge, in regard to the amended specification of the patent of 1849, that it "described essentially the same machine as the former one did, but claimed, as the thing invented, the breaking apparatus only." And this the patentee had a right to do. He had a right to restrict or enlarge his claim, so as to give it validity and to effectuate his invention.

In the argument, the counsel very properly considered the patent of 1844, as not in the case. It was designed to secure a new combination, not included in the first patent, and as the patent of 1844 was surrendered and can-[85*] celed and not reissued *it being equally disconnected with the patent of 1843, and the reissued and corrected patent of 1849, it can have no effect on the claim of the plaintiff.

We think the court also erred in saying to the jury, "We instruct you that your verdict, in each case, must be for the defendants."

This, as well as the two instructions above noticed, took from the jury, facts which it was their province to examine and determine. It was the right of the jury to determine from the facts in the case whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines, to make the one described. This the statute requires, and of this the jury are to judge.

The jury are also to judge of the novelty of the invention, and whether the renewed patent is for the same invention as the original patent; and they are to determine whether the invention has been abandoned to the public. There are other questions of fact which come within the province of a jury, such as the identity of the machine used by the defendant with that of the plaintiff's, or whether they have been constructed and act on the same principle.

The judgment is reversed, and the cause is remanded to the circuit court for further proceedings.

Judgment reversed and cause remanded.

SAMUEL MAYER and Henry Mayer, Appts.

v.

THE GALLIOTE VENELIA, Eddes, Master, Her Tackle, Apparel and Furniture.

Appeal dismissed with costs by court because neither party was prepared to argue at second term.

Argued Dec. 18, 1854. Decided Dec. 18, 1854.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. H. M. Phillips for appellants. Messrs. Kane and Fallon for appellees.

Mr. Chief Justice Taney made the following order of this cause, Dec. 18, 1854:

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and it occurring to the court here that this is the second term at which this case has been called for argument, and that neither party is now prepared to argue the same, it is considered by the court that this appeal should be dismissed at the costs of the appellants, pursuant to the 55th rule of this court; whereupon, it is now here ordered and decreed by this court, that this cause be, and the same is hereby dismissed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law and justice.

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THE NORWICH AND NEW LONDON STEAMBOAT COMPANY, a Corporation, etc., owners of the Steamboat Worcester, her Engines, Tackle, etc., Libelants, App'ts,

v.

THE STEAMBOAT "BAY STATE," her Steam Engine, Boilers, etc., Richard Borden, Jefferson Borden, Nathan Durfee, Fidelia B. Durfee, Joseph Durfee, James S. Warner, Mary B. Durfee, Walter Paine, Joseph Butler, David S. Brown, Wm. S. Tisdale, Wm. Borden, Robert H. McCurdy, Herman L. Aldrich, and William Spencer.

Appeal dismissed, etc., with costs, on certificate of clerk that no return had been filed.

Argued Dec. 18, 1854. Decided Dec. 18, 1854.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Mr. Lord for appellees. No opposing counsel on motion to dismiss.

Mr. Chief Justice Taney made the following order: Dec. 18, 1854.

Mr. Lord, of counsel of the appellees, having filed and read in open court the following certificate, to wit:

"U. S. Circuit Court, Southern District of New York.

The Norwich and New London Steamboat Company, Corporation, etc., Owners of the Steamboat Worcester, her Engine, Tackle, etc., Libelants, Appellants, v. The Steamboat Bay State, her Steam Engine, Boiler, etc., Richard Borden, Jefferson Borden, Nathan Durfee, Fidelia B. Durfee, Joseph B. Durfee, James S. Warner, Mary B. Durfee, Walter Paine, Joseph Butler, David S. Brown, William S. Tisdale, William Borden, Robert H. McCurdy, Herman L. Aldrich, and William Spencer, Claimants and Respondents.

I, John W. Nelson, clerk of the Circuit Court of the United States for the Southern District of New York, do hereby certify that the above cause in admiralty was heard and a decree entered in favor of the claimants on the 8th day of October, 1853; and an appeal was taken in the cause, and allowed on the 27th of the same month and year, and that no return has been made to the same.

John W. Nelson, Clerk."

And having stated that the appellants had altogether failed to file the record of said cause in this court, or in any way to prosecute said appeal, now here move the court in pursuance of the 63d rule of this court to have this appeal docketed and dismissed; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that this appeal from the Circuit Court of the United States for the Southern District of New York be, and the same is hereby docketed, and dismissed with costs; and that this cause be and the same is hereby remanded to said Circuit Court, for further proceedings to be had therein in conformity to law and justice, the said appeal notwithstanding.

*JAMES UDALL, Libelant and Appellant, [*17

v.

THE STEAMSHIP OHIO, her Tackle, etc., George Law and Marshall O. Roberts, Claimants.

(See S. C. 17 How. 17-19.)

Jurisdiction—amount necessary—when cannot include interest—amendment.

Where the amount claimed in a libel does not exceed $2,000, this court has no jurisdiction, and the appeal will be dismissed, although if proper interest to time of the trial be added it will exceed $2,000.

The practice of ascertaining the damages in the Circuit Court, cannot affect the question of jurisdiction. The amount claimed must be sufficient on the face of the pleading.

Amendment to the pleading, stating the interest, will not be allowed in this court.

Argued Dec. 2, 1854. Decided Jan. 3, 1855.

THE case is fully stated by the court.

Motion to dismiss appeal for want of jurisdiction. Mr. E. C. Benedict for appellant, Messrs. Donohue and Cutting for appellees.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Southern District of New York, in admiralty.

The libel was filed in the District Court, which stated that in the years 1847 and 1848, the steamship Ohio, then being in process of construction by Bishop and Simonson, the libelant furnished at the City of New York, for the building of said vessel, a large quantity of materials, timber and tree-nails. That said articles, at a fair price, amounted in the whole to the sum of $2,973.57, of which sum there is still due $2,159.28, less tree-nails, which not having been used were to be received back by the libelant, amounting to the sum of $468. That *the balance of $1,691.28, the own- [*18 ers, or those in charge of said vessel, have refused to pay, etc.

The appeal states the claim to be at the time of the trial in the Circuit Court, interest included, $2,164.86.

The libel was dismissed in the District Court, and the case was appealed to the Circuit Court. In that court the decree of the District Court was affirmed, from which an appeal was taken to this court.

A motion is now made to dismiss the appeal for want of jurisdiction.

It is stated by the counsel opposed to the motion, that it is the uniform practice in the Southern District of New York, to establish on the hearing only the liability of the defendant, and to have the amount of the damages ascertained on a reference to a commissioner, as the proofs in the record are not the full proof, as to the amount of the damages.

It is not perceived how the practice in the

NOTE.—Jurisdiction of U. S. Supreme Court dependent on amount—see note, 7 L. ed. U. S. 592.

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Circuit Court can effect the question of jurisdiction. The decree of the District Court which dismissed the libel, having been affirmed by the Circuit Court we must look to the claim of the appellant in his libel whether it exceeds the sum of $2,000. The balance of the account claimed, only amounts to the sum of $1,691.86. But it is insisted that if the interest on this sum be computed, up to the time of the trial in the Circuit Court, the sum would exceed the amount required to give jurisdiction.

Where the claim is founded on dollars and cents, whether it be a libel, a bill in chancery, or an action at law, the damages must appear to give jurisdiction on the face of the pleading on which the claim is made. No computation of interest will be made to give jurisdiction, unless it be specially claimed in the libel. If not intended to be included in the claim of damages, it should be specially stated. This would certainly be the case in an action at law, and no reason is perceived why the rule should be relaxed in a case of libel.

Under the 24th admiralty rule of this court, it is suggested, the libel may be amended at any time as of course, on application to the court. And if this be necessary, the counsel now moves to amend the libel by inserting "together with the interest to the time of the final decree in this court or any appellate court."

It has not been the practice of this court to allow amendments, except by the consent of parties; though, in the case of Kennedy v. Ga. State Bank, 8 How. 610, this court say: "there is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments, etc., but the practice has been to remand the cause to the lower court for amendment.

19*] *If amendments be allowed so as to give jurisdiction to this court, where there was no jurisdiction when the trial was had and the appeal taken, parties would be taken by surprise, and litigation would be encouraged. The plaintiff, under such circumstances, would never fail to sustain the jurisdiction of this court, on his appeal.

On the ground that the matter in dispute does not appear on the face of the libel to exceed $2,000, the appeal is dismissed.

Dismissed for want of jurisdiction.

JAMES N. OLNEY, Libelant and Appellant,

v.

THE STEAMSHIP FALCON, her Tackle, etc., and George Law and Marshall O. Roberts, Claimants.

(See S. C. 17 How. 19-22.)

Jurisdiction—amount necessary—interest, when not to be included in.

Where the amount claimed in a libel is "eighteen hundred dollars and upwards," although these terms were intended to embrace the interest, which to the time of trial would increase the sum to over $2,000, the claim is too indefinite to give this court jurisdiction. The interest not being specially claimed in the pleading, cannot be considered on this question.

Argued Dec. 22, 1854. Decided Jan. 3, 1855.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Motion to dismiss for want of jurisdiction.

Messrs. Benedict and Brauey for appellant. Mr. Cutting for appellee.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Southern District of New York, in admiralty.

A motion is made by defendant's counsel to dismiss the appeal for want of jurisdiction.

*In the libel, the shipment of a box of [*22 merchandise which was not delivered to the consignee, etc., is alleged, and that the libelant is entitled to recover of said vessel the damages by him sustained, which amount to the sum of $1,800 and upwards, etc.

The District Court dismissed the libel, from which decision an appeal was taken to the Circuit Court, and that court affirmed the decision of the District Court. From this last decision an appeal has been taken to this court.

On the part of the appellant it is stated, that the claim was for $1,800 and upwards, besides the interest; that, on the hearing, the libelant claimed the said principal and interest, amounting to $2,250, and that he was entitled to recover on his proofs and allegations that sum. That this was the claim at the time of the appeal, and that another year's interest has since accrued, and it is contended that the sum sworn to, being $1,800 and upwards, was intended to cover the accruing interest.

The right of appeal from the Circuit to the Supreme Court is given "where the matter in dispute exceeds the sum or value of $2,000, exclusive of costs." The defendant can appeal where the judgment or decree against him exceeds the sum or value of $2,000; but an appeal may be taken by the plaintiff where his claim of damages, in the declaration or libel, exceeds the above sum, or where the value of the thing claimed exceeds it, as this is held to be the matter in dispute.

The appellant in this case claims in his libel, which is sworn to, $1,800 and upwards. The words "and upwards" it is said were intended to embrace the interest, and that if this be calculated from the time of filing the libel up to the time of the trial, the sum would exceed $2,000.

The interest in an action of this kind, if taken into view, is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item. The claim of more than $1,800 is too indefinite to give jurisdiction under the Act of Congress; and the interest not being specially claimed, for the reason stated, cannot be computed. The appeal is therefore dismissed for want of jurisdiction. Gordon v. Ogden, 3 Pet. 34; Scott v. Lunt's Administrator, 6 Pet. 349.

Cause dismissed.

NOTE.—Jurisdiction of U. S. Supreme Court dependent on amount—see note, 7 L. ed. U. S. 592.

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47*] *ROBERT WICKLIFFE, App't,
v.
THOMAS D. OWINGS.

(See S. C. 17 How. 47-53.)

Jurisdiction properly averred, how denied—of chancery decree on reversal, for affirmative relief.

Where the jurisdiction of the Circuit Court dependent on residence of the parties, appears by proper averments on the record, the defendant can only impugn it by a special plea. See equity rule 39.

A court of chancery has jurisdiction upon general principles (and also in this case by a statute of Kentucky), to grant perpetual injunctions for quieting titles, after the right has been settled at law.

Imputations of fraud in this case not sustained, nor the allegation of a prior action.

This court on reversal render such decree as the court below ought to have rendered.

Argued Dec. 15, 1854. Decided Jan. 3, 1855.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

Wickliffe filed his bill in chancery in the Circuit Court of the United States for the District of Kentucky against Thomas Deye Owings, to be quieted in the possession and right to certain tracts and parcels of land of which he alleges he is seised in fee and holds in actual possession.

The relief is sought under general principles of equity, but more particularly under the Connecticut Statute of 1796, which gives the owner of the legal title who is in possession, a right to quiet his title against claimants. 1 Morehead & B. Ky. Stat. 294.

The answer denies the jurisdiction of the court, on the ground that the defendant is a citizen of Connecticut; and alleges that if Wickliffe has any legal title, he obtained it by fraud; and also sets forth that the defendant had filed a bill in chancery, to be let in to redeem in the Circuit Court of the County of Bath, State of Kentucky, before the institution of this suit, which he informally alleges as ground to abate this suit. The court below dismissed the bill. Complainant appealed to this court.

A further statement of the case appears in the opinion of the court.

Messrs. C. A. Wickliffe and Preston, for appellant, contended:

That the court has jurisdiction, because the defendant is a resident of Texas; that the suit of Wickliffe was first pending; that the charge of fraud is not sustained by the proof; that the compromise with Bascom will be favored in equity.

Taylor v. Patrick, 1 Bibb, 168; Leggett's Heirs v. Ashley, 5 Littell, 178; Fisher v. May, 2 Bibb, 448; Mills v. Lee, 6 Monroe, 98; Bates v. Todd, 4 Littell, 177; see, also, Elmendorf v. Taylor, 10 Wheat. 152; Fenwick v. Macey, 1 Dana, 279. The legal title to the lands in controversy, being in Wickliffe, coupled with the possession, he should have his title quieted.

Mr. A. H. Lawrence, for appellees:

The bill in this case was filed in the Circuit Court of the United States for the District of Kentucky against Thomas Deye Owings, to be quieted in the possession and right to sundry tracts and parcels of land enumerated in the bill, of which he alleges he is seised in fee, and holds in actual possession. The bill further alleges that the defendant Owings had set up title and claim to the land in question without any right in him whatever, and had thus injured the title of the complainant.

The relief sought is under general principles of equity, but more particularly under the Kentucky Statute of 1796, which gives the owner of the legal estate who is in possession, the right to quiet his title against claimants.

1 Morehead & Brown, Ky. Stats. 294.

To this bill the defendant has filed an answer, denying the jurisdiction of the court, and denying that he was a citizen of the State of Texas, but stating that he was residing in Kentucky at the time this suit was brought. The answer admits the possession of Wickliffe, and does not directly traverse the allegation that Wickliffe is vested with the legal title, but alleges that if said Wickliffe has any legal title, he obtained it by fraud. The answer also sets forth that he, the defendant Owings, had filed a bill in chancery, to be let in to redeem in the Circuit Court of the County of Bath, State of Kentucky, before the institution of this suit, which he alleges as ground to abate the suit.

The court below dismissed the bill, whereupon the complainant took an appeal to this court.

The case is further stated in the opinion of of the court.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiff filed his bill in the Circuit Court of the United *States for Ken- [*48 tucky, against Thomas Deye Owings, by which he assumes to be the owner, and in the lawful possession, of a number of tracts of land, lying in different counties of the State, which had at one time been the property of the defendant, but of which he had been legally divested, and notwithstanding claims, by the instigation and advice of other persons, to the prejudice and vexation of the plaintiff. The object of the bill is to establish the title and to quiet the possession of the plaintiff.

The facts disclosed by the record are that in the years 1817 and 1818, the defendant was possessed of a very large estate in lands, but was indebted beyond his means of payment. During those years two of his creditors (Luke Tiernan and Samuel Smyth) respectively recovered, in the Circuit Court of the United States for Kentucky, judgments for the aggregate sum of $25,000 and upwards; the one by default, the other by confession. Immediately thereafter, the defendant adopted a system of legal proceedings, to postpone the day of payment of those judgments, which terminated in the augmentation of the debt, and the introduction of other persons, in the character of sureties, to share in the entanglements of the debtor. By the interposition of injunctions, replevin, and stay bonds, and for the want of bidders at execution sales, the defendant withstood his creditors until 1824.

In November, 1824, Tiernan purchased a number of the tracts in dispute, and others in 1827 and 1834, under the executions, and for which he has the deeds of the Marshal.

In 1820, Samuel Smyth assigned his judg-

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ment to Ellicott and Meredith, in trust for creditors, and these persons, between 1826 and 1829, purchased nearly, if not all, of the tracts for which Tiernan had acquired a title.

In 1824, before any of these sales, Owings had conveyed the lands to the sureties whom he had involved upon the bonds before referred to in these and other cases, for their indemnity, and delivered to them the possession of the property, and ceased to have any control of it. He gave to them authority to "sell, dispose of, and convey any of the estate, whenever it might be necessary for their protection," and in such cases as a majority of them might consider as most beneficial to all concerned, in case their principal was in default. Tiernan and Meredith and Ellicott, in 1827, commenced suits for various parcels of the lands they had purchased at the marshal's sales in the Circuit Court of the United States, and recovered judgments. The questions involved in the issues, appear to be the regularity of the sales by which they acquired title. In 1829, after a portion of these trials, the sureties and assignees of Owings executed a deed to Ellicott and Meredith, for the tracts of land described in 49*] *the bill, upon a "general compromise," with them, by which the debt to Samuel Smyth, with the various bonds taken to secure it, were surrendered to be canceled. The record shows that Owings was advised of this settlement, and expressed approbation of it. Some time after this settlement with the assignees of Owings, an arrangement was concluded between Tiernan, Ellicott and Meredith, and the Bank of the United States, by which the bank agreed to reimburse Tiernan for his debt and advances, and to cancel an indebtedness of Smyth, and to take the title to the property they had acquired by these proceedings. This arrangement was carried into effect by a suit in the Circuit Court of the United States, in which a sale was ordered, at which in 1834 and 1835, the bank became the purchaser.

In 1836, the bank sold its title to the plaintiff in this suit. In order to free the title from any imperfections, a bill was filed in the Circuit Court of Bath County, Kentucky; and in that suit, the titles of Tiernan, Ellicott and Meredith, and the bank, were, in 1848, conveyed to him.

In the course of these proceedings, a number of confirmatory deeds were taken from purchasers of portions of the property at the marshal's sales, that it is unimportant to describe. To appreciate fully the case of the plaintiff, it is proper to notice a transaction between him and Mr. Bascom, the son-in-law and attorney in fact of Owings, in 1837. The plaintiff, after the acquisition of his titles from the bank, instituted suits for the recovery of the family residence and other lands of the defendant, in the courts of Kentucky. At the trial term of these suits, a proposal for an adjustment was submitted to the plaintiff, by Mr. Bascom (under the advice of counsel), which was accepted by him. He agreed to convey to Mrs. Bascom the family residence and other lots, a balance due on the judgment of Tiernan, to release the claim for mesne profits, and to dismiss the suits pending, each party to pay costs. Owings and Bascom were to confirm the title acquired by the plaintiff, to the lands described in the bill. This settlement was executed by the delivery of the proper evidences of title. Those in the name of Owings were executed by Bascom as his attorney in fact.

The land conveyed to Mrs. Bascom has remained in the family till this time, and in 1847 was divided among the children of Owings, in a suit to which he was a party. The validity of the conveyance of Wickliffe to her, was asserted in that suit, and admitted in the decree of the court, as the basis upon which it was founded. Owings in 1836 or 1837, left the United States for Texas; during the interval, from 1837 to 1849, the plaintiff was in the open possession of the property. Before the departure of Owings, the plaintiff had offered to reconvey to him the *whole of his purchases, [*50 upon an extended credit and a reduced rate of interest, for the consideration of the debts and costs they represented; which proposal Owings acknowledged his inability to accept, and fulfil the obligations he would thus incur. In 1849, he was induced to return to the United States, and to renew the controversy which had been so long pending, by the assertion of pretensions hostile to the title of the plaintiff, and prejudicial to his useful and peaceful enjoyment.

The evidence shows that the lands are in the possession of the plaintiff, occupied by a numerous body of tenantry; that sales have been obstructed and rents diminished by the assertion of these claims.

The right of the plaintiff to relief is rested upon the general principles of equity, as well as a statute of Kentucky, to the effect "that any person having both the legal title to, and the possession of land, may institute a suit against any other person setting up a claim thereto, and if the complainant shall establish his title the defendant shall be decreed to release his claim." 1 Bro. & More, Stat. 429.

The jurisdiction of a court of chancery to grant perpetual injunctions for quieting inheritances, after the right and matter in question has been fairly settled by concurring verdicts, has been long established; and in addition to this general ground for equitable interference, this case presents a strong claim for the interposition of the court, arising from the settlement between Bascom, as the attorney in fact of the defendant, and the plaintiff. The consideration of that settlement has been enjoyed for many years, by the family of Owings. We conclude that this arrangement, embracing the fact that a confirmatory deed to the plaintiff had been executed in his name, under the letter of attorney to Bascom, was communicated to him, and that it received his approbation. If additional assurances were, therefore, required to perfect the title of the plaintiff, and to maintain his quiet enjoyment, it is the duty of the court to exact them.

But if a question might arise upon the facts of this case, upon this branch of it, there will be none when we connect it with the statute of Kentucky:

"When the nature of our conflicting titles," says the Supreme Court of that State, "whether derived from the laws of Virginia or of this State, are considered, there is an apparent necessity of permitting the holder of the legal estate to call his adversary to the test when it

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cannot be otherwise reached. This Act ought to be liberally expounded as a remedial statute." Cates v. Loftus, 4 Mon. 439.

And in accordance with this view, that court decreed a release to one having the legal title and possession from one who "pretended 51*] *a claim under a vague and void entry without equity." 1 Mon. 97.

And in another case, where the party in possession with title averred "that the defendants pretended to have a claim upon it, and thereby disparaged his title and obstructed him in the full enjoyment of his property." Armitage v. Wickliffe, 12 B. Mon. 488.

This statute is too important a portion of the law of property in Kentucky, to be disregarded in the exercise of the equitable powers of the courts of the United States in that State; and without affirming that it can be so fully applied under the constitution of those courts as by the State tribunals, we are satisfied that its protection may be properly invoked in cases like the present. Clark v. Smith, 13 Pet. 195. The statement of the plaintiff's title shows that the lands described in his bill were sold as the property of the defendant, by a public officer, with legal process, issued upon valid judgments, and that the title of the purchasers have vested in him; that this title has been submitted to a court of law, and maintained in a succession of trials; that besides, the sureties who were bound for these judgments, and to whom the lands were delivered by the defendants for their indemnity, with powers to use them for that purpose, have transferred them, to relieve themselves and their principal, to the grantors of the plaintiff; that, in addition, the son-in-law, agent, and attorney of the defendant, to preserve a portion of his estate for his family, has confirmed in his name the title of the plaintiff, as we are bound to believe, with the knowledge and acquiescence of his principal, and that family still retains the consideration of this deed; finally, that the plaintiff, and those whose title he has, has been in possession since 1824.

The defendant resists the suit of the plaintiff, for relief. 1st. By a denial, in his answer, of the averment that he is a citizen of Texas, and consequently the jurisdiction of the court. 2d. By the plea that before this suit was commenced he had instituted one in the Circuit Court of Bath, Kentucky, contesting the plaintiff's title and provoking a full investigation into its validity, and that he could not be restrained from its prosecution there. 3d. That the sales by the marshal were valid, and that the conveyance executed by Bascom in his name to the plaintiff is void, for misrepresentation, fraud, and the want of consideration.

The doctrine of this court is settled, that when the jurisdiction of the circuit court appears, by proper averments, on the record, the defendant can only impugn it in a special plea. The 39th rule of practice for courts of equity in the United States, adopted by this court, excludes "matters of abatement, objections to the character of parties and to matters of form," 52*] from the answer, *and confines its operation to "matters in bar, or to the merits of the bill." It is proper to say, that if the fact of citizenship was open to inquiry, the evidence *sustains* the allegation of the bill.

2. Whether we consider the commencement of the suit as dependent upon the filing of the bill with the clerk of the court, or the issue, service, or return of process upon it, there is no sanction in the evidence for the plea by the defendant of a prior suit pending in the Circuit Court of Bath County. The plaintiff's bill was filed and process issued before that of the defendant was entered, and the process from the court of the United States was executed more than a year before the service of a subpœna to answer, on the plaintiff. Nor are the imputations of fraud, oppression, and injustice, upon the conduct of the plaintiff, nor the charges that he acquired his titles by corrupt and champertous contracts, better supported. No evidence has been taken which authorizes the crimination of the plaintiff by such allegations, in any part of the complicated and involved controversies which he seeks by this bill to close.

Our conclusion is, that the plaintiff is entitled to the relief he asks for, and that the decree of the Circuit Court must be reversed, and a decree entered here conformable to this opinion.

Decree reversed.

And this court, proceeding to render such decree as the said Circuit Court ought to have rendered, doth order, adjudge and decree, that the complainant has shown a legal title to all those tracts or parcels of land which are described and set forth in the two deeds in the record, executed by Owings and Bascom, dated 6th April, 1837, and marked No. 54, and by A. Trombo, Commissioner, dated 25th day of September, 1848, and marked No. 58, in both of which the said complainant is the grantee, but excepting from this decree the lands which were conveyed to Mary N. Bascom, by the said complainant, the 6th April, 1837, and as to which this decree has no application.

And it is further ordered, adjudged, and decreed by this court, that the said complainant has shown sufficient matter of equity to entitle him to a release, by Thomas D. Owings, or his heirs at law or devisees, or other legal representatives, of all their claim, and to be quieted in the possession and enjoyment of the said parcels of land.

*And it is further ordered, adjudged [*53 and decreed, that the said complainant do not recover his costs in this cause in this court, of and from the said defendant.

It is therefore further ordered, adjudged and decreed by this court, that this cause be, and the same is hereby remanded to the said Circuit Court, with instructions to cause an approximate deed of release and quitclaim to be prepared and executed by the said defendant, or his heirs at law or devisees, or other legal representatives of their rights, as aforesaid; and also that the said court issue an injunction to them commanding their agents and attorneys, aiders and abettors, to refrain perpetually from any molestation or disturbance of the right and possession of the said complainant, under any title of the said Thomas D. Owings, and that the said Circuit Court do execute and carry into effect all the provisions of the aforesaid decree of this court.

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ISRAEL W. RAYMOND, Owner and Claimant of the Cargo of the ship Orphan, consisting of 844 tons of coal, App't,

v.

WILLIAM TYSON, Libelant.

(See S. C. 17 How. 53-71.)

Charter-party—construction of—lien for freight, when waived.

A charter-party should be construed liberally, agreeably to the intention of the parties, and conformably to the usage of trade in general, and of the particular trade to which it relates.

Although the owner of a ship has a lien on the cargo for freight and hire of the ship, his lien may be waived, without express words, by stipulations in the charter-party inconsistent therewith, or when it can be fairly inferred that he meant to trust to the charterer's personal responsibility.

If it be only doubtful in the construction of a charter-party whether the owner has waived his lien upon the cargo, he must have the benefit of that doubt.

Time and place for the payment of freight, other than those for the delivery of the cargo, is a waiver of the lien, unless expressly reserved.

Freight payable in New York, and due, cannot be required, as a condition of discharging the cargo, in San Francisco, where not so provided in the charter-party, or agreed.

Uncertainties, changes of relation between the parties, and consequences, may be stronger against the lien claimed than any inferences in its favor.

English and American cases examined.

Argued Dec. 7, 1854. Decided Jany. 13, 1855.

APPEAL from the District Court of the United States for the Northern District of California, from a decree adjudging a lien to the libelant, Tyson, part owner and agent of ship, upon the cargo of $12,000, which decree was affirmed by the Circuit Court.

In this case the libel was filed by Tyson in the District Court of the United States for the Northern District of California.

The District Court decreed that Tyson was entitled to a lien upon the cargo of coal in question, for $12,000, etc.

Raymond appealed to the Circuit Court of the United States.

On suggestion of counsel, the decree of the District Court was affirmed by the Circuit Court for the purpose of taking and prosecuting an appeal to the Supreme Court. The reason of this probably was, that the Circuit Court consisted simply of the District Judge, sitting with the powers and the jurisdiction of the Judge of the Circuit Court. The minutes speak of this case as an appeal from the Circuit Court, as it is, in form, though really an appeal from the District Court.

The case is stated by the court.

Mr. Daniel Lord, for the appellant, after stating the facts, made the following points:

No express terms of hypothecating the cargoes, or subjecting them to liens, are found in the charter-party; the omission of which usual provision in charters of American ships, confirms the inference from the general character of the instrument, that it was made on the credit of the charterers, without the exaction of any lien.

Volunteer, 1 Sumn. 551; 3 Kent, Com. *220.

The charter-party binding the ship owner to deliver the cargoes, without any reference to payment of charter money, supports the same construction.

The reservation of payment, in such modes and under such circumstances as are above referred to, is inconsistent with the implication of any lien; and the absence of any express creation of any lien, excludes its existence in this case. 2 Kent's Com. *635, *639.

Mr. F. B. Cutting, for the appellee, after stating the facts, made the following points:

First. Possession of the ship continued in the owner, and he was to manage, control and navigate her. The master was his agent, and not the agent of the charterer. The libelant remained subject to all the responsibilities and obligations of ownership, and was answerable to the charterers for the acts and conduct of the master and mariners.

NOTE.—Lien for repairs and necessaries for vessel, and for supplies, salvage and freight. Proceedings in rem for. See note to Blaine v. The Charles Carter, 2 L. ed. U. S. 636; note to The Palmyra, 6 L. ed. U. S. 531, and note to The General Smith, 4 L. ed. U. S. 609.

Lien for freight, who has, and how waived.

Where by the terms of the contract the charterers have possession of the ship, the charter-party is not a contract for the transportation of goods, but is a letting of the ship, and the charterers are considered as owners for the voyage. In this case the general owners have no lien on the cargo for the hire of the ship. Lander v. Clark, 1 Hall, 355; Drinkwater v. The Spartan, Ware, 149; Clarkson v. Edes, 4 Cow. 470; Pickman v. Woods, 6 Pick. 248; Belcher v. Capper, 4 Man. & Gr. 502.

A charterer, if he chooses, may carry goods for others, and as owner pro hac vice, he has a lien on these goods for the freights payable to him. Lander v. Clark, 1 Hall, 355. See Shaw v. Thompson, Olcott, 144.

Where the general owner retains the possession, command and navigation of the vessel, his lien for freight remains. The charter-party is a mere affreightment. Marcardier v. Chesapeake Ins. Co. 8 Cranch, 49; Hooe v. Groverman, 1 Cranch, 237; 1 Johns. 229; Williams v. Johnson, 11 Barb. 501; Mactaggart v. Henry, 3 E. D. Smith, 390; Ruggles v. Buckner, 1 Paine, C. C. 358.

Payment of freight to the owner would in such a case be a good defense to an action by charterer against shipper. Holmes v. Pavenstedt, 5 Sand. (N. Y.) 97.

This lien does not exist where parties by contract fix time and manner of paying freight, so that the cargo is to be delivered before the time fixed for payment of freight. Chandler v. Belden, 18 Johns. 157.

Delivery of cargo without demanding freight or notifying him of the master's lien therefor will, in absence of special agreement or local usage to contrary, discharge such lien. The Tan Bark case, 1 Brown Adm. 151; Bags of Linseed, 1 Black, 108.

Mere manual delivery by the carrier to the consignee does not of itself necessarily operate to discharge the lien for freight. The delivery must be made with intent to part with his interest, or under circumstances from which the law will infer such intent. Gaughan v. One Hundred and Fifty-one Tons of Coal, 15 Int. Rev. Rec. 84.

Carrier does not impair his right to hold balance of a consignment for freight on whole by delivering from it a portion of a particular consignment. Sears v. Bags of Linseed, 1 Cliff. 68; Fox v. Holt, 36 Conn. 558.

Where goods have been delivered to the consignee, or time has been allowed for the payment of freight, the carrier's lien is lost. 4 A. & E. 260; 1 Sumn. 569; 2 Raym. 752; 6 East, 622; Perkins v. Hill, 2 Wood. & M. 158. It is also lost by sale of the goods. Marks v. Barker, 1 Wash. 178.

If the carrier is induced by fraud or trick to surrender possession of the property, the lien for freight is not devested. The goods may be replevied. Bigelow v. Heaton, 6 Hill, 43 S. C. 4 Denio, 496.

Both the common law and the statute recognize the right of the master or owner of a ship to a lien for freight, expenses and charges, and for his liability upon outstanding bills of lading. Campbell v. Conner, 70 N. Y. 424; aff'g, 41 N. Y. Supr. 9 J. & S. 450.

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Certain Logs of Mahogany, 2 Sum. 589; Marcadier v. Chesapeake Ins. Co. 8 Cr. 49; Palmer v. Gracie, 4 Wash. C. C. 110, 122-3; S. C. 8 Wh. 605, 641; McIntyre v. Bowne, 1 Johns. 229; Clarkson v. Edes, 4 Cow. 470; Holmes v. Pavenstedt, 5 Sandf. 97; 3 Kent's Com. 138; 1 Pars. Cont. 657.

If, upon the whole instrument, it be doubtful what was intended, the general owner continue such during the term; his rights can only be displaced by a clear and determinate transfer of them.

Logs of Mahogany, 2 Sum. 589.

Second. The ship owner has a lien upon the cargo for the freight of its transportation, unless it has been waived or abandoned by agreement.

Gracie v. Palmer, 8 Wh. 605, 641; S. C. 4 Wash. C. C. 110-123; Clarkson v. Edes, 4 Cow. 481, per Savage, Ch. J.; The Volunteer, 1 Sum. 551; Ruggles v. Bucknor, 1 Paine, 358; Drinkwater v. Brig Spartan, 1 Ware, 156; Holmes v. Pavenstledt, 5 Sandf. 97; Small v. Moates, 9 Bing. 574, Gledstanes v. Allen, 12 Com. Bench, 202; Gledstanes v. Allen, 22 Eng. Law and Eq. 382; Angel on Car. secs. 385, 386; Abbott on Ship. 287, 288, 299.

Third. The stipulation that the charter money should be paid in New York semi-annually, is not a waiver of, nor is it incompatible with the right of lien for freight money due and unpaid.

Saville v. Campion, 2 Barn. & Ald. 503; The Volunteer, 1 Sum. 551; Logs of Mahogany, 2 Sum. 589; Campion v. Colvin, 3 Bing. N. C. 17.

(a). It had no other effect than to fix the periods of payment, and to suspend the right to enforce a lien upon the cargo, until default of payment.

New v. Swain, 1 Dan. & Lloyd. 193.

(b.) Default was made in the payment of the freight money due at the end of the six months; and the ship owner was thereupon at liberty to proceed and enforce his lien.

New v. Swain, 1 Danson & Lloyd, Merc. Cases, 193; Dixon v. Yates, 2 Nev. & Man. 177; Saville v. Campion, 2 B. & A. 503, 513; Abbott on Ship. 289.

Mr. Justice **Wayne** delivered the opinion of the court:

This is an appeal from the district court for the northern district of California.

The suit was brought by a libel in the admiralty against 844 tons of coal (of which Raymond was the claimant) on board the ship Orphan, of which Tyson the libellant, was a part owner. Its object was to enforce an alleged lien on the coal claimed under a charter-party between Tyson and J. Howard & Son, of New York, charterers. The charter-party was made at New York on the 1st February, 1850, the ship at the time being on her voyage to London. The whole ship, with the exception of the deck, cabin, and necessary room for the crew and stowage of provisions, sails, and cables, was chartered by the owner to J. Howard & Son, for a voyage from London direct, or from thence to Cardiff in Wales (if required), to load for a port or ports on the Pacific, where she was to be employed between such ports as the charterers might elect; thence to be returned back either to New York or Great Britain at their option. The time for her employment was to extend to the full term of fifteen months, with a privilege to the charterers to extend it to twenty-four months. The charterers engaged *to furnish the [*58 ship with a full cargo—bills of lading to be signed for it without prejudice to the charter —and they contracted to pay to the owner of the ship or his agent, for the use of the vessel, at the rate of $2.000 per month, commencing in London, if she proceeds thence direct to the Pacific, when ready to load, and notice of the same was given to the charterers or their agent. But if the vessel shall be ordered to Cardiff to load, then the charter was to commence from the time she might be ballasted, and be ready for sea, in London. In that case the ship is to be allowed ten days from the time she is ready to sail from London until her arrival at Cardiff, and only that time, for which the charterers were to pay, should the ship be a longer or shorter time in making the passage to Cardiff. It is agreed between the owner and the charterers that the charter should be payable in New York semi-annually; the first payment to be made six months from the commencement of the same, and so every six months during the continuance of the charter, before the arrival of the ship and her being delivered back to the owner, in New York or Great Britain; or upon satisfactory proof of total loss of the ship, all moneys in arrears and due up to the time of the loss were to be paid on demand. Should the vessel be ordered to California, the charterers agree to pay the expense of victualling and manning her, attendant upon the California voyage and the charter money for any detention caused by desertion of the crew. The charterers agreed also to pay all port chargers of the ship incident to her employment, except victualling, manning and repairs, and to advance funds for the ordinary expenses of the ship after she left Europe, which were to be deducted from the charter payments on vouchers from the captain.

The ship sailed for Cardiff, on the 1st April, 1850, and arrived there on the 14th April. She there took on board from Branson, Sands & Co., the agents of the charterers, a cargo of 844 tons of coal, the property of the charterers. For this cargo a bill of lading was signed May 4, 1850, at Cardiff, expressing that the ship was bound to Panama, for orders, to be delivered to order or assigns, he or they paying freight, as per charter-party. The bill of lading is as follows:

Bill of lading. Shipped in good order and condition, by Branson, Sands & Co., of Liverpool, in and upon the good ship or vessel called "The Orphan," whereof R. C. Williams is master for this present voyage, and now lying in the port of Cardiff, and bound for Panama for orders, eight hundred and forty-four tons of Nixon's Merthyr and Cardiff steam coal," being marked and numbered as per margin, and are to be delivered in the like *good order and condition at the port, [*59 according to orders, (all and every the dangers and accidents of the seas, and navigation of whatsoever nature or kind, excepted) unto "order," or to assigns; he or they paying for

844 tons of "Nixon's Merthyr and Cardiff steam coal."

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the said goods, as per charter-party, with average accustomed.

The ship proceeded to Panama with her cargo, and thence, by orders of the charterers, to San Francisco. She arrived at San Francisco, December 2d, 1850, and the cargo was retained on board by her captain, to preserve an alleged lien upon it for freight. The libelant avers that $12,000 was due for charter money, on the 1st October, and that it had not been paid by the charterers; and that they had not furnished funds for the ships expenses after she left Europe; and for the money due he claims a lien upon the coal.

Raymond, the claimant, answers, that the bill of lading of the coal had been transferred to him at the time of its shipment by J. Howard & Son, for a valuable consideration paid; and this is not denied in the case. That he thereby became owner of the coal, and has ever since continued to be so, free from any lien or claim in favor of the owners of the ship, or any other persons; that he had demanded the coal, but that the master refused to deliver it. After the libel was issued and the answer had been put in, the master of the ship petitioned for an order for the sale of the coal, as a perishable commodity. The order was granted, the coal was sold, and the proceeds were adjudged to be liable to a lien for the sum due upon the charter-party on the 1st October.

We shall give our judgment upon the foregoing statement, without considering in detail the general principles governing contracts of affreightment. But we will state two of them, because they have a decisive bearing upon the charter-party, under which this controversy has arisen.

First, it must be remembered, that a charter-party is an informal instrument as often as otherwise, having inaccurate clauses, and that on this account they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of trade. So Lord Mansfield said a long time since. Abbott, in his treatise relative to merchant ships and seaman, Story's edition, 188, gives the rule of construction very much in the same words, but perhaps with more precision. "The general rule which our courts of law have adopted, in the construction of this as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates." Chancellor Kent, in his 60*] 47th chapter *on the contract of Affreightment, cites the rule approvingly. The late Mr. Justice Thompson, of this court, asserts it in Ruggles v. Bucknor, 1 Paine, 358. Judge Story acted upon it ten years afterwards, in the case of The Volunteer, 1 Sumner, 550; and again in another case, 2 Sumner, 589. The first says: "It was pressed upon me by the defendant's counsel, that I should decide this abstract question, and lay down some general rules as to the lien on the cargo for the freight, when the voyage is performed under a charter-party. This I do not feel disposed to do, especially as it would and ought to be considered as a mere obiter opinion, if not required by the facts of the case. And, indeed, it is impracticable to lay down any general rules to meet the great variety of cases that must necessarily arise in commercial transactions. Each case must depend, in a great measure, upon its own circumstances. Parties are not bound to any fixed and precise stipulations to be embraced in a charter-party." In the case of The Volunteer and cargo, the most difficult question was, whether there was, under the charter party a lien on the homeward cargo for the freight. Judge Story says: "In general, it is well known that by the common law there is a lien on the goods shipped for the freight thereon; whether it arise under a common bill of lading, or under a charter-party. But then this lien may be waived by consent; and in cases of charter-parties, it often becomes a question whether the stipulations are or are not inconsistent with the lien." The other case mentioned in 2 Sumner, 589, Certain Logs of Mahogany v. Richardson, was one which was decided upon the inaccurate and inconsistent stipulations of a charter-party by a liberal construction of them, in furtherance of the real intention of the parties and the usage of trade. In Gracie v. Palmer, 8 Wheat. 605, 634, this court has said: "That the contract of affreightment, like any other contract, is the creature of the will of the parties. It may be varied to infinity, and easily adapted to the exigencies of either party or of any trade. It is only where the express contract is silent, that the implied contract can arise." These authorities are sufficient, without citing others, to establish the general rule for the construction of charter-parties.

The next rule for the construction of charter-parties, deduced by us from an examination of all the leading cases in the English and American Reports, including those cited in the argument of the counsel of the appellee, is this: that though the owner of a ship, of which the charterer is not the lessee, but freighter only, has a lien upon the cargo for freight properly so called, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as having been waived, without express words to that effect, if there are stipulations in the charter-party *in- [*61 consistent with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer. In Ruggles v. Buchnor, Paine, 363, Mr. Justice Thompson said; "There can be no doubt that a ship owner may by express stipulations as to payment of freight, incompatible with a claim upon the cargo for the same, be deemed to have waived his lien, as if he should by the charter-party, or otherwise, agree to receive his freight at a time and place having no reference to the delivery of the cargo, or a variance with such time and place. But, as by the general rules of law the cargo is liable for the freight, it should be satisfactorily shown that the claim has been relinquished before the ship owner can be required to part with the cargo without payment of the freight." As early as the year 1820, Chief Justice Spencer had ruled the same in the case of Chandler v. Belden, 18 Johns. 157, 162. His language is: "The right to retain the cargo for the freight has grown out of the usage of trade; and it does

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not exist, nor can it be enforced, when the parties have expressly regulated the time and manner of paying the freight by stipulations in a charter-party, and especially if the cargo is deliverable before the arrival of the periods of payment. Such an agreement is an express renunciation of the right to insist on freight before the cargo is delivered.

Judge Story says, in the case of The Volunteer, "But then this lien may be waived by consent, and in charter-parties it often becomes a question whether the stipulations are or are not inconsistent with the existence of the lien. For instance, if the delivery of the goods is by the charter-party to precede the payment or security of payment of freight, such a stipulation furnishes a clear dispensation with the lien for freight, for it is repugnant to it, and incompatible with it." Judge Story had had occasion to consider this point five years before he gave his opinion in the case of The Volunteer. We find in his note to his edition of Abbott on Shipping, printed by Hilliard, Gray, Little & Wilkins, at Boston, in 1829, page 178, a citation of the case of Chandler v. Belden, 18 Johns. 157, with this commentary: "That part of the language which seems to deny the right to retain, where there is an express stipulation of the time and manner of paying the freight, if it means that that fact alone overturns the lien, whether the stipulation be or be not inconsistent with such lien, admits of much question, and seems inconsistent with the doctrine of the cases cited in the text, as well as with that in Chase v. Westmore, 6 M. & Sel. 180, and Crawshawy Homfray, 4 B. & A. 50."

In Lucas v. Nockell, 4 Bing. 729, it was said: "It may distinctly appear from the charter-par- 62*] ty, that the owner has been *content to trust to the personal responsibility of the merchant, and fixing a specific time of payment, before or after delivery has waived his right to a lien. In Lowell v. Simpson, 16 Ves. 275; Chase v. Westmore, 5 M. & Sel. 180; and in Crawshawy v. Homfray, B. & A. 52, it was ruled, if there be a specific contract for a particular time and mode of payment, and that contract is inconsistent with the right to retain, it will of course defeat a claim to exercise it."

Nothing can be found in the cases cited by the counsel for the appellee in conflict with the extracts just given: on the contrary, most of them admit the principles expressed in those extracts.

Gracie v. Palmer, in 8 Wh., the same case upon appeal to this court, decided by Mr. Justice Washington, in 4 Wash. C. C. Reports, affirms what no one will deny: if the ship owner retains the possession of the ship, and the charterer is merely the freighter—that the former has a lien upon the cargo for freight. Other points were ruled in that case but they have no bearing upon this, and especially none upon what shall be considered a waiver of a lien for freight. Clarkson v. Edes, in 4 Cowen, is to the same point; but both Chief Justice Savage and Mr. Justice Woodworth decided that case from the intention of the parties, as that could be inferred from the charter-party.

Small v. Moates, in 9 Bingham, 574, decided by Chief Justice Tindal, was a case in which it was expressly agreed that the ship during the continuance of the voyage, should remain firmly and fully vested in the owner, and that he should at all times during the voyage and service have a complete lien upon the lading of the ship. It was ruled that he had a lien upon the goods of the charterer, and against his indorsee of the bill of lading. The grounds upon which the indorsee contended against the lien need not be stated here, as they have no relation to any controversy in this case.

Saville v. Campion, much relied upon in 2 B. & A. 503, 512, decided by Chief Justice Abbott, does not interfere in any way with the rules of construction which we have stated to be applicable to charter-parties. The point ruled in that case was, that as there were no express words of demise of the ship itself in the charter-party, the freighter did not thereby become the owner for the voyage, and that the possession continued in the owner, and that he had therefore a lien upon the cargo for freight. But the lien on the goods, for the stipulated hire of the ship is expressly put upon the ground "that there was nothing to show that the delivery of the goods was to precede the payment of that hire, in cash and bills, as provided *for by the deed. The case of [*63 Campion v. Colvin, 3 Bing. N. C. 17, involved, first, the inquiry whether or not the owner of the ship did not retain the possession of her, and that the charterer was only freighter. It was ruled that the owner was left in possession, the charter-party being the same on which the court of King's Bench decided, in Saville v. Campion. Next, whether it was the intention of the parties that the ship owner meant to insist on the delivery of the bills which were to be given on London before the delivery of the cargo; it was decided that he did, but that the decision was given upon the ground of the special agreement, and not on the general right of lien, is obvious from the language of the Chief Justice: "Looking to the intent of the parties, it is clear the ship owner meant to insist upon the delivery of the bills before the delivery of the cargo, so that, with respect to the time at which the freight was payable, there was no difference between that and the preceding cases." And lastly, whether or not the assignees of the charterer stood in a different relation to the owner from that of the charterer; it was ruled that he did not. The opinion given by Chief Justice Tindal in this case is manifestly not reported with accuracy as to the statement, and is apt to mislead in respect to the second ruling of that learned judge. It appears that neither the case of Saville v. Campion, nor that of Campion v. Colvin, 3 Bing. N. C. 17, contains anything against the second rule of construction which we have stated. There was not in either of the charter-parties of those places, though London had been fixed upon for the place of payment, anything incompatible with the lien upon the cargo, or at a variance with the time and place which had been agreed upon for its delivery. Upon the authorities cited, we consider the rule to be, that though the owner of a ship who retains possession of her has a lien for freight upon the cargo of the freighter, the lien may be adjudged to have been waived without an

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express agreement or words to that effect, if there are stipulations in the charter-party, inconsistent with the exercise of such lien or when it can be fairly inferred, from the language of the instrument, that the owner meant to trust to the personal responsibility of the charterer for the freight or hire of the ship.

The limitation upon such construction and inference is as well expressed as it can be, in the language of Judge Story, in the case of Certain Logs of Mahogany, 2 Sumn. 597. It is: "Let us now proceed to the consideration of the terms of the present charter-party, in order to ascertain what is their true meaning and interpretation. If, upon comparing the various clauses, we are led to the conclusion that it is doubtful whether the charterer was intended to 64*] have the sole possession and control *of the brig during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such, for his rights and authorities over the voyage must continue, unless displaced by some clear and determined transfer of them." So we now say, if it be only doubtful in the construction of a charter-party whether the owner has waived his lien upon the cargo, he must have the benefit of that doubt; his lien being given by the force of the common law, which cannot be taken from him, "though there is a special contract, unless there is something in that contract inconsistent with that lien, or unless it is waived by fair implication." Williams, Justice, Pinney v. Wells, 10 Ct. 104, 115.

We will now turn to the charter-party in this case, and form our judgment accordingly as the two rules of construction which have been stated shall bear upon it. In the first place, it is not for the carriage of a single cargo or for a voyage, but for a voyage from London direct, or from Cardiff, in Wales, to load for a port or ports in the Pacific, where the ship is to be employed between such ports as the charterers may elect; the time of employment in that way being for fifteen months certain, with the right of the charterers to extend it to twenty-four months. For such employment the charterers agree to pay to the owner or his agent, at the rate of two thousand dollars per month, payable in New York semi-annually, and so on every six months during the continuance of the charter. Now, if there be not something else in the charter to control the meaning of the words designating time and place for payment, it cannot be doubted that it was the intention of the owner and charterers to make time and place substantial parts of their contract. This is not an inference of intention, but a declaration of it in words too intelligible for the use of interpretation. They have a fixed meaning, and cannot, of themselves, have any other meaning. That meaning, then, is the contract between the parties; precisely with the same obligation upon them as another stipulation would have, for the payment of money at a given time and place, in any other analogous mercantile contract. There are no qualifying words of those used to make them doubtful; nothing in the charter which can be applied to make them so. No fact could happen, from any stipulation in it, to make the time and place agreed upon for payment uncertain. Place *for the payment of money is a substan-*

tial part of any contract to pay it there. It can be insisted upon by him who is to receive it, and cannot be rightfully refused or omitted by him who has it to pay. A broken promise of that kind gives to the creditor a right of action against the debtor for its recovery. Why upon principle should a promise to pay freight at a particular time, and at a place other *than that where the owner of the ship [*65 has undertaken to deliver the cargo, be required to be paid elsewhere? It is the payer's privilege to pay it there. And, should it not be paid, why should the owner have more than a right of action for its recovery, or larger remedies by suit, than are given in any other contract? We confess we do not see why. Place for the payment of freight, other than that for which the cargo is shipped and discharged, amounts to a stipulation that freight will not be demanded at the last as a condition for the cargo's delivery. All of the authorities concur in this, that place for the payment of freight is a waiver of a lien upon the cargo unless there are already circumstances or stipulations to show that it could not have been meant. It is so, because it is at variance with the enforcement of such a lien according to the usage of trade; and it is so, because, when parties to a charter-party depart from that usage by agreeing to pay and receive freight at another place than that where the common law gives to an owner of a ship a lien to enforce payment, it must be regarded that the owner had some sufficient reason for not insisting upon his right according to the common law.

But it was urged by the counsel for the appellee, with earnestness and ingenious ability, that it might be shown that the time and place fixed for the payment, under the charter, was not meant by the owner to be a waiving of a lien. That it had no other effect than to fix the periods of payment, and to suspend the right to enforce a lien upon the cargo until default of payment. Time only might do that, but place connected with time for payment does not.

It was said that the cargo which the charterers agreed to furnish the ship, and which was put on board of her, to be carried from Cardiff to the Pacific, and that the clause in the charter, that bills of lading were to be signed without prejudice to it, in connection with the fact that, according to the ordinary length of such a passage, the ship could not have made it before the first payment would have become due, indicated the owners' intention to retain a lien upon the cargo as an additional security for the first payment. It may have been that the owners had such a purpose in view, apart from the changed condition of the charterers, when payment was not made in New York; but we are sure, from its inconsistency with the chartered employment of the ship, that the charterers never contemplated it. The ship was to load with a full cargo at London or Cardiff, for a port or ports in the Pacific, to be employed between such ports as the charterers might elect. She was not loaded for a specific voyage to any particular port where the cargo was to be discharged, but it was to be discharged at one or more ports, as it *might have [*66 been their interest to direct. The ship sailed from Cardiff to Panama, for orders, with a

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cargo to be delivered "according to orders." Such is the language of the bill of lading (exactly in conformity with the charter-party), signed at Cardiff on the 4th May, 1850, thirty-four days after the ship's hire is said to have commenced. When she arrived at Panama is not shown, but when she arrived at San Francisco the first payment had become due; and when it was learned there that it had not been paid in New York, her captain refused to discharge the cargo according to orders, unless payment was made, or security had been given for the freight; in that way demanding money at San Francisco which was only payable in New York, or that security should be given for it; neither of which had been provided for in the charter-party in the event of a default of the first payment. By doing so, he took the ship out of her employment, which had then seven months to run, and disabled the charterers from using her in the only way for which she was chartered. It is no answer to say that his act and its consequences were occasioned by the default of the charterers to make the first semi-annual payment. They had at that time rights for a longer service of the ship, and it had not been agreed that their default should either interrupt or terminate them. The lien as claimed and enforced, raised uncertainties in the relations of the parties not anticipated by either, and at variance with the rights of both. If it had been meant that such a lien should be enforced, it certainly had not been provided upon which of them the loss should fall for the time that the ship would be withheld from her employment; whether or not the owner should make an allowance for it out of the monthly hire of the ship, or that the charterers should continue to pay it whilst she was not in their use or under their control. Such uncertainties, changes of relations between the parties, and consequences are stronger against the lien claimed than any inferences can be in its favor, which are made from the engagement of the charterers to furnish a cargo or from the clause in the charter that bills of lading were to be signed without prejudice to it, or from the fact asserted that the ship could not arrive until after the first payment had become due.

Whether or not the delay in her arrival would have been as it is said the owner anticipated it would be we do not know; but we do know that the bill of lading was signed on the 4th of May, 1850; that there were then one hundred and forty-six days before the first payment would become due for her to make the passage, and it is not so certain that it might not have been done, as that the contrary can be assumed to give any force to the suggestion that the cargo had been stipulated for and furnished 67*] *to give additional security to the owner by a lien, should there be a failure to make the first semi-annual payment. There is too much of indirectness and covert intention in such an anticipation for us to countenance it. The cargo was obviously put on board as an adventure for profit. Without it, the time it would have taken to make the passage to the locality of the ship's principal employment, for which the charterer was paying at the rate of two thousand dollars per month, would have been a dead loss at least of five months of the time of her charter, or of ten thousand dollars. It cannot be supposed that the charterers were so blind to their interest as to permit that, or that it was not their own interest which prompted them to furnish the cargo without any intention of giving to the owner an opportunity to assert a lien for securing money which they had promised to pay in New York.

Further, the declaration that the time and place fixed for payment was a suspension of the lien, is an admission, if the ship had arrived from Cardiff in time for the discharge of the cargo before the first payment became due, that the owner meant it should be done without being subject to a lien for freight. It was certainly meant that the cargoes which the ship might have carried from port to port in the Pacific, between the intervals when payments were to be made, were to be discharged and delivered without being subject to a lien for freight. It must have been then the owner's intention that all of the cargoes which the ship might carry were to be exempt from a lien, except that which she might have on board when the payment occurred. There is not in the charter any such distinction between them or anything looking like the reservation of such a right. Unless that can be made to appear, the engagement of the owner to release a lien upon all other cargoes, and that they were to be discharged before the payment of freight, does not permit the exception of any one of them from that engagement. All of the authorities declare that the owner's consent to receive freight before the cargo is delivered, whether it shall be paid or not, is a waiver of a lien upon the cargo; and that such a waiver may be inferred from a time and place having been agreed upon for the payment of freight, which has no reference to the place where the cargo is to be discharged.

But we will take the case as it was; that the ship did not arrive until after the time fixed for the first payment, that it was not paid, and that on such account the lien was claimed. It does not make the claim stronger. Had it been meant that non-payment should give the lien, it should have been so stipulated. The non-arrival of the ship cannot give to the default any additional support for a lien. The lien here was asserted, not *in virtue of the law [*68 giving a lien upon cargo, but upon incidents out of the charter, which it is said gave to the owner a lien upon the contingency of their happening. Such a contingent or conditional lien may be agreed for by the owner and the charterer of a ship—but it must be done in terms leaving no doubt about it; or it must be a clear case of inference, to prevail against time fixed for the payment of freight at a place where the cargo is not to be discharged. The charter-party is to be construed liberally, for the purpose of preserving a lien given by the law, if the matter of it shall be only a matter of doubt. But that doubt cannot be helped by contingencies outside of the charter-party not plainly anticipated or growing out of one of its stipulations. Charter-parties are so frequently inaptly and incautiously drawn, that they may be said almost to have the indefinite-

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ness of commercial guaranties. The language of this court upon the trial of one of the last is applicable here:

"Letters of guaranty are written by merchants, rarely with caution and scarcely ever with precision. They refer in most cases, as they do in the present, to various circumstances and extensive commercial dealings in the briefest and most casual manner without regard to form." The same may be said of charter-parties. "Though they have usually a printed form for a basis, they are often filled up by ship brokers and merchants, with little caution and without much attention to a perception of the fitness or unfitness of that form to the special circumstances of particular cases." It is to be expected, then, that there will be in them unprecise and inconsistent stipulations, which must have, as other mercantile contracts usually receive, a liberal construction in furtherance of the intentions of the parties and the usage of trade. But we do not know a point in commercial law upon which the reported cases are more in conflict. It is said by the last English editor of Lord Tenterden's Treatise, that on a review of the decisions respecting the ship owner's lien for freight, it is impossible not to regret the uncertainty introduced by their almost irreconcilable conflict with the construction of contracts of charter-parties. The courts of America, in the adoption of our refinements, have reaped for their mercantile communities all the uncertainties attending them; and there and here, as the law now stands, it will be useful for the ship owner to remember, that although the exercise of his lien may be upheld in cases of doubtful construction, an express contract is the surest and strongest ground upon which that light can rest; and that, by inserting an agreement respecting it in the charter-party, the parties to it may, between themselves, obviate all difficulty upon the subject.

It is certainly to be regretted that such 69*] should have been the *uncertainty in both countries, upon so important a point of commercial law. One of our objects in this opinion has been to produce more uniformity of construction hereafter. We thought it would be best done by establishing from adjudicated cases, and only from such, those rules for the construction of charter-parties, and other contracts of affreightment, which are most frequently needed in trials upon them in courts. One of them we will repeat in the language of Lord Tenterden. The general rule which our courts of law have adopted in the construction of charter-parties, as well as other mercantile instruments, is, that the construction shall be liberal, agreeable to the intention of the parties, and conformable to the usage of trade in general and of the particular trade to which the contract relates. Another rule drawn from the cases cited in this opinion is, if the owner of a ship stipulates to receive her freight at a time and place having no reference to the place for the delivery of the cargo, or at variance with such time and place, he is to be considered as having waived his lien.

Both of these rules of construction are applicable to this case. The owner's agreement to receive the hire of the ship at intervals of six months, and in the city of New York, during the continuance of the charter-party, has no reference to the place at which the cargo was to be delivered, and is at variance with the right which the charterer had to fix the time and place for such delivery. The owner, then, is considered by us as having waived his lien upon the cargo for freight. We shall therefore reverse the judgment of the court below, and decree a dismission of the libel, with directions that further proceedings in the case shall be in conformity with this opinion.

Dissenting, Mr. Justice Campbell and Mr. Justice Grier.

Mr. Justice Campbell, dissenting:

I dissent from the opinion of the court, and as the question is one of importance, I think it proper to record the reasons for the dissent.

The parties agree that the contract of affreightment between the libelant and Howard & Son did not displace the owner from the control and possession of the ship for any portion of the term of its duration.

When the master arrived at San Francisco with the vessel, he found the first instalment of the freight money due and unpaid, and that he was in the lawful possession of a cargo shipped according to the charter-party for the voyage which was then completed. The co-existence of such a debt with the lawful possession of such property from the conditions upon which a *lien depends; and the owners claim to [*70 detain the property as a security for the debt, and which must be allowed, unless he has defeated it by some obligation indicative of its "determinate abandonment." The claimant suposes that the evidence of such a contract exists in the charter-party.

Holt, in his work on shipping (part 3, chap. 6, sec. 63), upon a review of the cases concludes "that the language of a charter-party must be very strong indeed, to exclude under any circumstances the lien of the owner. This right, being both legal and equitable, the courts are naturally disposed to favor it, and not to impair or diminish its exercise except under circumstances where it would be unreasonable to enforce it and contrary to the intention of the parties." And further, "that the owner's right of lien is so far favored in law, that, whilst he keeps possession, by his master and crew, it can only be excluded by the most express and absolute terms, or by a necessary implication from the contract." And so are adjudged cases—Saville v. Campion, 3 Bing. N. C. 17; Gladstanes v. Allen, 12 C. B. R. 202; 1 Sum. 551; 2 Sumner, 597. There is no express stipulation in this contract to defeat the lien of the libelant, and the case of the claimant therefore depends upon the discovery of an article wholly incompatible with its existence.

Lord Tenterden, discussing clauses of a charter-party that affect a lien, says, "the right may exist, if it appear from the instrument in any way that the payment is to be made in cash or bills before, or at, the delivery of the cargo, or even if it does not appear that the delivery of the cargo is to precede such payment;" and

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"that when the payment is to be made by bills, the right of retention continues till they are given and would it is conceived revive, in case of their dishonor before the ship owner has parted with the goods." And so are adjudged cases. Abb. Ship. 229; 1 Dans. & Ll. 193; 1 M. & S. 535; Cross on Lien, and cases cited, 311. The circumstances that appear in the record seem to bring this case fully within the operation of these principles. It is not shown that the voyage from Cardiff to Panama "for orders" and the voyage from Panama to San Francisco pursuant to orders, were otherwise than in strict accordance with the calculations of the parties. The cargo taken at Cardiff by contract, did not reach San Francisco until after the first instalment for the use of the vessel upon these voyages became due and advices from New York had been received at San Francisco of the default of the shipper.

That a right should arise for the detention of the cargo, until the freight was paid, would seem to follow, from the principles before stated.

But it is said, there having been no express 71*] reservation *of a lien, and the owner having consented to receive his money in New York, by installments, present conditions inconsistent with the existence of a lien.

The reply is that the commercial law does not exact a stipulation to support the lien of the ship owner; but requires circumstances expressive of "a determinate abandonment" as the condition of its removal; no deduction can therefore be legitimately drawn from the silence of the contract. And the requisitions for payment in New York by installments, show that the owner had some confidence in the personal responsibility of Howard & Son, and did not rely exclusively upon the profits of the adventure, or the security of the cargo; but they cannot fairly be held to establish any renunciation or determinate abandonment of the remedies the law affords in case of their default. And this evidence of a waiver of a lien, imperfect as it is, is still more impaired by the facts that though the amount of the freight did not depend upon the lading of the vessel, but was payable in any event, and though a full cargo for so long a voyage could not fail to injure the vessel; nevertheless the owners stipulated that a "full cargo of lawful merchandise" should "be provided" and bills of lading signed without prejudice to the charter.

I admit that after the completion of her first voyage, and after the arrival of the vessel at San Francisco, and she had then entered upon the coasting trade between ports on the Pacific, cases may be put where a cargo might not be subject to a lien; and others where the libelant would find embarrassment in enforcing one. But this case involves no difficulty. And to allow the lien will be in my opinion a consistent application of familiar and well-settled principles of commercial law.

I am authorized to say, Mr. Justice Grier concurs in this opinion.

Judgment reversed with costs, and cause remanded, with directions to dismiss with costs.

*THE UNITED STATES, [*85
Plaintiffs in Error,

v.

SIXTY-SEVEN PACKAGES OF DRY GOODS, Jules Levois, Claimant, etc.

(See S. C. 17 How. 85-96.)

Duties—repeal of statute by implication—rule.

In the interpretation of our revenue laws, this court is not disposed to apply with strictness the rule which repeals a prior statute by implication, unless the repugnancy is clear and positive, so as to leave no doubt of the intent of Congress.

There is no provision in the Duty Act of 1842, or in any of the Duty Acts, operating as a repeal of the 66th section of the Act of 1799, forfeiting the goods for a false invoice, but it still exists in full force.

Argued Dec. 18, 1854. Decided Jan. 1, 1855.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The goods in question in this case were seized as forfeited, under the 66th section of the Act of March 2, 1799, 1 Stat. at L. 677, and prosecuted for condemnation in the District Court of the United States for the Eastern District of Louisiana, wherein judgment was rendered against the United States and for the claimant.

The case was taken to the Circuit Court upon writ of error, and the judgment of the District Court was affirmed.

From this latter judgment the present writ of error is brought.

The case is further stated by the court.

Mr. C. Cushing, Attorney-General, for the plaintiff in error:

By the bill and exceptions, it appears that the District Judge instructed the jury:

1. That the 66th section of the Act of March 2, 1799, in so far as it imposes the penalty of forfeiture of any goods, is inconsistent with, and impliedly repealed by, the 13th and 15th sections of the Act of March 1, 1823.

2. That said 66th section of the Act of 1799 is inconsistent with, and in so far impliedly repealed by, the 17th section of the Act of August 30, 1842.

3. That the proceedings directed and authorized by the 17th section of the Act of 1842 having taken place, as is proved by the evidence given on the part of the United States, "it was the duty of the Collector to have levied and collected the additional duty, which by said 17th section is imposed as a penalty on goods wheih should be appraised, estimated and ascertained to exceed the invoice value."

4. "That there was at present no law in force, authorizing the forfeiture of the said goods for the causes set forth in the libel."

These instructions, by the District Judge, were excepted to by the attorney for the United States, and were affirmed by the Circuit Court on the writ of error in that court.

Mr. J. P. Benjamin for the defendants in error.

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Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Eastern District of Louisiana.

A libel of information was filed in the District Court, by the Collector of the port of New Orleans, on behalf of himself and the United States, for the condemnation and forfeiture of sixty-seven packages of goods, on account of an alleged fraud upon the revenue, charging among other things, in the information, 91*] *that the goods were entered at the custom-house upon the production of an invoice, in which they were invoiced at a less sum than the actual cost thereof at the place of exportation, with a design to evade the duties.

On the trial, after evidence was given on the part of the libelants, tending to prove the facts charged in the information, the court charged the jury that the 66th section of the Duty Act of 1799 was repealed by force of subsequent statutes, and that, at present there was no law in existence providing for a forfeiture of the goods for the causes set forth in the libel. The jury found, accordingly, for the claimant.

This ruling was carried upon error to the Circuit Court, where the judgment was affirmed.

The 66th section of the Act of 1799, so far as it is material in the case, is as follows:

"That if any goods, wares or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, etc, or the value thereof, to be recovered of the person making the entry, shall be forfeited."

It was held in the case of Wood v. The U. S. 16 Pet. 342, which was an information founded upon this section, that it was then in force, and the property there seized was condemned under it. The goods in that case had been entered at the custom-house in 1839 and 1840. The Duty Act of 1842, which has since been passed, is supposed to operate a repeal of the section by implication.

The 19th section of that Act is mainly relied on, which is as follows:

"That if any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, etc., subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out, or pass, or attempt to pass, through the custom-house any false, forged or fraudulent invoice, every such person, his, her or their aiders and abettors, shall be deemed guilty of misdemeanor, etc., punishable by fine and imprisonment."

The invoice mentioned in the two sections (the 66th and 19th) is a very important document in the entry and passing of goods at the custom-house.

The 36th section of the Act of 1799 made it the duty of the person making the entry to produce to the collector the original invoice, in the same state in which it was received; and also, to make oath that it was the true, genuine 92*] and only invoice received, *and was in the actual state in which it was received; and that the deponent did not know of any other invoice or account of the goods different from that produced. And the 1st section of the Duty Act of 1818 further provided, that no goods subject to duty should be admitted to entry, unless the original invoice of the same was presented to the collector. The same provision is found in the 1st section of the Act of 1823.

The 4th section of the last Act also prescribes the oath substantially like the one in the Act of 1799, above referred to, except somewhat enlarged.

The 4th section of the Act of 1830, in the case of goods subject to duty, provided that if any package should be found to contain an article not described in the invoice, the same should be forfeited. This provision is modified by the 21st section of the Act of 1842, which saves the forfeiture, if the appraisers shall be of opinion that the omission in the invoice was not with a fraudulent design.

This brief reference to the several Acts is sufficient to show the great importance attached to this document, in securing the collection of the proper duties upon foreign importations, and the great care that has been taken to insure the production to the collector of the true, genuine, original one, and that it should be in the actual state and condition in which it was received by the owner, consignee or agent making the entry.

Now, the 66th section of the Act of 1799 dealing with this document, forfeits the goods of the party entered at the custom-house, "if not invoiced according to the actual cost thereof at the place of exportation, with a design to evade the duties."

The 19th section of the Act of 1842, subjects the party to a misdemeanor and punishable as such, concerned in making an entry, who, with intent to defraud the revenue, "shall make out, or pass, or attempt to pass through the custom-house, any false, forged or fraudulent invoice."

The former section has reference to the invoice so far as material to determine the forfeiture, simply with a view to the actual cost of the article at the place of exportation, without regard to the question whether the document itself is the true and genuine one or not. If the goods described in the invoice are invoiced under the cost value, with the design stated, the forfeiture takes place. The object is to prevent frauds upon the revenue in passing goods through the custom-house, by means of this device, at an undervaluation.

The latter provision is different, and has reference to the frauds that may be committed in passing or attempting to pass the goods upon the production of invoices not genuine—not the true, original invoices, but those made out for the occasion—with a design to impose upon the collector and other officers.

*The Acts of 1799 and 1823 sought to [*93 prevent this species of fraud, by requiring the production of the original invoice, with the oath of the party superadded, that it was the true, genuine, and the only one received, and in the actual state in which it was received. This, although the party was subjected to the penalty of perjury, in case of false swearing,

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seems not to have afforded the necessary protection, and the present provision, for the first time, has been enacted, subjecting the person to a misdemeanor who shall with intent to defraud the revenue, "make out or pass, or attempt to pass, through the custom-house any false, forged or fraudulent invoice," manifestly directed against the production and use of simulated invoices and those fraudulently made up, for the purpose of imposing upon the officers in making the entry.

The whole scope of the section confirms this view. It first makes the smuggling of dutiable goods into the country a misdemeanor; and, second, the passing or attempt to pass them through the custom-house, with intent to defraud the revenue, by means of false, forged or fraudulent invoices; the latter is an offense which, in effect and result, is very much akin to that of smuggling except done under color of conformity to the law and regulations of the customs.

In the interpretation of our system of revenue laws, which is very complicated, and contains numerous provisions to guard against frauds by the importers, this court has not been disposed to apply with strictness the rule which repeals a prior statute by implication, where a subsequent one has made provision upon the same subject, and differing in some respect from the former, but have been inclined to uphold both, unless the repugnancy is clear and positive, so as to leave no doubt as to the intent of Congress; especially in cases where the new law may have been auxiliary to, and in aid of the old, for the purpose of more effectually guarding against the fraud. This is the doctrine to be found in the case of Wood v. The U. S., already referred to, and in several subsequent cases. 3 How. 197; 16 Ib. 150.

It has been supposed that the 8th section of the present Act of 1846, which imposes an additional duty of twenty per centum for under valuation, works a repeal of the 66th section of the Act of 1799. But this provision has been part of the revenue system ever since the Act of 1818, with the exception of a few years, and has never been understood to have the effect claimed. On the contrary, the section has been regarded as in force, and has been in practical operation during all this time, notwithstanding the imposition of other additional duty. It was so considered in the case of Wood v. The U. S. This additional duty is imposed in case the 94*] appraised value exceeds *the invoice price of the goods ten per centum, irrespective of the question of fraudulent intent. Undoubtedly, if this additional duty has been levied upon the goods by the government, it cannot forfeit them under the 66th section; but, if the Collector is satisfied that the undervaluation in the invoice has been made with intent to evade the duties, instead of levying the additional duty, a forfeiture may be declared. It will be observed, also, that the forfeiture may be declared in cases of undervaluation where it is less than ten per centum of the invoice price, provided the fraudulent design exists.

We are satisfied that there is no provision in the Act of 1842, or in any of the Duty Acts, operating as a repeal of the 66th section of the Act of 1799, but that it still exists in full force and effect. The judgment of the court below must therefore be reversed, and record remitted for further proceedings, in conformity to this opinion.

Mr. Justice Campbell, dissenting:

This court, in a series of cases arising upon a succession of frauds perpetrated by a combination of persons in England and this country, determined that the 66th section of the Act of 1799, and the 4th section of the Act of 1830, as modified by the 14th section of the Act of 1832, were not repugnant, but formed a harmonious system for the prevention of frauds upon the revenue. 16 Pet. 342; 3 How. 211; 4 How. 242, 251.

The system formed was: 1st. By the Act of 1799, if an invoice contains goods that are undervalued with design to evade duties, the goods so undervalued are forfeited. 2d. By the Acts of 1830 and 1832, if a package or invoice is made up with intent to defraud the United States, the package or invoice thus made up is forfeited.

The court in its opinions declared that the latter Statutes apply only to the cases in which the fraudulent acts of the importer were discovered by the officers of the customs, in the opening and examination of the goods, in their transit through the custom-house; while the Act of 1799 applies to the case of completed entries under false invoices no matter when or where the detection took place, the suits were all for forefeitures where the goods had passed through the custom-house, with a regular entry and payment of duties, but upon false invoices, that is, importing on undervaluation.

In these entries "a true and original invoice" was demanded by the Collector, under the Acts of Congress then in force, and simulated and fraudulent invoices were furnished, and upon which the assessment of duties was made. A true and original invoice, showing the first cost of imports, formed the legal *basis [*95 for the estimate of the duties under these Acts, and the production of this was the end which these enactments were designed to secure.

The Tariff Act of 1842 (5 Stat. at L. 548) was adopted after these decisions.

Its title signifies that its purpose, among other things, "was to change and modify existing laws imposing duties on imports," and all conflicting Acts and parts of Acts were expressly repealed. The frauds referred to in the cases cited, were accomplished by false representations of the cost of the import in the invoice and the danger of a forfeiture for an undervaluation did not prevent them.

The Act of 1842 abolishes the "cost price at the place of exportation" as the basis of the estimate of duties, but employs the "market value" or "wholesale price" and provides appraisers who were to ascertain these without regard "to any invoice whatever." To perform this office they were armed with inquisitorial powers, might call for merchants' books, letters, invoices and papers, and examine, as witnesses, the parties in interest. False swearing was punished with the forfeiture of the import, and as a perjury.

Here then is the substitute for the invoice in the old system in the ascertainment of the basis

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of the estimate and these were the sanctions employed to secure its integrity.

The "true and original invoice" would nevertheless afford important evidence to ascertain the "market value," for in a majority of cases this would be the "cost." The production of the true invoice was still required in every entry. If the invoiced value differed from the appraised or market value ten per centum, an additional penal duty now amounting to twenty per cent., was exacted. This was to compel a fair exhibition of a "true invoice." This duty is collected without suit, depends upon the single fact of a variation of ten per cent. between the market and invoice price, and has proved a most efficient instrument to prevent fraud. Besides the duty may be collected in goods at the invoice rate and thus the undervaluation would be corrected.

Finally, "if any person shall willfully, and with intent to defraud, make out, or pass, or attempt to pass through the custom-house, a false, forged or fraudulent invoice, every such person, his aiders and abettors, shall be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding five thousand dollars, or imprisoned for a term of time not exceeding two years, one or both at the discretion of the court." 5 Stat. at L. secs. 19, 565.

The invoice spoken of in this section of the Act is one which does not represent truly the 96*] facts the importer is bound to disclose *at the date of this entry, and which are exhibited by an original and true invoice, and where the misrepresentation whether by falsehood, forgery or fraud, is with the design to evade the duties. It is admitted that this Act provides for cases never before comprehended in any revenue law. For the attempt to defraud is punished as well as the consummate effort. The system of the Act of 1842 is thus disclosed. It relies upon a home valuation made by public officers, upon evidence, instead of a representation of cost by the importer, as the basis of value in the assessment; and it provides, by forfeiture, and fine, and imprisonment, against the false testimony of the importer. It compels the production of the original and true invoice by a penal duty; by fine and imprisonment, and the power to take payment of duties in undervalued goods.

There are besides provisions directed against smuggling. The Act contains a selection from the various laws which had been passed by Congress, whether in force or otherwise, and introduces new securities for the collection of the revenue.

Every case provided for by the system first considered, is distinctly and efficiently provided for in the Act of 1842.

The principle applicable to such a state of facts is laid down by this court in Norris v. Crocker, 13 How. 429. "That where a new statute covers the whole subject matter of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication, as the two provisions cannot stand together;" and that where "a recent statute covers every offense found in the former act," and prescribes a new and different penalty recoverable by indictment, "it is plainly repugnant."

The statement of the systems adopted at the different periods will show that the importance of the 66th section of the Act of 1799 had ceased and that the retention of it as a cumulative penalty would accomplish no good, and serve only to involve the government in litigation, that the revenue officers might claim the penalty.

Judgment reversed and cause remanded.

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*THE UNITED STATES, Pl'ffs in Er., [*97

v.

NINE CASES OF SILK HATS, Paul Tricon, Claimant.

(See S. C. 17 How. 97-98.

Duties—repeal of statute by implication.

This case is similar to the preceding case. The 66th section of the Duty Act of 1799 not repealed.

Submitted Dec. 18, 1854. Decided Jan. 9, 1855.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

This case was similar to the preceding one.

Mr. C. Cushing, Attorney-General, for the plaintiff in error.

Mr. Justice Nelson delivered the opinion of the court:

This was a libel of information, filed in the District Court of The United States, against 9 Cases of Silk Hats, for condemnation and forfeiture, on the allegation that the entry of the goods at the custom-house was made upon an invoice in which they were invoiced at a less sum than the actual cost at the place of exportation, with a design to evade the duties.

After hearing the evidence, the court instructed the jury that the 66th section of the Act of 1799, which imposed a forfeiture on the goods in question, had been repealed and was not in force at the time of the entry at the customs, and gave judgment for the claimant. On a writ of error to the Circuit Court, this judgment was affirmed.

For the reasons given in the case of The United States v. 67 Packages of Dry Goods, the judgment must be reversed, and the record remitted to the court below for further proceedings, in conformity to the opinion of this court.

Dissenting, Mr. Justice Campbell.

Judgment reversed and cause remanded.

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98*] *THE UNITED STATES Pl'ffs in Er.,

v.

ONE PACKAGE OF MERCHANDISE, Lion, Pinsard & Co., Claimants.

(See S. C. 17 How. 98.)

Duties—repeal of statute.

This case is similar to the two preceding ones. 66th section of Duty Act of 1799 is not repealed.

Submitted Dec. 18, 1854. Decided Jan. 9, 1855.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

It is a similar case to that of U. S. v. 67 Packages of Dry Goods, ante.

Mr. C. Cushing, Attorney-General, for plaintiff in error.

Mr. Justice Nelson delivered the opinion of the court:

The libel of information was filed, in this case, in the District Court of the United States for the Eastern District of Louisiana, for the condemnation and forfeiture of one package of goods; the entry, as charged, having been made upon an invoice in which the goods were invoiced under their actual cost value at the place of exportation, with a design to defraud the duties. After the evidence was heard, the jury, under the instructions, found a verdict for the plaintiffs.

The court afterwards arrested the judgment for the plaintiffs and directed a judgment for the claimants on the ground that the 66th section of the Act of 1799 had been repealed; which judgment was affirmed on error by the Circuit Court.

Dissenting, Mr. Justice Campbell.

Judgment reversed and cause remanded.

99*] *THE UNITED STATES, Pl'ffs in Er.,

v.

ONE CASE OF CLOCKS, Lion, Pinsard & Co., Claimants.

(See S. C. 17 How. 99.)

Duties—repeal of statute.

This case is similar to the three preceding ones. 66th section of Duty Act of 1799 is not repealed.

Submitted Dec. 18, 1854. Decided Jan. 9, 1855.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

This is a similar case to that of The U. S. v. 67 Packages of Dry Goods, ante.

Mr. C. Cushing, Attorney-General, for the plaintiff in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a libel of information filed in the District Court of the United States for the Eastern District of Louisiana, for the condemnation and forfeiture of one case of clocks, for entry of goods upon an invoice in which the goods were invoiced at a sum less than the actual cost value at the place of exportation, with a design to evade the duties.

The jury found a verdict for the plaintiff, upon which a judgment was rendered; but afterwards the court arrested and set aside the judgment, and gave judgment for the claimants, dismissing the libel, which was affirmed on error in the Circuit Court.

For the reasons given in the case of The U. S. v. 67 Packages of Dry Goods, the judgment of the court below must be reversed, and the record remitted for further proceedings, in conformity to the opinion of this court.

Dissenting, Mr. Justice Campbell.

Judgment reversed and cause remanded.

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*ALEXANDER M. LAWRENCE et al., [*100 Claimants of the Ship Hornet, Appellants,

v.

CHARLES MINTURN.

(See S. C. 17 How. 100–116.)

Consignee presumptive owner—jettison—goods on deck with owner's consent—duty of master—ship warranted seaworthy—loss by peril of the sea—want of additional support of deck, when not ground of recovery.

1. The consignee of goods, named in the bill of lading, is presumptively the owner of the goods.

2. Consignee, who is managing owner, may sustain a libel in his own name, against ship, for non-delivery of goods. It is the duty of the master of a ship to determine whether a jettison be necessary.

3. If he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful.

4. Where the lives, ship and cargo have been placed in imminent peril, during a gale, by heavy goods laden on deck, the decision of the master that such goods be, as soon as possible, thrown overboard for the safety of the whole, is justifiable, as a precaution against dangers so nearly certain that it was not unreasonable to act upon the assumption that they would occur.

5. The owner warrants his ship to be seaworthy for the voyage with the cargo contracted for.

But a breach of this implied contract does not amount to negligence or want of skill of the master or mariners.

6. A jettison, by a peril of the sea, is a loss by a peril of the sea. If a jettison of a cargo becomes necessary from any fault or breach of contract by the master or owners, the jettison is attributable to

NOTE.—Seaworthiness; implied warranty of—see note, 24 L. ed. U. S. 1012.

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that fault or breach of contract, and not to sea peril, though that also may be present and enter into the case.

Facts deemed sufficient to establish careful loading on deck. The owner contracts for due care and skill in stowing the cargo and in navigating the vessel.

Goods jettisoned from the deck, are not, as a general rule, paid for in general average, but contribute if not thrown over.

If the vessel is seaworthy to carry a load under deck, and there is no general custom to carry such goods on deck, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm would in all probability have produced no injurious effect on the vessel if not thus laden.

The master is bound to use due diligence and care in stowing and staying the cargo; but there is no absolute warranty that what is done shall prove sufficient.

Though additional supports of the lower deck would have assisted the vessel in bearing the weight, yet where there is no reason to believe they would have enabled it to carry the unusual burden through a storm, if there was negligence in this particular, it cannot be said that the loss was attributable to it.

Argued Dec. 18, 1854. Decided Jan. 9, 1855.

APPEAL from the District Court of the United States for the Northern District of California.

Charles Minturn filed a libel in the District Court of the United States for the Northern District of California, against the ship Hornet, for the non-performance of a freight contract, alleging a loss of the goods through carelessness, etc., of the master, his mariners and servants.

The answer set up two matters in defense, one, misrepresentation as to the weight of the freight. Second, that the said freight was necessarily jettisoned. The District Court rendered a decree in favor of the libelants, and the claimants appealed to this court.

The case is further stated by the court.

Mr. F. B. Cutting, for the appellants:

First. The libelant had no right, merely as consignee, to institute this action in his own name.

He was the mere agent of the shipper to receive the goods. No contract existed between him and the ship owners. The authorities are decisive against his right to sue.

Price v. Powell, 3 N. Y. 322; Dows v. Cobb, 12 Barb. 310; Coats v. Chaplin, 3 Adol. & E. (N. S.) 483; Wright v. Snell, 5 Barn. & Ald. 350; The Francis, 2 Gall. 391; Howard v. Metcalf, 5 Met. 306.

Second. The boilers were lost by one of the excepted perils, even if the ship be held to its responsibility as a common carrier.

1. The carrier is not responsible for the loss by jettison of goods laden on deck with the assent of the shipper, when such jettison is necessary to save the vessel and the crew.

Gould v. Oliver, 4 Bing. N. C. 142; Case cited by Coke, in Bird v. Astcott, 2 Bulst. 280; Approved, Sto. on Bail. sec. 531; Mouse's case, 12 Co. 63; Gillett v. Ellis, 11 Ill. 579; Johnston v. Crane, 1 Kerr, 356 (N. B. Rep.); Smith v. Wright, 1 Cai. 43, and note (a), 45; Crosby v. Fitch, 12 Conn. 419, 420; Da Costa v. Edmunds, 4 Camp. 142.

2. The loss occurred by dangers of the sea, within the meaning of the bill of lading.

3. The circumstances that human agency intervened to case the boilers into the sea makes it none the less a loss by perils of the sea.

Hagedorn v. Whitmore, 1 Stark. 157; Barton v. Wolliford, Comb. 56; Gillett v. Ellis, 11 Ill. 579; Smith v. Scott. 4 Taunt. 126.

Third. The shipper having contracted for the shipment of the boilers on deck, cannot, in the absence of fault or negligence in the carrier, recover for a loss by perils incident to that mode of transportation.

Gould v. Oliver, 4 Bing. N. C. 142; Baxter v. Leland, Blatch. 526; Clark v. Barnwell, 12 How. 272, 281-2; Shackleford v. Wilcox, 9 La. 33, 39; Angell, Car. secs. 215, 217.

Fourth. The ship owners were not common carriers as to these goods; they were special bailees under a particular contract. They are answerable for misconduct or negligence, or the want of that diligence which prudent men commonly take of their own goods.

N. J. S. Nav. Co. v. Merch. Bank, 6 How. 344, 382; Citizens' Bank v. N. Steamboat Co. 2 Sto. 16, 34, 36; Allen v. Sewall, 6 Wend. 335, 355, 364; Wells v. The Steam Nav. Co. 2 N. Y. 208; Edwards v. Sherratt, 1 East, 604, 611; Thomas v. Prov. and Bos. R. R. Co. 10 Metc. 472; Ang. on Carr. secs. 45, 46, 54, 89; Sto. on Bail. sec. 442.

If The transportation of the boilers on deck was not an undertaking that the ship held herself out to the public to perform; it was not in the usual course of her employment. Arn. on Ins. 69, 775; Angell on Car. secs. 125, 86-94.

They only warrant that she should be tight, staunch, strong, and furnished with all tackle and apparel necessary for the intended voyage, and should be competent to transport a usual cargo on such a voyage.

Amies v. Stevens, 1 Str. 128; Abb. Ship. 840, part 4, ch. 5; Ang. on Carr. sec. 173.

The shipper cannot take advantage of any unseaworthiness caused by his own act upon an implied warranty. He desired to have the boilers taken on deck, and if there be fault in the attempt to stow them in that manner, he concurred in, and was a party to it.

Johnston v. Crane. 1 Kerr. N. B. 356; Gould v. Oliver. 4 Bing. N. C. 142; Brind v. Dale, 8 C. & P. 207. Ang. on Carr. secs. 57, 217.

Fifth. The libel does not aver unseaworthiness, incapacity or fault of the ship, or any improper stowage of cargo, or any overloading of the ship. The proofs and the right to recover must be confined to the allegations.

1 Car. & P. 251; Houseman v. Sch. N. Carolina, 15 Pet. 50.

The evidence having shown that the master and mariners were justified in the jettison. The burden was thrown upon the libelant to show negligence or misconduct, and the opinion of the District Court is, in this respect, erroneous.

Brind v. Dale, 8 C. & P. 207; Newton v. Pope, 1 Cow. 109; Clark v. Spence, 10 Watts, 335; Ang. on Carr. sec. 61; Story on Bail. sec. 454.

Sixth. The damages decreed to the libelant are excessive.

If the rule that has generally been adopted

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in the cases where the vessel reaches the port of delivery were applied, all that could be recovered would be the price for which the boilers could have been sold, had they arrived undamaged at the port of destination.

1 Arn. on Ins. 202; 2 Arn. on Ins. (Am. ed.) 943, 929, 932, 933; 2 Phill. 128, 129, 3 Kent, Com. 242; Depau v. Ocean Ins. Co. 5 Cow. 63; Rogers v. Mechanics' Ins. Co. 2 Sto. C. C. 173.

Mr. Daniel Lord, for the appellee:

The ship sailed from New York, August 23, 1851; experienced a storm at sea, near Gulf Stream, on the 26th of August, which continued twenty-four hours. The ship labored severely.

On the 29th August, after the gale, the master got up the protest signed by the ship's company, declaring that for the future preservation of the ship all persons and things on board, the steam boilers, etc., on deck, should be thrown overboard. The ship arrived in safety at San Francisco, and soon after her arrival was, on the 30th January, 1852, proceeded against in admiralty for the loss of the shipment. On the 30th November, 1852, the District Judge decreed for the libelant, and awarded damages, $25,275 and costs.

From which decree the claimants of the ship, on the 3d December, 1852, appealed to this court on the pleadings of the case and proceedings in the cause.

1. The contract of the carrier in its nature requires the utmost care and diligence on his part, and also a ship fit and capable of performing the engagement, unless defeated in so doing by vis major. Although perils of the sea be the immediate cause, still they are not within the exception unless they have been encountered after all the obligation of the carrier has been performed.

As the obligation of the carrier is, by his own contract, he would be liable on the principles of law, notwithstanding all accidents, unless he had expressly excepted them. And the exception is not to be enlarged by implication.

See Spence v. Chodwick, 10 Ad. & El. 524, where the law is reviewed.

2. Loading a ship beyond her capacity is a matter at the charge of the carrier. His contract warrants her ability to perform the voyage in safety, so far as that depends on the ship. Secret defects are at his risk, and not at that of the shipper. He is to determine the quantity of cargo she can safely carry.

3. Has the carrier, in this case, shown the jettison within the exception, as thus expounded? Has the ship met the storms and gales to be expected on her voyage, with suitable fitness to meet them, so far as her own carrying qualities and a reasonable loading are involved?

After a full examination of the evidence, the counsel concludes this point as follows:

The vessel, therefore, although at the time of loading, apparently able to carry the cargo where it was stowed, was really overloaded, and unfit to carry the cargo. The cargo really stood no chance of being carried when the ship sailed with it, under an engagement to convey it safely and to deliver it in good order.

See Millward v. Hibbert, 3 Ad. & El. (N.S.) *120, Col. Ins. Co. v. Ashby, 13 Pet. 338.*

4. The libel is properly brought in the name of Charles Minturn, consignee, to whom the delivery was to be made, and by whom the freight was to be paid. The bill of lading was a sufficient contract and title paper to him.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from a decree of the District Court of the United States for the Northern District of California, sitting in admiralty. The appellee filed his libel in that court against the ship Hornet, for the non-delivery of two steam boilers and chimneys, shipped on board that vessel in the port of New York, and consigned to the libelant.

The appellants intervened, as owners of the ship, and upon the pleadings and proofs the District Court made a decree in favor of the libelant. The claimants appealed.

The first question to be determined on the appeal is, whether the libelant had a right to sue in his own name. The facts bearing on this question are, that on July 19, 1851, Edward Minturn, at New York, made a contract with the agent of the ship Hornet, which was reduced to writing, as follows:

Memorandum of agreement to ship on board the ship Hornet, by Edward Minturn, Esq., two boilers, two chimneys or steam-chests, smoke-pipes in sheets, and some grate bars, in all about forty tons weight, from this port to San Francisco, California, for the sum of $4,500, with five per cent. primage, the whole to go on deck, except the grate-bars and sheet-iron for smoke-pipe. It is understood that the shipper is to put them on the deck of the vessel at his expense, and the ship is to discharge them as soon as convenient, and they are to be received at Cunningham's wharf, in San Francisco, without other than the ordinary charge per day for discharging. It is further understood that the said boilers are to be ready to go on board the *vessel on the ninth day of [*106 August, or as soon thereafter as the ship may require them, giving shipper two days notice thereof.

(Signed) Edward Minturn.
E. B. Sutton,
Agent for ship Hornet.

It appeared that the boilers and chimneys were manufactured in New York, upon an order given by James Cunningham; that they were intended for the steamer Senator, a boat then in California; that James Cunningham and Edward Minturn were part owners of The Senator, and that they paid the makers for these articles. The bill of lading was as follows:

210. Shipped, in good order and well conditioned, by Edward Minturn, on board the ship called The Hornet, whereof Lawrence is master, now lying in the port of New York, and bound for San Francisco, California, to say: two boilers, and two steam-chimneys for ditto, eight pieces sheet-iron work, three pieces pipe, one band, two hundred and four grate-bars, sixteen grate-bar bearers, eight boiler bearers, six man-hole plates, eight boiler doors, one bundle (four) bolts, two boxes; the whole to be discharged as soon as convenient, and to be received at Cunningham's wharf, in San Fran-

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cisco, without other than the usual or ordinary charge for discharging per day, being marked and numbered as in the margin.

Freight	$4,500 00	Contents unknown. Goods to be delivered at the vessel's tackles when ready to be delivered. Not accountable for breakage, leakage or rust;
5 per cent. primage	225 00	
	$4,725 00	

E. B. SUTTON,
84 Wall Street.
Dispatch line California packets.

freight payable before delivery, if required; and are to be delivered, in like order and condition, at the port of San Francisco (the dangers of the seas, fire and collision only excepted), unto Charles Minturn, or to his assigns, he or they paying freight for the said boilers, steam-chimneys, and other iron work, $4,500, with five per cent. primage, and average accustomed.

In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in New York, August 19, 1851.

(Signed) William W. Lawrence.

Upon the proofs we are of opinion that the libelant had a right to sue the carrier in his own name. He is the consignee named in the bill of lading; and, in the absence of evidence to control the effect of that document, the 107*] property is presumed to *be in him. In Evans v. Marlett, 1 Lord Raymond, 271, it is laid down that "if goods by bill of lading, are consigned to A, A is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special, to be delivered to A, to the use of B, B ought to bring the action."

Whether it be strictly correct to affirm that in the case first put. A shall have a right of action against the carrier, though in point of fact he be only an agent for the consignor, has been much controverted. In Griffith v. Ingledew, 6 S. & R. 429, goods were shipped by A for his own account and risk, but deliverable under the bill of lading to B or his assigns. The previous decisions were examined with great care. There was a difference of opinion on the bench, Mr. Justice Gibson dissenting; but the majority of the court held, that by force of the bill of lading the legal title was in the consignee, and he could maintain the action.

Since that decision was made, the question has been much discussed, both in this country and in England. It is not easy to reconcile the decisions. We shall not attempt to do so here; the case does not require it. For, if we take the rule to be that an action against the carrier cannot be brought by a consignee who has no beneficial interest in the goods, it still remains true, that a presumption of such an interest in the consignee arises from a bill of lading which makes the goods deliverable to him or his assigns. This is admitted in the cases in which it has been held that the consignee had not the right of action or was not liable for the freight. Coleman v. Lambert, 5 M. & W. 502; Wright v. Snell, 5 B. & A. 350; Chandler v. Sprague, 5 Met. 306.

In Grove v. Brien et al. 8 How. 439, this court said: "The effect of a consignment of goods generally is to vest the property in the consignee;" and though it is also there declared that this effect may be controlled by special clauses in the bill of lading, or by evidence aliunde, yet the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable, is conceded.

This is in accordance with the rule given in Abb. on Shipp. 415, 416.

Such being the presumption arising from the bill of lading, we do not find it to be controlled by any proof in this case. It does appear that Edward Minturn and James Cunningham were part owners of The Senator, for which boat these boilers and chimneys were intended, and that they contracted with the makers of the articles and paid for them, and that Edward Minturn shipped them in New York. But all this leaves open the question whether the libelant was not the managing owner *and [*108 ship's husband of The Senator, residing in California, where that boat was employed, attending to its repairs and supplies, for the joint account of himself and the other owners. Indeed, the testimony of Squire, an agent of the libelant, in the absence of all other evidence, tends to prove that such was the fact; for he speaks of himself as acting for the libelant in reference to the management of The Senator, and says that her boilers being worn out, an order was sent out to obtain new ones to replace the old. We understand this order to have been given by the libelant for the boilers now in question.

Considering the burden of proof to have been on the respondents to displace the prima facie right of action of the consignee arising from the bill of lading; that for aught he has shown, and upon the proof, we may conclude that the consignee ordered these articles as managing owner of The Senator; and that if so, he, as consignee and managing owner, might sustain the libel in his own name, this objection to the decree must be overruled.

The next inquiry is, whether the failure to deliver the boilers and chimneys is justified.

The Hornet sailed from New York on the 23d of August, 1851, having these articles on deck. On the 5th of September the chimneys, and on the 12th of September the boilers, were thrown overboard.

Two questions arise:

1. Was the jettison necessarily made for the common safety? And if so,

2. Was the necessity attributable to any, and what, fault on the part of the master or the vessel?

The material facts upon which the first of these questions depends, are, that The Hornet was a clipper ship of about 1600 tons burden, built at New York in the year 1850 and 1851, of the best materials in use for first-class ships at that port. She had a cargo under deck, and the weight of these boilers and chimneys on deck was somewhat over thirty-one tons. The height of each of the boilers, above the deck at the forward end, when stowed, was about twelve feet. The steam chimneys were between five and six feet in diameter, and besides these there was a piece of steam pipe weighing 667

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pounds. The ship sailed on the 23d of August, and on entering the gulf stream encountered rather heavy weather and a cross sea. The performance of the vessel in this sea was found to be bad. On the 26th a gale came on from the south, veering to the northwest, and lasted until the night of the 27th.

Though this gale was not of uncommon severity, it raised a heavy cross sea. The effect of 109*] this sea was to cause the ship *to roll down to leeward, so as to take in water over her rail; she rose very slowly and then rolled over to windward, straining and laboring in a manner described by the witnessess as very unusual. She would not mind her helm, but would fall off; she would settle down aft and take in water over her stern, and plunged heavily forward. At sundown on the 27th, the wind lulled and the sea became more smooth. It was found during and immediately after the gale, that the ship was very severely strained, so as to open some wood ends aft, one half to three quarters of an inch, and her waterway seam half an inch, and that other injuries, of an alarming character, had been received. The master then held a consultation with his officers, and drew up the following protest.

August 29, 1851, latitude 31° 0′ N., longitude 61° 5′ W.

At sea, on board ship Hornet, of New York, William W. Lawrence, master, bound from New York to San Francisco, California.

We, the undersigned, master, officers and mariners of the ship Hornet, of New York, do, after mature and serious deliberation, enter this solemn protest: That on August 26th, 1851, the ship Hornet being then in or about the longitude of 49° W., latitude 37° N., experienced a gale of wind from south, veering to N. W.; and that during said gale, which lasted until the night of the 27th of August, the weight of the deck load, consisting of two boilers, with furnaces attached, and two steam-chimneys (the whole supposed to be of the weight of forty-tons, or thereabouts), did cause the ship to labor very hard, rolling gunwale deep, shipping large bodies of water, straining the ship in her upper works and decks, causing the ship to leak badly, and her pumps constantly worked, placing our lives, ship and cargo, in imminent peril for their safety. We now, therefore, do most seriously and solemnly assert, that for the future preservation of the ship, and thereby our lives and cargo, the said boilers, furnaces and chimneys are unsafe on the decks, and for the safety of the whole should be thrown overboard as soon as possible, the weather and sea permitting.

In testimony whereof to the above, we hereby subscribe our respective names.

This protest was signed by all the officers and by such of the crew as could write, and its substantial facts are testified to by the master and officers who were examined in the cause in such a manner as to satisfy us of their truth.

Upon these facts, we have come to the conclusion that the jettison was necessary for the common safety.

The nature of the case imposes on the master the duty, and clothes him with the power, to 110*] judge and determine upon the *facts before him, whether a jettison be necessary. He derives this authority from the implied consent of all concerned in the common adventure. The obligation of the owners is to appoint a competent master, having reasonable skill and judgment, and courage, and they are liable, if through his failure to possess or exert these qualities, in any emergency, the interest of the shippers is prejudiced. But they do not contract for his infallibility, nor that he shall do, in an emergency, precisely what, after the event, others may think would have been best.

If he was a competent master, if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person to whom the law has intrusted authority to decide upon and make it has duly exercised that authority.

Applying these principles to the case before us, we find no reason to doubt that this jettison was thus necessary. It is true, that when it was actually made, the sea was smooth, and the ship in no immediate danger. But it satisfactorily appears that these boilers and chimneys could not be thrown overboard without the greatest risk, when there was any considerable sea. To require delay until a storm, would be, in effect, to prohibit the sacrifice. Precaution against dangers, which are certain to occur, is surely proper. That they must experience gales and heavy seas at that season, in that voyage, was so nearly certain, that it was not unreasonable to act on the assumption that they would occur, and prepare the ship to encounter them while in a smooth sea, when alone they could do so.

We find the conduct of the master and crew in making the jettison to have been lawful, and the remaining inquiry is, whether the necessity for it is to be attributed to any fault on the part of the master or owners.

The libel alleges the loss of the goods to have been "through the mere carelessness, unskillfulness and misconduct of the said master, his mariners and servants."

We were at first inclined to the opinion that this allegation is not broad enough to put in issue what the libelants have at the hearing much relied on, and what we think is the main question in this part of the case, the sufficiency of the ship to carry this cargo. It is, no doubt, the general rule, that the owner warrants his ship to be seaworthy for the voyage with the cargo contracted for. But a breach of this implied contract of the owners does not amount to negligence, or want of skill of the master or mariners.

*There would be much difficulty, [*111 therefore, in maintaining, as a general proposition, than an allegation of negligence of the master would let the libelant in to prove unseaworthiness of the vessel.

But it must be observed that this libelant relies not on general unseaworthiness, but upon the fact that a vessel, stanch and sufficient to carry a cargo, was overloaded by this burden on the deck; and as the quantity of lading and the consequent trim and seaworthiness of a

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vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is intrusted for the benefit of all concerned with a supervision, his failure to do so, properly, is negligence, for which the owner may be liable. While, therefore, we have some difficulty in respect to the sufficiency of this allegation, we think it is such as necessarily leads us into the inquiry whether the loss by jettison was occasioned by negligence of the master in overloading the ship. And as we find it extremely difficult, if not impossible, to distinguish between the obligation of the owners and master in these particulars, we shall proceed to consider the question whether the case is one of culpable negligence, or is within the exception of perils of the seas contained in the bill of lading.

There can be no doubt that a loss by a jettison, occasioned by a peril of the sea, is a loss by a peril of the sea. In that case the sea peril is deemed the proximate cause of the loss. But if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract, and not to sea peril, though that also may be present and enter into the case. This distinction is familiar in the law of insurance. General Mut. Ins. Co. v. Sherwood, 14 How. 365, and cases there cited.

In this case, did the necessity for the jettison arise from any fault or breach of contract by the master or owners?

Two grounds are assumed by the libelant. The first is, that considering the great weight of these articles, resting upon a small part of the upper deck, sufficient means were not used to support the weight and stiffen the ship, so as to prevent the deck from being strained.

This was a new ship, built of such materials, and so fastened and braced, as to be uncommonly strong. The owners employed a ship carpenter, who had worked on the vessel when built, to do what he deemed necessary to support this unusual weight on the deck. He describes what was done. The master superintended these alterations. He and the carpenter deemed them sufficient. They were both going 112*] to sea in the vessel—the one *as commander, the other as carpenter—and can hardly be supposed to have omitted anything which they thought necessary for safety. The owners do not appear to have restricted them, in point of expenditure. We cannot avoid the conclusion that everything was done which these men thought necessary; and possessing, as they must be presumed to have done, competent skill in their respective occupations, they believed this part of the cargo was securely stowed and fastened and stayed, to go safely on the voyage. In point of fact, however, after being subjected to the action of the sea in a storm, it was found the deck had settled.

The second ground taken by the libelants is, that the ship was so overloaded, by the great weight of these articles on deck, as to be unseaworthy; and as the jettison was made to relieve the vessel from this condition, the owners are responsible for the loss. In part, at least, the same principles of law will be found applicable to both these grounds, and therefore we consider them together.

The principal question—and it is one of much importance—is, what is the extent and operation of the implied contract of the owner respecting the ability of his ship to carry a particular deck load which he receives on board, under a contract that it shall be carried on deck, dangers of the seas excepted?

In general, the owner warrants the sufficiency of his vessel to carry the cargo put on board by the freighter, provided the vessel be not injured by a peril of the sea. Besides this, he contracts for the use of due care and skill in stowing the cargo, and in navigating the vessel.

But, in applying these rules to cargo on deck, some peculiar considerations must be borne in mind.

This bill of lading declares that the property is to go on deck. It excepts perils of the seas. The exception must be construed with reference to the particular adventure, which the contract of affreightment shows was contemplated by the parties. Under this bill of lading the question is, not what in other circumstances could be deemed a peril of the sea, but what is to be deemed such when operating on this vessel, with this deck load. If a very burdensome cargo, like iron, is taken on board, and heavy weather met with, and a jettison made, it would not be a ground of claim against the owner, that the weather encountered would not have been sufficient to justify a jettison if the cargo had been cotton.

And when this freighter consented to place on the deck of this ship his boilers and chimneys, weighing upwards of thirty tons, not distributed about the deck, but lying in a small space, must he not be taken to have known that their necessary effect *might be to [*113 embarrass the sailing of the ship in a gale of wind, and cause her to labor in a heavy sea. The grounds upon which the rights and obligations, as to contribution, of owners of cargo on deck, in case of jettison, have long rested, have an intimate connection with this question. Valin, lib. 3, tit. 8, art. 12, giving the reason of the rule, that goods jettisoned from the deck are not paid for in general average, but contribute if not thrown over, says: "The reason why articles on deck, thrown overboard or damaged, are not contributed for, is, that as they cannot but embarrass the working of the ship, the presumption is, that they have been jettisoned before a full necessity for a jettison of cargo arose, and only because they hindered and confused the maneuvering of the vessel."

This has been still more clearly expressed by Locré, in his Commentary on the Code du Commerce Maritime, lib. 2, tit. 12, art. 421. He says: "Perhaps the common safety would not have made a jettison necessary if the lading had not been in contravention of rule, if it had not brought the dangers on the vessel, or contributed to enhance them." Similar views have been taken by the most approved writers on the law of insurance in this country and in England, and they have been applied in many cases. Abbott on Shipping, 481, 490, and notes; 3 Kent's Com. 240; 2 Phillips on Ins. 71; 2 Arnold on Ins. 890. It was remarked by Lord Denman, in Milward v. Hibbert, 3 Ad. & El. (N. S.) 120, that the reason assigned by Valin, that goods on deck embarrassed the navigation of the ship, is not sufficient to form the basis

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of a universal rule, excluding goods on deck from the benefit of contribution, because it may be that in many cases, goods can best and most safely be stowed on deck; and that they may, in some cases, be so stowed as not to be in the way of the crew in their operations. This may be true; but the point here is, not whether there may be cases in which the deck load does not embarrass the navigation or increase the danger but whether, in case it does so, the shipper who has consented to his goods being placed on deck, under a special contract, and not pursuant to any general custom, which might be evidence of the safety of the practice, must not be taken to have known that such might be its effects.

It was strongly urged by the libelant's counsel that the shipper could not be supposed to have, and should not suffer for not possessing, a knowledge of the capacity or sufficiency of the ship; that the carrier was bound to know that the instrument, by which he agreed to perform a particular service, was sufficient for for that service: and that, as these carriers contracted to convey this deck load to San 114*] Francisco, they were obliged to *ascertain whether placing it on deck would overload their vessel. This appears to have been the ground on which the court below rested its decree.

This reasoning would be quite unanswerable if applied to a shipment of cargo under deck, or to its being laden on deck without the consent of the merchant, or to a contract in which perils of the sea were not excepted. But the maritime codes and writers have recognized the distinction between cargo placed on deck, with the consent of the shipper, and cargo under deck.

There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of its owner; and they afford very high evidence of the general and appropriate usages, in this particular, of merchants and ship owners. Consolato, par Pardessus, ch. 186; Ord. de Mar. Valin, lib. 2, tit. 1, art. 12; Code du Com. Mar. par Locre, art. 229, lib. 2, tit. 4, art. 229; Emerigon, ch. 12, sec. 42; Boulay Paty, tom. 4, 566, 568.

So the courts of this country and England, and the writers on this subject, have treated the owner of goods on deck, with his consent, as not having a claim on the master or owner of the ship in case of jettison. The received law, on the point, is expressed by Chancellor Kent, with his usual precision, in 3 Com. 240: "Nor is the carrier in that case (jettison of deck load) responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss."

The cases of Smith v. Wright, 1 Cai. 43; Dodge v. Bartol, 5 Green. 286; The Brig Thaddeus, 4 Martin's La. 582; Story on Bailments, 339, sec. 531; and Gould v. Oliver, 4 Bing. N. C. 142, support this statement. In the last-mentioned case, Tindal, Ch. J. says: "Now, where the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship owner or master for a wrongful loading of the goods on deck, can exist. The foreign authorities are, indeed, express on that point; and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions his loss, leads to the same conclusion."

It must be admitted that no one of the authorities referred to go so far as to maintain that the ship owner contracts no obligation whatever to the merchant respecting the sufficiency of the vessel to carry the deck load received on board. They should not be understood as supporting such a position. The extent to which we understand them to go, and the law which *we intend to lay down, [*115 is this: that if the vessel is seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden. It is not for him to say that, in the first storm the vessel encountered, though not of unusual severity, she proved to be unable to carry the deck load, and so was not of sufficient capacity to perform the contract into which the carrier entered.

The carrier does not contract that a deck load shall not embarrass the navigation of the vessel in a storm, or that it shall not cause her so to roll and labor in a heavy sea as to strain and endanger the vessel. In short, he does not warrant the sufficiency of his vessel, if otherwise stanch and seaworthy, to withstand any extraordinary action of the sea when thus laden. If the vessel is in itself stanch and seaworthy, and her inability to resist a storm arises solely from the position of a part of the cargo on the deck, the owner of the cargo, who has consented to this mode of shipment, cannot recover from the ship or its owners, on the ground of negligence or breach of an implied contract respecting seaworthiness. His right to contribution is not involved in this case.

Applying these principles to the case before us, there is no difficulty in coming to a satisfactory conclusion. This vessel was uncommonly stanch and strong. The amount of dead weight on board was not excessive, for there is no pretense that she was too deep in the water. There was no apparent inability to carry the deck load when she sailed, nor until heavy seas were encountered. Her inability to carry these boilers and chimneys arose solely from their particular position on deck.

The libelant, through the shipper in New York, consented to their being placed in this position. He took the risk of their rendering the ship unmanageable in a storm; and he, and not the ship owners, must bear the loss occasioned by their being placed on the deck, so far as the liability for the loss rests upon any ground of negligence in the place of stowage, or breach of warranty respecting the seaworthiness of the vessel. As to the argument,

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that there was negligence in not properly stowing and supporting this burden on deck, we think it is not made out in proof. The master is bound to use due diligence and skill in stowing and staying the cargo; but there is no absolute warranty that what is done shall 116*] prove sufficient. We are of *opinion that due diligence and skill were used. Besides, we do not find the necessity for the jettison attributable to any defects in these particulars. It may be that additional supports of the lower deck would have assisted the vessel in bearing the weight, but we see no reason to believe they would have enabled it to carry this unusual burden through a storm; and therefore, if we found negligence in this particular, we could not declare that the loss was to be attributed to it.

The decree of the District Court is to be reversed, and the cause remanded, with directions to dismiss the libel with costs.

Decree reversed and cause remanded.

ADAM D. STEWART, Pl'ff in Er.,
v.
THE UNITED STATES.

(See S. C. 17 How. 116-130.)

Collector—extra compensation.

Section 18 of the Act of May 7, 1822, was intended to provide to the collector, and other officers named therein, compensation for extraordinary services incident to their respective offices, and to them only.

It does not embrace compensation to the collector for services as inspector.

Collector, as such, cannot claim compensation for services imposed by law upon his subordinate, the performance of which it is his duty to supervise and enforce.

Argued Dec. 26, 1854. Decided Jan. 9, 1855.

IN ERROR to the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

This was an action of assumpsit, brought in the court below to determine the construction of the law relating to the officers of the customs. The general issue was pleaded and the case tried upon an agreed statement of facts, which appears in the opinion of the court. Verdict and judgment in the court below having been in favor of U. S., the case is now here on a writ of error.

Mr. **Walter S. Cox**, for the plaintiff in error:

1. The Act of Congress of May 7th, 1822, does not apply to cases in which a collector holds at the same time the office of collector and any other distinct and independent office recognized by law, by distinct and independent appointment.

If the literal meaning of the Statute would extend to cases which the court are satisfied the Legislature never contemplated, or which would lead to absurd consequences, the operation of the statute must be restrained to narrower limits than the words import.

2 Inst. 386; Bac. Abr. Stat. I. 5; 1 Black, 88; Brewer's Lessee v. Blougher, 14 Pet. 178; U. S. v. Fisher, 2 Cr. 358; 1 Cond. 421.

Repeals by implication, whether general or partial, are not favored by the law; and there must be positive repugnancy between the old and the new law to make a repeal by implication.

Dwarris on Statutes, 674; Wood v. U. S. 16 Pet. 342.

There are two sets of phrases in the laws. The 15th section of the Act of May 7, 1822, which limits the amount to be received by a deputy-collector "for any services he may perform for the United States in any office or capacity," is supposed to indicate the same policy as the 18th section, and to apply only to services rendered by him as deputy-collector, and not to cases where he is invested at the same time with another distinct office.

On the other hand, the 14th section employs a distinct language, to apply to distinct offices.

The difference between the two forms of language is shown, and the above views generally are sustained, in the case of U. S. v. Morse, 3 Story, 87. The meaning of this Act is at least doubtful; and if so, it should be construed favorably to the plaintiff in error. Ib.

II. If our construction of the Act of May 7, 1822, be correct, the plaintiff in error was entitled to the compensation claimed by him in his accounts for the 4th quarter of the year 1832.

By the Act of March 2, 1799, ch. 22, sec. 21, 1 Laws U. S. 627, collectors are to appoint inspectors, with the approbation of the principal officer of the Treasury Department.

By the Act of March 3, 1815, ch. 94, sec. 3, 3 Laws U. S. 231, continued in force by Acts of April 27, 1816, and March 3, 1817, inspectors are declared to be officers of the customs, and required to take an oath of office.

The Act to regulate the collection of duties, etc., of July 31, 1789, 1 Laws U. S. 45, limits the compensation of inspectors to $1.25 for every day of actual employment.

The Act of March 2, 1799, sec. 2, 1 Laws U. S. 707, increases the maximum to $2 per day; and the Act of April 26, 1816, 3 Laws U. S. 306, makes it $3 per day.

Under these Acts, the Secretary of the Treasury, in 1820, established the compensation of the plaintiff in error at $3 per day. He continued in the office until January 15, 1833. Under the fixation of his salary by the proper officer, after the service was rendered, he acquired a vested right to the compensation established by the Secretary, unless the Act of May 7, 1822, sec. 18, reduced his compensation; and that, too, even if the Secretary erred, either in the appointment to office or the fixation of salary.

U. S. v. McCall, Gilp. 563; U. S. v. Macdaniel, 7 Pet. 15.

III. The act of the Secretary related entirely to the past, and must therefore be construed to be a mere decision, which, if erroneous, cannot conclude the judgment of the court.

U. S. v. Dickson, 15 Pet. 141.

Mr. **C. Cushing**, Atty.-Gen., for defendant in error:

Act of 7 May, 1822, 3 Stat. at L. by L. &

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B. 696, ch. 107, sec. 18, which took effect 1st July, 1822, enacts: "No collector, surveyor or naval officer, shall ever receive more than $400 annually, exclusive of his compensation as collector, surveyor or naval officer, and the fines and forfeitures allowed by law for any services he may perform for the United States in any other office or capacity."

The said Stewart has been allowed, in the adjustment of his accounts, the said sum of $400 annually, since the 30th June, 1822, over and above his compensation as Collector, and the fines and forfeitures allowed by law. But notwithstanding the said Act of 1822, Mr. Stewart claimed to be allowed the further compensation, at the rate of $3 per day from the 1st of July, 1822, during his continuance in office, until the 14th of January, 1833, which the accounting officers of the Treasury have uniformly rejected, as often as presented, since the said 1st July, 1822.

This rejected claim of $3 per day as inspector of the customs, while he was also collector of the district, is the subject of the bill of exceptions, and of this writ of error, by Mr. Stewart.

That the offices of collector of the district and of inspector of the customs are distinct and separate, is admitted; but that does not make an exception from the inhibition of the Act of 1822, "that no collector . . . shall ever receive more than $400 annually, exclusive, etc., . . . for any services he may perform for the United States in any other office or capacity."

The 21st section of the Act of 2d March, 1799, to regulate the collection of duties on imports and tonnage, 1 Stat. at L. by L. & B. sec. 642, ch. 22, shows that the several offices of collector, naval officer and inspector, are distinct.

The appointment, as a constitutional act, lies with the Secretary of the Treasury, the language of the Statute being quite inexact, and running as if the Secretary merely possessed a power of approving or disapproving. In fact, he, and he alone, appoints.

Marbury v. Madison, 1 Cr. 137, 155; U. S. v. Batchelder, 2 Gal. 15; U. S. v. Wood, 2 Gal. 361; Mr. Legare's Opinion, Opinions Atty.-Gen. pp. 1577, 1579.

But the inconvenience remains, of having the collector, as collector, employ himself as inspector. Act to Establish the Compensations of Officers employed in the Collection of Imports and Tonnage, 1 Stat. at L. by L. & B. 707, ch. 23, sec. 2.

The compensation to inspectors was increased by a subsequent Act, so that the maximum of allowance is $3 per day.

By the Act to regulate the collection of duties on imports and tonnage, approved 2d March, 1799, 1 Stat. at L.; by L. & B. p. 642, ch. 22, sec. 21, "The surveyor shall superintend and direct all inspectors, weighers, measurers and gaugers within his port; and shall, once every week, report to the collector the name or names of such inspectors, weighers, gaugers or measurers, as may be absent from, or neglect to do, their duty. . . And at the ports to which a collector only is assigned, such collector shall solely execute all the duties in which the co-operation of the naval officer is required, as aforesaid, and shall also, so far as may be, perform all the duties prescribed to the surveyors, at the ports where such offices are established."

Mr. Justice Daniel delivered the opinion of the court:

This case comes before us upon a writ of error to a judgment of the Circuit Court of the United States for Washington County, in the District of Columbia, in favor of the defendants in error, against the plaintiff, as Collector of the revenue for the District of Michilimackinac. The jury, upon the trial in the Circuit *Court, rendered a verdict for the de- [*125 fendants in error for the sum of $638.81, with interest thereon from the 13th day of January, 1833; and for this amount the court, at its October Term, 1852, gave judgment.

The questions of law passed upon and reserved by a bill of exceptions in the court below, and which this court are now called on to review, arises from the following agreed statement of facts, viz.:

That on or about the 12th March, 1818, the defendant was appointed by the President of the United States, collector for the district of Michilimackinac, and inspector of the revenue for the port thereof; which offices he continued to hold, by successive reappointments, and to receive the emoluments of, till the 15th day of January, 1833.

"That on or about the 1st April, 1819, the defendant was appointed, by the Secretary of the Treasury, inspector of the customs for the port of Michilimackinac; which office he continued to hold, under his original appointment, until January 15th, 1833. The defendant's is the only case found on record of a collector holding at the same time the office of inspector of the customs. His allowance, in that capacity, was fixed by the Secretary at $40 a month, and so continued until the second quarter of the year 1820, when it was increased by the Secretary to $3 per day, the maximum allowance permitted by law to a regular inspector of the customs. The defendant continued to be paid, as inspector of the customs, at this rate, till the 1st of July, 1822, when the Act of Congress of 7th May, 1822, went into effect, entitled: 'An Act further to establish the compensation of officers of the customs, and to alter certain collection districts, and for other purposes.' 3 U. S. Stat. at L. 693. The 18th section of this Act is as follows: 'No collector, surveyor or naval officer shall ever receive more than $400 annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law for any services he may perform for the United States in any other office or capacity.'"

"A copy of the foregoing law was duly transmitted by the Treasury Department to the defendant. In his accounts for the 3d and 4th quarters of the year 1822, the defendant charged compensation at the rate of $3 a day, as inspector of customs, which charge was disallowed at the treasury; and in his accounts for the three first quarters of the year 1823, he charged compensation at the rate of $40 a month, as inspector of the customs, which latter charge was also disallowed at the treasury. The defendant rendered several other accounts,

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containing no charge as inspector of the customs, till the end of the year 1824. In a treasury settlement, made at that date, the defend-
126*] ant is *credited with $1,000, 'the amount of an allowance made by the Secretary of the Treasury to the collector, for services as inspector, from 1st July, 1822, to 31st December, 1824, at $400 per annum.' In his account rendered for the 1st quarter of the year 1825, the defendant charged himself with the balance found due from him on the next preceding settlement, in which he had been allowed but $400 per annum as inspector of the customs; and in his several successive settlements from that time to 31st of December, 1831, continued to charge only $400 per annum as inspector of the customs."

"By the Act of 2d March, 1831, 'to regulate the foreign and coasting trade on the northern, northwestern and northeastern frontiers of the United States, and for other purposes,' 4th U. S. St. at L. 487, the compensation of every collector on the northern and northeastern and northwestern lakes and rivers, 'was fixed at an amount equal to the entire compensation received by such officer during the past year.' The defendant was credited, in 1831, and subsequently, with the compensation allowed to him in 1830, being $835 $\frac{85}{100}$, which included $400, allowed him as inspector of the customs. In 1832, he charged his compensation under the law; but in the 4th quarter of that year he claimed the difference between $400 and $1,095 a year, from the 30th of June, 1822, to the 31st of December, 1832, *being $7,297 $\frac{50}{100}$, for ten years and six months. This claim was, before the commencement of this suit, presented to the accounting officers of the treasury for their examination, and was disallowed. On the foregoing evidence the counsel for the defendant prayed the court to instruct the jury as follows: That the 18th section of the Act of Congress, passed on the 7th of May, 1822, farther to establish the compensation of the officers of the customs, etc., was not intended to operate, and ought not to be construed as operating, so as to limit the salary or compensation of any district officer, which may by distinct and independent appointment be vested in the person of one holding at the same time the separate office of collector, surveyor, or naval officer; and that such limitation applies only to cases where the collector, surveyor, or naval officer is called to perform services in any other office or capacity, in virtue of, and as an incident to his office; not to any case where either of those officers was appointed to and executed the duties of another separate office, whilst collector, surveyor, or naval officer."

"If, therefore, the defendant was appointed to, and held and exercised the office of inspector of customs, at the same time as that of collector of Michilimackinac, such office of inspector was not within the purview of the 18th section of the said Act.

"Which instruction the court refused to give."

127*] *In the above statement of the claim of the plaintiff in error there is an apparent confusion in terms, which it may be proper here to mention, although its elucidation is not deemed essential to the decision of this case. Thus, it is said that the plaintiff in error was, in March, 1818, commissioned by the President, collector for the district of Michilimackinac, and inspector of the revenue for the port thereof, which offices he held by successive commissions until the 15th January, 1883. In the next place it is stated that the plaintiff in error was, on the 1st of April, 1819, appointed by the Secretary of the Treasury inspector of the customs for that port, which latter office he also continued to hold under this appointment until the 15th of January, 1833.

If by these two statements a distinction is designed between the office of inspector of the revenue and that of inspector of the customs, this court can perceive no warrant for any such distinction, but must regard the terms used as properly applicable to those inspectors or agents who, by the 21st section of the Revenue Law of March 2, 1799, are authorized, together with weighers, gaugers and measurers, to be employed by the collectors, with the approbation of the officer at the head of the Treasury Department.

Again, regarding as we do the place of inspector, alleged to have been conferred by each of the appointments spoken of by the plaintiff, to be the same in character and objects as provided in the Statutes, there would be a manifest irregularity in an attempt to refer its origin and commencement to different sources of creation, and thus to cover the same duties and obligations, and for the same period of time, under the guise of distinct and separate commissions.

The foundation of the claim preferred by the plaintiff in error, rests on the position that the offices of collector and surveyor are separate and different in their character, and in the powers and duties allotted to each; and that under his separate commission, and in the discharge of his separate and appropriate duties, each officer is entitled to his separate and appropriate compensation.

Let us examine this proposition; nay, let it, as a general proposition, be conceded; the inquiry will still remain, how far the concession will sustain the claim of the plaintiff in the present instance.

It is undeniably true, that the Act of Congress of March 2d. 1799, 1 Stat. at L. 642, creates and enumerates separately the different offices of collector, naval officer, surveyor of the port, inspector, weigher, gauger, and measurer, and defines and prescribes the functions and duties of each respectively. And it is clear that in ports or districts in which all these offices *are called into actual exist- [*128
ence, the functions and duties assigned to any one of them are not appropriated, in terms nor by necessary implication, to any of the others; on the contrary, those duties and functions, as distributed by the law appear to be different and in some sense incompatible with their union in the same individual, being in some instances in their nature supervisory, and being designed to ensure the fulfilment of a portion of those duties by others.

But whilst this is the case, there cannot be denied to Congress the power, under circumstances satisfactory to themselves, to blend in the same person or office functions or duties which, under another aspect of facts, they have thought it proper to divide and distribute. This is clearly a question of legislative discre-

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tion, bearing upon views of public necessity or policy; and accordingly we find, that, in view of such policy or necessity, Congress have, by the very same Act of March 2, 1799, materially modified, and to a certain extent contravened, the previous organization prescribed for the collection of the revenue, adapting such modification to the facts or necessities, as they really exist.

Notwithstanding, however, the power must be conceded to Congress to combine in the same officer duties and powers in their nature seemingly incompatible, that power can be conceded to the legislative authority alone and expressly declared, and cannot be implied upon any sound principle of legal interpretation or of public policy. Congress have, it is true, ordained, in certain conjunctures, the union of the duties of collector, naval officer, and surveyor of the port, but under no circumstances have transferred to either of the officers just enumerated the duties of inspector of the customs. This last-named agent, it is said by the Statute, may, with the approbation of the officer at the head of the Treasury Department, be employed by the collector. Under this provision of the Statute the question arises, whether the collector qua collector can, under any circumstances, apart from express legislative direction, become inspector of the customs, or under the authority to employ such an agent can contract with himself to employ himself as such an agent? We are very sure that such a proceeding on the part of the collector is not authorized by the language of the Statute, and we think it not warranted by any sound principle of policy, which on the contrary would inculcate a course tending rather to prevent than to invite to fraud or collusion. The collector therefore is not the inspector virtute officii, nor warranted in employing himself as inspector, nor in assuming the functions, nor in claiming the compensation, allowable to the latter officer.

In the case under consideration, the plaintiff 129*] in error has, by *the accounting officers of the government, been allowed for compensation, as inspector, the sum of $40 per month, until some time in the year 1820; and from the period last mentioned he was, for similar services, allowed the compensation of $3 per diem, until the 1st of July, 1822, from which last period the compensation of the collector was limited by the government, for all extra services, to the sum of $400 per annum, under the 18th section of the Act of May 7, 1822, which declares: "That no collector, surveyor, or naval officer, shall ever receive more than $400 annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law for any services he may perform for the United States in any other office or capacity."

The several allowances made by the government to the plaintiff in error, as inspector of the customs, and received by him in that character, and acquiesced in by both parties, may be regarded as no longer presenting subjects of controversy; but the facts of such allowances. and the acceptance of them, cannot be permitted to control the construction of a public law, nor to influence a claim now asserted under the provisions of that law; much less can they be regarded as affecting the power of Congress to regulate, prospectively, the duties and emoluments of agents created by its authority. When, therefore, the plaintiff in error advances a claim in the character of inspector, he must establish a legal and competent appointment to the office of inspector, and an appropriation to him of the duties and emoluments incident thereto. For these he has appealed to the revenue law of March 2, 1799; but neither in that, nor in any other revenue law, do we perceive, as appertaining to him as collector, the authority and functions of inspector, nor any right to compensation for the services of the latter officer.

With the regard to the allowance of $400 per annum, although accorded to him in settlement as inspector of the customs, it is plain from the language of the Statute of May 7, 1822, sec. 18, that this was intended to provide compensation to the collector, naval officer, and surveyor of the port, for extraordinary services incident to their respective offices, and to them only; and did not embrace the subordinate position of inspector, as to which a different mode and rate of compensation, that is, one graduated by the month or by the day, had been provided. To entitle himself to this latter compensation, the claimant must show himself regularly and exactly in the situation to which the law has allotted it. Upon a consideration of the case, we regard the question properly before us to be this: whether the collector, as such, and in virtue of his office, can claim compensation for services not required by the language of the Statute by which *his duties are pre- [*130 scribed, nor inherently nor regularly appropriate to his office; services which the law has, upon obvious principles of policy, imposed on another and a different agent, subordinate to the collector, the performance of which services it is made the duty of the collector to supervise and enforce. We are of the opinion that the Collector could have no such claim, and therefore decide that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

THE PROPELLER MONTICELLO, John Wilson, Claimant, Appellant, v. GILBERT MOLLISON.

(See S. C. 17 How. 153-156.)

Collision between schooner and propeller—insurance paid no defense in action against wrong doer.

Collision. Where schooner keeps her course when near enough to propeller to be in immediate danger of collision, the propeller held to be in fault, under the circumstances.

That the owner of the sunken vessel has received satisfaction from the insurers, is no defense to the wrong-doer, respondent.

Argued Dec. 19, 1854. Decided Jany. 16, 1855.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

This case was commenced by libel filed in

NOTE.—Measure of damages in collision—see notes, 4 L. ed. U. S. 456; 11 L. ed. U. S. 35. Rules for avoiding collision.—see notes, 35 L. ed. U. S. 453; 41 L. ed. U. S. 1053.

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the District Court of the United States for the Northern District of New York, by Gilbert Mollison, against the propeller Monticello, claiming damages for the loss of the schooner Northwestern and a part of her cargo, in consequence of a collision with the said propeller. The libel alleged that the collision was occasioned by the negligence and unskillful manner in which the propeller was navigated, while the schooner was seaworthy and properly manned and managed. The answer of the claimant denied the negligence, etc., and alleged that the schooner was insured, and that the libelant had been paid the insurance money and could not maintain his suit.

The District Court rendered a decree in favor of the libelant, which decree was affirmed by the Circuit Court, on appeal, and the claimant brought the case to this court.

The case is further stated by the court.

Mr. R. H. Gillett, for the appellant:

1. Under the circumstances, it was the duty of the schooner to have kept on her course.

St. John v. Paine, 10 How. 557; Story on Bailments, sec. 611; Handysyde v. Wilson, 3 Car. & P. 528; 1 Wm. Rob. 475; 3 Hagg. 414; Conk. Adm. 307-309.

2. The propeller had a right to act upon the supposition that the schooner would perform her duty. Williamson v. Barrett, 13 How. 101, 109; St. John v. Paine, 10 How. 557.

3. The propeller being free from fault, is not liable for any consequences to the schooner.

Strout v. Foster, 1 How. 89, 92; Conk. Adm. 29, etc.

4. If the libelant is entitled to recover, he is limited to the damages he has sustained beyond the insurance money he has received; otherwise he would receive double damages for the loss. Fretz v. Bull, 12 How. 466.

Mr. A. P. Grant, for the appellee:

The two vessels were approaching each other from opposite directions, on the same line dead ahead. Each should have ported her helm and passed the other on her larboard hand.

Abbott on Ship. 310; Ang. Law of Car. 2d ed. 657; The Columbine, 2 Wm. Rob. 27; 10 How. 557; Conk. Adm. 306.

Judge Leavitt, in the case of The Atlantic, says: "There can be no doubt of the existence of the rule that it is the duty of vessels, whether propelled by steam or wind, when meeting dead ahead, or nearly so, to port helm and each turn to the right."

Steam vessels are considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on either tack.

Abb. on Ship. 6th ed. 310; Conk. Adm. 306, sec. 3; St. John v. Paine, 10 How. 557.

The collision having been occasioned by the negligence of the propeller, she is liable for all the damages resulting therefrom. Fitzhugh v. The Genesee Chief, 12 How. 443.

Mr. Justice Grier delivered the opinion of the court:

The appellee in this case filed his libel in the District Court for the Northern District of New York, against the steam propeller Monticello, in a cause of collision.

The libel sets forth that the libelant is owner of the schooner Northwestern; that on the 15th of September, 1850, the schooner with a cargo of salt was on her voyage from the port of Oswego, in New York, to the port of Chicago, in Illinois; that about half past eight o'clock in the evening, being about ten or twelve miles from Presque Isle, on Lake Huron, and about six miles from land, and sailing with a fair breeze, on the course of west-northwest (the wind being south-southwest), the sparks from the chimney of the propeller were seen some six miles off. In order to give a "wide berth" to the approaching vessel, the schooner ported her helm and ran her course a point more to the north. That when from four to six miles apart, a bright light was placed in a conspicuous position on the schooner, and the vessel held steadily to her course, so that the approaching propeller might not mistake the course of the schooner. That the propeller exhibited no light, except that occasionally thrown out by the sparks from her chimney. That some time after, the master of the schooner, by close observation, discovered that the propeller was directly forward of the beam of the schooner, close upon her, and steering directly for her. He then hailed the steamboat, and ordered his helm aport, but too late to avoid the collision, which caused the schooner to sink immediately.

The answer admits that the lights of the schooner were seen when five miles off, and states that the steamboat was on a course of east-southeast, and continued on that course for a short time after seeing the light of the schooner; but that, as the schooner appeared "far in shore," in order to give her lake room *the propeller bore away into the lake [*154 about three quarters of a point; and that the collision was occasioned by the fault of the schooner in not keeping her course.

The answer also alleges, as a defense, that the schooner and cargo had been insured and abandoned to the insurers, who accepted the abandonment, and had paid the insurance to the libelant, prior to the filing of the libel.

1. On the first point, as to the party to whom the fault of this collision is to be imputed, we entirely concur with the judgment of the District and Circuit Courts. The testimony of libelant's witnesses is consistent, and connected with the admissions of the answer and of respondent's witnesses, is conclusive to show that the fault was in the steamboat. The master of the steamboat was not on board on that occasion; and the testimony of the mate, who had command, and by whose obliquity of vision, or want of judgment, the steamboat was so dexterously brought into collision with the schooner, attempts to excuse his conduct by a statement of facts disproved by all the other witnesses, and demonstrably incorrect. He admits that he saw the bright light of the schooner five miles off. He asserts that the schooner's light appeared on the starboard bow of the steamer; this is clearly a mistake in his statement of facts, or if true, was occasioned by the steamer turning out of her course.

The theory of mere negligence or inattention will hardly account for this collision. Defendant's witnesses admit that they at one time mistook the bright light of the schooner for the Presque Isle lighthouse; and it is evident

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that, laboring under this delusion, they must have steered directly for the schooner's light, not discovering their mistake till it was too late to remedy it. The night, though dark, had some starlight, by which the land, some six miles off, showed itself above the horizon. With a channel and room to pass as wide as the lake, with the bright light of the schooner full in view for more than twenty minutes before the collision, it cannot be accounted for, except by the hypothesis of the active co-operation of the officers of the steamboat, caused by a delusion, under which they continued to labor in consequence of a reckless inattention to their duty.

It is contended, on behalf of the respondent, that the fault of the collision is to be attributed to the schooner, because she did not keep on her course and leave the steamboat to pass as best she could, according to the rules laid down by this court in the case of St. John v. Paine, 10 How. 557. The answer to this argument is obvious. When the master of the schooner first observed that he was sailing on a line with the steamboat, and ordered his helm to be ported, so as to avoid being on the track of the approaching vessel, they were seven or 155*] eight miles or more apart, *not in the narrow channel, but in the wide lake. There was no immediate danger of collision. The order was one of extreme caution; it did not tend to produce the collision, for when the light of the schooner was first seen, five miles off, the schooner was sailing steadily on her course of northwest by north, making an angle of one point with the course of the steamer, and continued on that course till she was run down and sunk.

The rules laid down by this court for avoiding collision, should be strictly adhered to, so that conflicting orders may not produce the collision instead of avoiding it. But in the present case, when the schooner changed her course, the vessels were in no danger of collision, being many miles apart in an open sea. They had not approached to that point of danger which brings the rules of the admiralty into exercise, and makes their observance necessary in order to avoid a collision. When the steamer first discovered the light of the schooner, she was sailing steadily on the course adopted, and continued to do so, till the collision was produced by the perverse dexterity of the helmsman of the steamboat.

2. The defense set up in the answer, that the libelants have received satisfaction from the insurers, cannot avail the respondent. The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others. This is a doctrine well established at common law and received in courts of equity. See Yates v. Whyte, 4 Bing. N. C. 272; Phill. on Ins. 2163; Abb. on Sh. 318.

It is true, that in courts of common law the injured party alone can sue for a trespass, as the damages are not legally assignable; and if there be an equitable claimant, he can sue only in the name of the injured party; whereas, in admiralty, the person equitably entitled may sue in his own name. But the same reasons why the wrong doer cannot be allowed to set up as a defense the equities between the insurer and insured, equally apply in both courts. The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured party, he cannot be made liable to another suit, at the instance of any merely equitable claimant. If notified of such a claim before payment, he may compel the claimants to interplead; otherwise, in making reparation for a wrong done, he need look no further than to the party injured. If others claim a right to stand in his place, they must intervene in proper time, or lose their recourse to the respondent.

*The insurer may at all times inter- [*156 vene in courts of admiralty, if he has the equitable right to the whole or any part of the damages. Under the 34th rule in admiralty of this court, he may be allowed to intervene, and become the dominus litis, where he can show an abandonment, which divests the original claimant of all interest. See 1 Curtis, 340. Under the 43d rule also he may intervene after decree, and claim the damages recovered, by showing that he is equitably entitled to them. But with all this the respondent has no concern, nor can he defend himself by setting up these equities of others, unless he can show that he has made satisfaction to the party justly entitled to receive the damages.

The judgment of the Circuit Court is therefore affirmed, with costs.

Dissenting, Mr. Justice Daniel:

In the case of the Propeller Monticello v. Mollison, in admiralty, and in those of Clapp v. The City of Providence, and of The Bank of Tennessee v. Horn, I dissent from the opinion and decision of this court; not upon the merits of those cases, but upon the ground of a want of jurisdiction in this court to adjudicate them. The reasons for my objection to the jurisdiction of this court, in cases like those above mentioned, have been so frequently assigned in preceding instances before this court, that a repetition of them on the present occasion, is deemed superfluous. My purpose is simply to maintain my own consistency in adhering to convictions which are in nowise weakened.

Judgment affirmed with costs and interest.

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*THE PRESIDENT, DIRECTORS AND [*157
COMPANY OF THE BANK OF TENNESSEE, Pl'ffs in Er.,

v.

LEWIS B. HORN,

(See S. C. 17 How. 157-160.)

Louisiana insolvent law—effect of, and constitutionality.

By a law of Louisiana all the property of an insolvent petitioner passes to his creditors after the cession to, and acceptance by, the court.

An ambiguous or erroneous description in the schedule will not prevent its so passing.

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After such cession and acceptance, it is not liable to be sold on execution on judgment afterwards obtained by a creditor.

Such state insolvent law constitutional. Peale v. Phipps, 14 How. 368.

Argued Dec. 20, 1854. Decided Jan. 16, 1855.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

This was a petitory action brought by the defendant in error, in the Third Judicial District of the State of Louisiana, to recover a certain tract of land of Bernard and Hare. Bernard and Hare answered that they were tenants of the Bank of Tennessee. They called on the Bank of Tennessee as defendant, and were themselves discharged from the cause. The Bank, after having the cause removed to the United States Circuit Court, answered, claiming title and ownership. Both parties claimed that for many years Peter Corney, Jr., was the undisputed owner and possessor of the property in question, and each party claims that this title of Corney, by virtue of certain proceedings stated in the opinion of the court, became vested completely in himself. After various proceedings, the Circuit Court rendered a judgment in favor of Horn.

The case is further stated by the court.

Messrs. William Dunbar, Stockton and Steele, for the plaintiff in error:

It is not true that this property was ever at any time in the possession of the Second District Court of New Orleans, or of any one of its officers, or of the syndic, or of all of the creditors, or of any one of them. The property was not described in the schedule of property which Corney surrendered to his creditors. It was not described in any order of the court, made at any time either before or after the marshal's seizure.

In the case of Bauduc's Syndics v. Nicholson, 4 La. 85, the Supreme Court of Louisiana, in delivering their opinion about property, which had been placed by the insolvent upon his schedule, but which was seized by Nicholson, the United States Marshal, before the syndic took possession, say: "It was not in possession of an officer of the court. No seizure had been made of it."

See, also, Erwin v. Lowry, 7 How. 180; Dupuy v. Bemiss, 2 La. Ann. 509; Suydam et al. v. Brodnax et al. 14 Pet. 74, 75; Wiswall v. Samson's Lessee, 14 How. 52; Peale v. Phipps, 14 How. 372.

The following are all the decisions of the Supreme Court of Louisiana, which have been made upon the Act of 1826, with reference to this particular subject:

Muse, Syndic v. Yarborough, 11 La. 530; Levy v. Jacobs et al. 12 La. 112; Baldwin v. Union Ins. Co. 2 Rob. 133; Dwight's Syndic v. Smith, 9 Rob. 32; West v. His Creditors, 8 Rob. 128; Lawrence's Syndic v. Guice, 9 Rob. 223; Rivas et al. v. Humstock, 2 Rob. 191, 194; Smalley v. His Creditors, 3 La. Ann. 387.

Mr. Louis Janin, for the defendant in error:

Under the Act of 1826, all the property of the insolvent became vested in his creditors, and in their syndic, who represents them. Dwight v. Simon, 4 La. Ann. 493, and cases there cited.

It is not charged that Corney intended to conceal or misrepresent his property, and if such had been the fact, it could not prejudice the rights of creditors. For the purposes of this case it would be quite immaterial whether the property was put upon the schedule or not. This is a familiar point in the jurisprudence of Louisiana.

"All the property of the debtor is presumed to be entered on the schedule, because he is to swear that it is; and if any has been omitted, it is clear it does not belong to the debtor, but passes to the creditors by the cession."

Muse Syndic v. Yarborough, 11 La. 521.

Mr. Chief Justice Taney delivered the opinion of the court:

The facts in this case, as they appear on the record, are as follows:

Peter Corney, Jr., who resided in New Orleans, on the 7th of November, 1851, filed a petition under the Insolvent Law of Louisiana, in the second District Court, declaring his inability to meet his engagements, and praying that a cession of his property might be accepted by the court for the benefit of his creditors, and that in the meantime all proceedings against him should be stayed. To this petition a schedule of his property *was annexed, [*160 in which it was apparent that the lot in question was intended to be included, but which is so erroneously described that it can hardly be identified by the schedule alone, as a part of his estate.

The District Court, on the day the petition was presented, accepted the cession, and ordered a meeting of the creditors on the 13th of December following. The meeting was held accordingly, and a syndic appointed, and a report of the proceedings made to the court. On the 8th of March following, the court authorized a sale of the property now in dispute, by the syndic; and at that sale, in May, 1852, the defendant in error became the purchaser.

The insolvent, at the time of his petition, was indebted to the Bank (the plaintiff in error) in a large sum of money, for which a suit was then pending in the Circuit Court of the United States for the Eastern District of Louisiana. The Bank proceeded in its suit and obtained judgment; but the judgment was rendered after the cession had been accepted and the syndic appointed by the creditors. The Bank, however, issued an execution, under which this property was seized by the marshal, in February, 1852, and sold in the April following. The Bank was the purchaser at this sale, and obtained possession of the lot under it.

The defendant in error, after his purchase from the syndic, brought suit for the premises, and upon a trial in the Circuit Court of the United States for the Eastern District of Louisiana, recovered a judgment; the court being of opinion that the property in question vested in the creditors, upon the cession and acceptance above mentioned, and was not liable to seizure under the execution which issued upon the judgment afterwards obtained by the plaintiff in error.

By an Act of the Legislature of Louisiana, passed March 29, 1826, all the property of an insolvent petitioner mentioned in his schedule is fully vested in his creditors from and after

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the cession and acceptance; and the syndic is directed to take possession of it, and to administer and sell it, for the benefit of the creditors. At the time, therefore, when the Bank obtained judgment against Corney, the insolvent, he had no interest in the lot in question upon which the judgment could be a lien, or which could be seized upon, on execution issuing on that judgment. The right and title to it had, by operation of the law of the State, vested in the creditors, to be administered by the syndic as their trustee.

Nor can the imperfect or erroneous description in the schedule have any influence on the decision. For it is well settled by the decisions of the courts of Louisiana, that all the property of the insolvent, whether included in his 161*] schedule or not, passes to his *creditors by the cession. 4 Ann. Rep. 492, 493; 11 La. 521; 8 Rob. 128; 9 Rob. 223. Consequently, if, under the ambiguous or erroneous description in the schedule, this lot must be regarded as omitted, it still passed by the cession, and Corney had no remaining interest in it.

Neither can there be any constitutional objection to this law of the State. The validity of a state law of this description has been fully recognized in the case of Peale v. Phipps, 14 How. 368, and in the previous cases therein referred to, and cannot now be considered as an open question,

We see no error, therefore, in the judgment of the Circuit Court, and it must be affirmed.

Affirmed with costs.

Dissenting, Mr. Justice Daniel.

THE CITY OF PROVIDENCE,
Plaintiff in Error,
v.
DANIEL R. CLAPP.

(See S. C. 17 How. 161-170.)

Rhode Island—sidewalks unsafe from snow—liability for.

In Rhode Island, by law, all highways within any town are required to be kept in repair, so as to be safe and convenient, at the expense of the town, under direction of the surveyors of highways, who are also authorized, when any highway is encumbered with snow, to cause so much thereof to be removed or trod down as will render the road passable. The town is made liable for any neglect to keep the highway in repair, to all persons injured thereby.

This Act applies to cities as well as towns, and to sidewalks, when they are part of the highway.

The rule of responsibility, whether the obstruction be by snow or by any other material, is the removal or abatement, so as to render the highway, street or sidewalk at all times safe and convenient, regard being had to its locality and uses.

No distinction, in this respect, exists between obstructions by falls of snow and those of any other description.

Argued Dec. 28, 1854. Decided Jan'y 16, 1855.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

This action was commenced by Clapp, in the Circuit Court of the United States for the District of Rhode Island, against the plaintiff in error, claiming damages for an injury sustained from a fall occasioned by the ice and snow, and other obstructions which had accumulated and been suffered to remain upon the sidewalk of a street in the City of Providence.

The plaintiff in error pleaded the general issue.

Upon the trial below, the jury rendered a verdict in favor of the plaintiff. Judgment was entered, and the defendant brought the case to this court by writ of error.

Mr. Samuel Ames, for plaintiff in error:

First. The duty of the towns and cities of Rhode Island, in dealing with falls of snow in their highways and streets, is created and imposed solely by the Statutes of Rhode Island, and must be measured by the standard appointed by those Statutes.

Second. The liability of said towns and cities, in civil actions, to individuals for injuries sustained by them in their person or property, through neglect of duty on the part of said towns and cities, in mending their highways and streets, and in removing therefrom permanent obstacles to passage, as well as temporary ones caused by the falls of snow, is created and imposed solely by said statutes, and cannot be extended beyond the Statute measure thereof.

Russell v. Inhabitants of Devon, 2 T. R. 667; Mower v. Inhabitants of Leicester, 9 Mass. 247; Loker v. Inhabitants of Brookline, 13 Pick, 346; Tisdale v. Inhabitants of Norton, 8 Met. 388; Holman v. Inhabitants of Townsend, 13 Met. 297, 300; Brailey v. Southborough, 6 Cush. 141,

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NOTE.—Liability of municipal corporations for ice on streets or sidewalks,—see notes, 21 L.R.A. 263; 58 L.R.A. 321.

The common law obligation to repair highways. In England the inhabitants of the several parishes at large are prima facie and of common right bound to repair all highways lying within them. This right is enforceable by indictment against the parish. Rex v. Liverpool, 3 East, 86; Parsons v. St. Matthew's Vestry, L. R. 3 C. P. 56; Rex v. Eastrington, 5 A. & E. 765; Gibson v. Mayor of Preston, L. R. 5 Q. B. 218; Rex v. Great Broughton, 5 Burr. 2700.

This is so unless by prescription the onus can be thrown on particular individuals by reason of their tenure. Rex v. Sheffield, 2 Term, 106. If others, before liable, become unable through insolvency, or if a portion of the parish, bound to repair roads within it, be exempted by statute, the common law liability re-attaches upon the parish. Anon. Raym. 725; Rex v. Oxfordshire, 4 B. & C. 194.

No agreement by the parish with any person for the making of repairs and, no statute imposing that obligation upon others, will exonerate the parish. 1 Vent. 90; Rex v. St. George, Hanover Sq. 3 Camp. 222; Rex v. Scarisbrook, 6 A. & E. 509; Rex v. Neatherthong, 2 B. & A. 179.

If it be intended to charge one part or precinct of the parish to repair all the ways within the parish, it is not enough to allege that they immemorially ought to repair. It must be shown how they are bound, and it should be shown that they have repaired. Vent. 256; 3 Keb. 301; Rex v. Great Broughton, 5 Burr. 2700; Rex v. Sheffield, 2 Term. 111; Rex v. Pendenyn, 2 Term. 513; Rex v. Bridekirk, 11 East, 304; Rex v. Martin, Andr. 276; Rex v. Mile End. Str. 163; Regina v. Scott, 2 Raym. 222; Regina v. Frydden, 10 Eng. L. & Eq. 402.

The parish must, to discharge itself, point out the party liable by special plea. Under a plea of not guilty, it can only show that the road is in repair. Rex v. St. Andrews, 1 Mod. 112; Little Bolton v. Regina, 12 L. J. N. S. C. M. 104; Rex v. Stoughton, 2 Saund. 159.

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142; Hull v. Richmond, 2 Wood & M. 341, 342; Reed v. Inhabitants of Belfast, 20 Maine, 246; Chidsey v. Canton, 17 Conn. 478–480; Morey v. Town of Newfane, 8 Barb. 646, 648, 650–653; Lumley v. Gye, 20 Eng. L. and Eq. 189; Sawyer v. Inh. of Northfield, 7 Cush. 494–496; Smith v. Inh. of Dedham, 8 Cush. 524; Farnum v. Concord, 2 N. H. 392.

Third. That by the Statute of Rhode Island, entitled "An Act for the mending of highways and bridges," the towns and cities of Rhode Island are bound only to keep their highways and streets open, in case of falls of snow, so as to be passable for travelers, and not to keep them from being slippery from ice or trodden-down snow; and the requisition, in this Statute, that the highways and streets be kept safe and convenient for travelers, at all seasons of the year, refers, so far as the incumbrance of snow is concerned, if it refer at all to such incumbrance, to safe and convenient passage through and over the same, in opposition to allowing the highways to remain, in case of falls of snow, blocked up and impeded thereby, so as to be unsafe and inconvenient of passage, and not to safety and convenience, in the sense of being kept free from ice or trodden-down snow, so that foot travelers or cattle may not slip or fall thereon.

This appears, from the language used in the 1st section of said Act, applied to its subject in the climate of New England, as well as by collating therewith the 14th and 15th sections of the same Statute, and the 6th section of the Act entitled "An Act for mending highways," passed in 1798, and the above construction of said Statute is the accustomed sensible, and, indeed, looking to the Statute as a practical guide to duty, the necessary construction to be put thereon.

Digest of Laws of R. I. of 1798, 386, 387; Digest of Laws of R. I. of 1844, pp. 323, 326.

Fourth. The Acts of the State of Rhode Island, relating to the sidewalks of the City of Providence, do not change, in any way, nor extend the duty or liability of said City, in relation to the incumbrance thereon, but were procured to be passed by said City, merely to enable it to provide for the building and maintaining of sidewalks in said City, in a mode and at a charge and through an instrumentality different from those applied by law to other portions of the streets.

Fifth. Still less do the ordinances of said City, requiring the owners and occupants of lots and buildings therein to remove all the snow from the sidewalks in front of the same, within a specified time, under penalty for neglect in this respect, create or extend or change the character of the duty of the City in regard to the incumbrance of snow, nor create nor extend nor change the character of the liability of said City, for injuries occasioned by the said incumbrance.

Levy v. Mayor, etc., of New York, 1 Sandf. N. Y. 465.

Sixth. Said Sidewalk Acts and Ordinances afford no test or standard of the degree or kind of care, or mode of dealing with falls of snow, required of the City of Providence by the Statute of Rhode Island, entitled "An Act for the mending of highways and bridges," which, notwithstanding said Acts and Ordinances, and the different condition of Providence, applies the same standard, in this respect, to the other towns of the State, as to said City; but are municipal regulations, merely extending the power of the City of Providence and by-laws passed by the legislative body of said City, imposing duties and liabilities upon her citizens, in respect to sidewalks, and the removal of snow therefrom, without increasing or extending her own.

Mr. **T. A. Jenckes**, for the defendant in error:

First. The Statute of Rhode Island entitled "An Act for the mending of highways and bridges," imposes upon the towns and cities of that State, the duty of keeping highways in a safe and convenient condition for travelers, at all seasons of the year, and creates a liability on the part of such town or city, to any person using such highway with ordinary and proper care, who suffers injury in consequence of any defect in such highway, or obstruction thereon which the town or city might have removed by the use of ordinary care and diligence, and which, while thus negligently suffered to remain, rendered such highway inconvenient and unsafe.

Cassedy v. Stockbridge, 21 Vt. 391; Frost v. Portland, 11 Me. 271; Bigelow v. Weston, 3 Pick. 267; Raymond v. Lowell, 6 Cush. 534; Springer v. Bowdoinham, 7 Greenl. 442.

Second. This duty and liability extends to sidewalks when they constitute a part of the highway or public streets; and such sidewalks are required to be kept in a safe and convenient condition for pedestrians, as the roadway is for horses and carriages. Brady v. City of Lowell, 3 Cush. 121; Bacon v. City of Boston, 3 Cush. 174; Drake v. City of Lowell, 13 Met. 292.

Also a liability arises of individuals to repair a way from inclosure. If a common way becomes dangerous, incommodious or founderous, the public have a right to go upon the adjacent land, whether it be sown with grain or not. 1 Roll. Abr. 390; Absor v. French, 2 Show. 28; Taylor v. Whitehead, Doug. 749.

Therefore, where the owner of lands, not inclosed, next adjoining the highway, incloses his lands on both sides of it, he is bound to make a perfect good way, as long as the inclosure lasts, and shall not be excused by making it as good as it was before the inclosure, if it were then in any way defective; because by the inclosure, he takes from the people the liberty of going over the lands adjoining the common track. 1 Roll. Abr. 390; Dunscombe's case, Cro. Car. 366; Regina v. Ramsden, 1 Ellis, B. & E. 949; Sid. 464.

If A make a hedge on one side and B on the other, they shall be chargeable by moieties. Sid. 464; 2 Keb. 665.

If there be a hedge, time out of mind, on one side, belonging to A, and B make a hedge on the other side, then B shall be charged with the whole repair. Sid. 464; 2 Keb. 665; 2 Saund. 157.

Where a person has made himself liable to repair the way by inclosures, if he destroys them and again open the way, it seems clear that he will be freed from the repair thereof, and that the burden reverts to the parish. 2 Saund. 160; 1 Burr. 465.

Persons may also be charged with the duty of repairing the highway by prescription; so, also, a corporation aggregate; a particular district or division of a parish, the highways within its limits; one parish the highway in another parish. 13 Rep. 33; Rex v. St. Giles, Cambridge, 5 M. & S. 260; Reg. v. Blakemore, 9 En. L. & Eq. 541; Rex v. Liverpool, 3 East, 86; Rex v. Stratford-upon-Avon, 14 East, 348; Rex v. Machynlleth, 2 B. & C. 166; Rex v. G. & B. Ry. Co. 9 C. & P. 469; Rex v. Bish. of Auckland, 1 A. & E. 749; 12 Mod. 409; Rex v. Inhab. of Ecclesfield, 1 Barn. & Ald. 348.

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Third. The degree of convenience and safety which is required by said Statute, and the degree of care and diligence which the towns and cities must bestow upon the highways, in order to relieve themselves from liability under the statute requirement, have relation to the nature and uses of the highway, and the frequency of its uses. The same standard is not to be applied to the principal thoroughfares of the City of Providence, as to a cross road in the country; but the law as to the extent of repair, and what will constitute obstructions rendering a public way unsafe and inconvenient, must depend in a good degree on the locality of the road.

Fourth. The law is the same, when applied to obstructions of highways or sidewalks by snow, as to any other obstruction, and the duties and liabilities of towns and cities in reference to the want of safety and convenience in their highways, caused by snow, as when caused by other obstructions.

The latter clause of the 1st section of the Statute does not vary or limit the duty imposed by the first clause, but is directory to the surveyor of highways in the performance of his duty; and the word "passable" means safely and conveniently passable, as well when applied to sidewalks, as to the other portions of the traveled highway.

Loker v. Brookline, 13 Pick. 343.

Fifth. The several Statutes of Rhode Island, concerning sidewalks in the City of Providence, authorize the construction of sidewalks in said City, and such sidewalks being constructed and accepted by the City under the authority of said Act, it becomes the duty of said City to keep said sidewalks in a safe and convenient condition for pedestrians, at all seasons of the year. Whenever a fall of snow shall render any such sidewalk not conveniently safe and passable, the City is bound to use ordinary care and diligence to restore the sidewalk to a reasonably safe and convenient state. The statute referring generally to all highways and all parts of such highways, points out the two modes: one of removing the snow, and the other of treading it down for the purpose of rendering such highways safe and convenient, and the City of Providence, by their ordinances, have prescribed a rule for themselves and their citizens, by directing a removal of the snow from the sidewalks, and have provided for the enforcement of this rule by their officers, and by penalties on the owners and occupants of estates.

Sixth. That the public statute contemplates a removal of the snow in same cases, and a treading down in others, is manifest from the nature of the obstruction itself; it being an obstruction to travelers with sleds and sleighs, only when drifted when lying light, and subject to drift; as when trod down it generally facilitates all traveling with vehicles adapted to the altered conditions of the road. But snow, under all conditions, is an obstruction to the pedestrian, and his safety and convenience are best provided for by an entire removal of it from his path. Hence the obligation to make the pathway set apart for such travelers safe and convenient in a large city, and along one of its principal thoroughfares, is not satisfied by leaving the snow to be trod down as it fell in *drifts, or* to be thawed and frozen into ridges of several inches in height, in such a manner as to throw down pedestrians using ordinary care and caution, although the sidewalk might be passable in the sense that the snow was to be waded through or climbed over, or otherwise avoided by such travelers.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Rhode Island.

The suit was brought in the court below against the City of Providence, to recover damages for an injury occasioned by an obstruction on the sidewalk in one of its principal streets. The obstruction consisted of a ridge of hard-trodden snow and ice on the center of the sidewalk, along which the plaintiff was passing in the night time, and by means of which he fell across the ridge, breaking his thigh bone in an oblique direction.

After the evidence closed, the counsel for the defendants *prayed the court to charge [*166 the jury that the Statutes of Rhode Island, requiring highways to be kept in repair, and amended from time to time, so that the same may be safe and convenient for travelers at all seasons of the year, as far as respected obstructions from falls of snow, merely required that the snow should be trodden down or removed, so that the highways should not be blocked up or incumbered with snow; but did not require that said highways should be free from snow or ice, so that the traveler should not be in danger of slipping thereon; and that the said snow being so trodden down and hardened into ice, and the sidewalk not blocked up or incumbered therewith, but open and passable in the sense of the Statute, in this case the defendants were not liable.

The counsel for the defendants, also, after referring to the Statutes authorizing the City of Providence to build and repair sidewalks, and also to the ordinances of the City passed in pursuance thereof, further prayed the court to charge, that neither the said Statutes nor the Ordinances defined or enlarged the duty or liability of the City as to the removal of snow from the sidewalks, beyond that under the General Statute of the State; nor were they evidence of the degree of care required of the City by the General Statute; but that, notwithstanding the same, the City would not be liable under the general law, if the snow on the sidewalk was trodden down so as to be open and passable.

The court refused so to charge, but charged, that, by the statute law of the State, the City was obliged to keep this street conveniently and safely passable at all seasons of the year; that, by a special Act, the Legislature having authorized the City to have sidewalks designed for foot passengers, it was bound to keep those sidewalks convenient and safe for pedestrians; that the law did not require absolute convenience or safety, but safety and convenience in a reasonable degree, having reference to the uses of the way and frequency of its uses; that when a fall of snow takes place, so as to render a sidewalk not conveniently and safely passable, it was the duty of the City to use ordinary care and diligence to restore it to a

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reasonably safe and convenient state. That the law does not prescribe how this shall be done, whether by treading down or removing the snow; and that it was for the jury to find, as matter of fact, whether the sidewalk, at the time in question, was in a reasonably safe and convenient state, having reference to its uses; and if it was not so, whether its want of safety and convenience was owing to the want of ordinary care and diligence on the part of the City; and in considering whether due diligence required the City to remove the snow, the jury ought to take into consideration the ordinances, not as prescribing a rule binding on the City, 167*] but as *evidence of the fact that a removal, and not a treading down of the snow, was reasonably necessary.

The 1st section of the Statute of Rhode Island concerning highways and bridges, provides, "that all highways, townways and causeways, etc., lying and being within the bounds of any town, shall be kept in repair and amended from time to time, so that the same may be safe and convenient for travelers, with their teams, etc.," at all seasons of the year, at the proper charge and expense of such town, under the care and direction of the surveyor or surveyors of highways appointed by law. The surveyors are then authorized to remove all sorts of obstructions or things that shall in any way straiten, hinder, or incommode any highway or townway, and when blocked up or incumbered with snow, they shall cause so much thereof to be removed or trod down as will render the road passable.

Among other provisions conferring upon the towns power to repair and amend the public highways, the 4th section enacts that each town, at some public meeting of the electors, shall vote and raise such sum of money, to be expended in labor and materials of the highways, as they may deem necessary for that purpose; and either the assessors or the town council, as the town may direct, shall assess the same on the ratable estate of the inhabitants, and all others owing ratable property therein, as other town taxes are by law assessed.

And the 13th section provides that if the town shall neglect to keep in good repair its highways and bridges, she shall be liable to indictment, and "shall also be liable to all persons who may in anywise suffer injury to their persons or property by reason of any such neglect.

It is admitted that the defendants are not liable for the injury complained of at common law, but that the plaintiff must bring the case within the above Statute to sustain the action. It must also be admitted that the Act applies to cities as well as towns, and also to sidewalks where they constitute a part of public highway. This has been repeatedly held by the state courts in several states, under statutes substantially like the one under consideration. 13 Pick. 343; 13 Metc. 297; 3 Cush. 121, 174; 4 Cush. 247; 6 Cush. 141, 524; 7 Greenl. 442; 15 Vt. 708; 19 Vt. 470; 21 Vt. 391; 2 N. H. 392; 35 Me. 100; Me. 242.

The counsel for the defendants conceding this view of the Statute, and of the liability of the city generally, contends that, as it respects obstructions or impediments occasioned by the fall of snow and accumulations of ice, the liability is qualified, and exists only in case of neglect to tread down or remove the snow, so that the track be not blocked up and incumbered thereby; and that, if the street or sidewalk is passable by not being *blocked [*168 up and incumbered with snow, as it respects this kind of obstruction, it is made safe and convenient within the meaning of the Statute. And the latter clause of the 1st section of the Act which directs that when the highways are blocked up or incumbered with snow, the surveyor shall cause so much thereof to be removed or trod down as will render the road passable; and also the 13th and 14th sections, which authorize the towns to impose penalties for the removal of snow from highways, and subjects the town to an indictment for neglect therein, are referred to as countenancing this modified liability.

But it will be found, on looking into the several decisions under a similar Act in Massachusetts, that no distinction exists between obstructions of a public highway by falls of snow, and those of any other description. In the case of Loker v. Brookline, 13 Pick. 346, 347, Morton, J., speaking of the first section of the Statute, observes, that language so general and explicit cannot be misunderstood or restrained. It must extend to all kinds of defects, as well as to all seasons of the year; and an obstruction caused by snow is as clearly included as one caused by flood, or tempest, or any other source of injury. See, also, 13 Metc. 297; 6 Cush. 141.

The foundation of the action rests mainly on the 1st and 13th sections of the Statute. The 1st imposes upon the town the duty of keeping in repair and amending the highways within its limits, so that the same may be safe and convenient for travelers at all seasons of the year; and the 13th declares, that if the towns shall neglect to keep in good repair its highways and bridges, it shall be liable to indictment, and shall also "be liable to all persons who may in any wise suffer injury to their persons or property by reason of any such neglect."

The other provisions, and among them those referred to by the counsel, relate to the powers conferred upon the towns to enable them to fulfill the obligations enjoined, and to the powers and duties of the several officers having charge of the repairs of the highways. Ample means are furnished the several towns to discharge their obligations under the Statute.

The Act of 1821, amended by the Act of 1841, confers powers upon the City of Providence, to build and keep in repair their sidewalks, at the expense of the owners of the adjoining lots; and as may be seen from the several ordinances of the City, given in evidence, these powers have been liberally exercised for the purpose.

The powers of the towns and of the City are as ample for the purpose of removing obstructions from the highways, streets and sidewalks, arising from falls of snow and accumulation of ice, as those arising from any other cause; and the reason for *the removal, [*169 so that they may be safe and convenient for travelers. is the same in the one case as in the others. The 13th section of the Act, which gives the personal remedy, makes no distinc-

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tion in the two cases; and, in the absence of some plain distinction pointed out by the Statute, it would be exceedingly difficult, if not impossible, to state one. It is conceded that an obstruction from falls of snow or accumulations of ice must be removed by the towns and cities, so as to make the highways and streets passable; and that this is a duty expressly enjoined upon them. The question is, what sort or removal will satisfy the requirement of the Statute? It is admitted that, as it respects every other species of obstruction, the repairs must be such that the highways and streets may be safe and convenient for travelers; and that this is a question of fact to be determined by the jury. Is an obstruction by snow or ice to be determined by any other rule or any other tribunal? The counsel for the defendants suggests, that as it respects such safety and convenience for travelers in case of falls of snow, the Statute should be construed as meaning merely that the snow should be trodden down or removed, as that the highways and streets should not be so blocked up or incumbered as not to be safely and conveniently open and passable. But it is quite clear that this would be a very indefinite and uncertain rule to guide either the officers, whose duty it is to remove these obstructions, or the jury in passing upon them when the subject of legal proceedings. The suggestion may be very well as an argument to the jury, for the purpose of satisfying them that the repairs in the manner mentioned were such as to fulfill the requirement of the Statute, but to lay it down as a rule of law in the terms stated, might in many cases, and under the circumstances, fall far short of it.

The treading down of snow, when it falls in great depth, or in case of drifts, so that the highway or street shall not be blocked up or incumbered, may in some sense, and for the time being, have the effect to remove the obstruction; but as it respects the sidewalks and their uses, this remedy would be, at best, temporary; and, in case of rains or extreme changes of weather, would have the effect to increase rather than remove it. It is but common observation, and knowledge of those familiar with the climate of our northern latitudes, that not unfrequently the most serious obstructions arise from the great depth of snow and changes in the temperature of the weather; and that simply treading down the snow, and leaving it in that condition without further attention, would have the effect to render the highways and sidewalks utterly impassable.

In the case also of obstructions from snow, 170*] the sidewalks may *frequently require its removal, as to make a safe and convenient passage for the pedestrian, when, at the same time, the treading of it down in the street would answer the purpose for the traveler with his team. The nature and extent of the repairs must necessarily depend upon their location and uses; those thronged with travelers may require much greater attention than others less frequented.

The just rule of responsibility, and the one, we think, prescribed by the Statute, whether the obstruction be by snow or by any other material, is the removal or abatement so as to *render the highway, street or* sidewalk, at all times safe and convenient, regard being had to its locality and uses.

We are satisfied the ruling of the court below was correct, and that the judgment should be affirmed.

Dissenting, Mr. Justice Daniel.

Affirmed with costs and interest.

THE UNITED STATES, Appts.,

v.

DANIEL W. COXE et al.

(See S. C. 17 How. 41-43.)

Former decisions affirmed.

This case cannot be distinguished from the case of United States v. King, 7 How. 833, and of United States v. Turner's Heirs, 11 How. 663, and its decision follows those cases.

Argued Jan. 3, 1855. Decided Jan'y 18, 1855.

APPEAL from the District Court of the United States for the Eastern District of Louisiana.

This action was commenced in the United States District Court for the Eastern District of Louisiana, sitting in chancery, by D. W. Coxe and others, against the United States, for the purpose of establishing their title to, and to recover from the United States, certain land claimed by them under a Spanish grant.

Their claim was derived from the "Maison Rouge grant" which has heretofore been fully considered by this court in the case of The U. S. v. King, etc., 3 How. 773 and 7 How. 833. For the history of said "Maison Rouge grant" and the facts involved, see these reports.

The United States pleaded the general issue, and after various proceedings in the District Court a rule was entered, submitting certain issues to the jury, and after the solution of these issues, judgment was rendered for the plaintiffs.

The United States appealed from this judgment to this court.

Mr. C. Cushing, Attorney-General, for the appellant:

Without a particular statement of the law or the evidence of this case, it is supposed that it will be sufficient to state that the claim alleged by the petitioners was derived solely from the same "Maison Rouge grant," which has heretofore been fully considered and decided by this court, in the case of U. S. v. King, etc., reported in 3 How. 773 and 7 How. 833.

This court having finally adjudged that the grant conveyed no private right or property to the said Maison Rouge, and the petitioners claiming from him as the proprietors, in virtue of said grant, it must follow that the decrees in favor of the petitioners are erroneous, and ought to be reversed.

Mr. Richard S. Coxe, for the appellee, contended—

That because of various imperfections in the record, it ought not to be made a basis of a reversal of the judgment below.

Barton v. Wells, 5 Wharton, 225; Sampson

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v. Commonwealth, 5 Watts & S. 385; Munderback v. Lutz, 14 Serg. & R. 220; Powers v. David, 6 Ala. 9; Kirby v. Wood, 4 Shep. 81, 16 Me.; Simpson v. Wilson, 11 Shep. 437, 26 Me.; St. Louis P. Ins. Co. v. Cohen, 9 Mo. 416; Smith v. Kernochen, 7 How. 198.

The decision in 7 How. was restricted to the consideration of the construction given to one single paper taken by itself, without any other connection in any other part of the evidence. P. 847.

The question between the United States and the defendant is whether, according to the Spanish laws, at that time in force in the province of Louisiana, the instrument of writing dated 1797, pass the title to the lands described in the figurative plan of Trudeau to the Marquis de Maison Rouge as his private property.

In regard to the judgment of this court upon this point thus stated to be decided, we have not a word to say. We are precluded from arguing it. We submit with respect and deference to the judgment then pronounced.

In doing so, however, we are authorized by the language of the same court to say:

1. That we are now in a court of equity, and not of strict common law—a system unknown in Louisiana.

2. We are now entitled to the right, if not of showing that by such a document as that bearing date in June, 1797, a title did not pass to the Marquis de Maison Rouge, as his private property, according to the laws of Spain; yet that, in conformity with the established usages of the Spanish government, it did.

3. That if the preceding position is denied, we have still the right to show that, under the circumstances now brought to the notice of this court, sitting as a court of equity, we are warranted in making it the foundation of an argument in favor of the present title of the appellees, wholly unaffected by any previous decision or even dictum of this court, of an adverse character.

That usage will be allowed to operate effectively in the construction of even the largest contracts, either between individuals or between the government and individuals, cannot, I presume, admit of doubt.

U. S. v. Arredondo, 6 Pet. 714; 2 Pet. 657; Davey v. Turner, 1 Dall. 11; 6 Pet. 715; Smith v. The U. S. 10 Pet. 326, 330, 331.

The question whether or not a usage exists, is a question of fact for the consideration of the jury, and not of law for the court. After it has once been recognized by judicial decisions, it becomes incorporated into the law, and need not again be proved.

Consequa v. Willings, Pet. C. C. 231; 7 Cr. 506; 7 Pet. 128.

Mr. Chief Justice Taney delivered the opinion of the court:

43*] *This case cannot be distinguished from the case of U. S. v. King et al. 7 How. 833, and of U. S. v. Turner's Heirs, 11 How. 663.

The decree of the District Court must therefore be reversed, and a mandate issued to the court below to dismiss the petition.

Decree reversed and cause remanded with directions to dismiss.

*FERDINAND CLARK, Appellant, [*315
v.
BENJAMIN C. CLARK and William H. G. Hackett.

(See S. C. 17 How. 315-322.)

Bankruptcy—what property passes to assignee—sale by assignee to bankrupt, where fraudulent claims concealed, and afterwards recovered by bankrupt, belong to his creditors, and may be recovered after discharge—creditor's bill for himself and other creditors—within what time.

Claim of bankrupt, for unlawful seizure of property, passes to his assignee in bankruptcy, and is subject to his creditors.

Where the assignee in bankruptcy sold all the bankrupt's rights of property at auction for $2, the bankrupt bidding, but ordering the title to be made to his sister, who relinquished to him the next day by formal deed; held that a claim against Mexico for the unlawful seizure of a cargo, of which, and its great value, the assignee, was ignorant, and information of which was withheld by the bankrupt from such assignee, he reporting that the assets were of no value when sold, but which was afterwards recovered to a large amount, did not pass by such sale, but still might be reached by the creditors, and that the purchase by bankrupt was fraudulent.

Although the bankrupt and his future acquisitions are discharged from all his debts by the certificate of bankruptcy, yet the rights of property which vested in his assignee, are still subject to his creditors, and the money arising therefrom is held in trust for them.

The assignee having died, the creditor can file a bill and detain the fund for the creditors generally.

That the creditor had not proved his debt, and made himself a party to the proceedings in bankruptcy, is immaterial.

The 8th section of the bankrupt law, which requires the action to be brought within two years, does not apply; but if it does, the action having been brought within thirty days after the claim was awarded, was in time.

APPEAL from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington.

This suit was instituted in the Circuit Court for the District of Columbia, under the 8th sec. of the Act of March 3, 1849, to carry into effect certain stipulations in the Treaty of Guadaloupe, 9 Stat. 394, which authorized any person claiming any part of any award made by the Board of Commissioners, created by said Act, after giving proper notice to the Secretary of the Treasury, to file a bill for relief and injunction in the said court, the fund to remain in the Treasury to await the decision of the court.

The original claimant, B. C. Clark, and the other parties who came into the cause by petitions and bills (with the exception of the assignee in bankruptcy, founded the action on certain judgments they had obtained against the appellants in the year 1841, in the Superior Court in the City of New York.

Clark, the appellant, on the 7th day of December, 1844, obtained a discharge in bankruptcy in the District Court of the United States for the District of New Hampshire. This discharge was alleged by the appellees to be fraudulent. The original bill prayed an injunction, commanding Ferdinand Clark not to receive the award upon his Mexican claim, and also prayed that such assignee as should

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be appointed by the Bankrupt Court, should have leave to come in and make himself a party to this bill, and that the amount of said award be decreed to be applied in payment pro rata of the debts due by said Ferdinand Clark at the time of his bankruptcy.

After various proceedings the Circuit Court decreed that the fund in controversy should be paid over to the complainant, William H. G. Hackett, the assignee in bankruptcy of Ferdinand Clark, for distribution in the Bankrupt Court, to wit: The District Court of the United States for the District of New Hampshire, according to the respective rights of the creditors of the said bankrupt.

The case is further stated by the court.

Mr. A. H. Lawrence, for the appellant, maintained:

1. That B. C. Clark, the complainant in the original bill, had no standing in court at all, he being a mere general creditor at the time of bankruptcy of the appellant, and his debt having been discharged by the bankruptcy and proceedings thereon.

2. That there was no privity between B. C. Clark (who had never made himself a party to the bankrupt proceedings at all) and the assignee in bankruptcy; but that Hackett, the assignee, must stand upon his own compliance with the 8th section of the Act of 3d March, 1849, or else fall.

3. That the Circuit Court of the District of Columbia had no jurisdiction in this case, except that conferred by the said 8th section. The fund was in the Treasury of the United States, and the parties were non-residents. Inasmuch as Hackett, the assignee, had not given the bond nor filed the notice specified in said 8th section, upon which the jurisdiction of the court was to attach, the bill should have been dismissed.

4. That by the sale and conveyance of the bankrupt's effects, the appellant became the lawful owner of the Mexican claim, and was entitled to prosecute it for his own benefit, and in his own name.

5. That the proceedings in bankruptcy were perfectly regular, and authorized the sale and conveyance.

It is submitted that Clark, the bankrupt, had no official relation to that sale after his discharge in bankruptcy. His personal connection with the assignee and with the bankrupt's estate ceased.

The courts have not gone farther on the subject of the constructive fraud than to look to an official legal relation.

6. That if said proceedings were not regular, yet, as all the assets were in fact offered for sale, and in fact sold by the assignee, and a bill of sale of all the assets, with the schedules annexed, was given to R. M. Clark, and under this sale the appellant claims: and as no effort was made in Bankrupt Court to have the matter corrected, for the space of two years, this action is barred by the limitation of the 8th sec. of the bankrupt law. 5 Stat. at L. 446.

7. That if not barred by the limitation, the proceedings of the Bankrupt Court cannot be impeached in another court in a collateral proceeding. Thompson v. Tolmie, 2 Pet. 157.

8. That the present assignee is estopped from denying the title of the purchaser at the sale of his predecessor, on the mere ground of the informality in the official proceedings.

9. That the complainants never having proved any debt in the Bankrupt Court, although having had notice by letter, until after the sale, and never having filed any objections to the bankrupt's discharge, or made any effort in the Bankrupt Court to set aside the sale, cannot now call upon a court of equity, to interfere and remedy the consequences of their own negligence.

Messrs. Reverdy Johnson and J. M. Carlisle, for the appellees, contended that the bankrupt was the real purchaser, and that even if the sale could be sustained as to a third person, it was void as to him, and that the fund remained to be distributed in bankruptcy.

They relied upon the principles stated in the case of Michoud v. Girod, 4 How. 552, and cases there cited, and 1 Story, Eq. Jur. 321, 322, as applicable to the alleged purchases by the bankrupt.

They contested all the points stated in the appellant's brief, and maintained that the decree ought to be affirmed, as well upon the general principles of equitable relief as under the special Act of March 3d, 1849.

Mr. Justice Catron delivered the opinion of the court:

Ferdinand Clark applied for the benefit of the bankrupt law, and filed a schedule of his debts, and another of his property and rights of property. Pursuant to the latter schedule, the assignee in bankruptcy sold all Clark's interest in the property, and rights of the property at auction, for the sum of $2, Clark himself bidding at the sale, but ordering the title to be made by the assignee to his (Clark's) sister, who relinquished to him by a formal deed on the next day. By virtue of this purchase Clark claims to be bona fide owner of all the property, and rights of property he had given in or indicated on his schedule.

The bill alleges that the claim against the Republic of Mexico, *for an unlawful [*319 seizure of the cargo or a vessel owned by the bankrupt, called The Louisiana (the proceeds of which are in dispute), was not described in any manner to make the same available to Clark's creditors; nor was any such information or evidences of the claim put into possession of the assignee as would enable him to recover it, but that all the information and evidences were fraudulently withheld by said bankrupt, and that his assets and effects generally were so described in his schedule that the assignee was ignorant of their true value, and in fact reported to the court that the same could not be sold; and that because of this fraud the sale was void.

This allegation is put in issue by the answer, and was sustained by the Circuit Court, which ordered the moneys awarded to Clark by the commissioners, acting under our Treaty of Peace with Mexico, to be paid over to the assignee in bankruptcy, and distributed by him among the bankrupt's creditors. From this decree Clark appealed.

If the right of property to the claim for indemnity was concealed so that the assets were sold for a nominal amount, and to Clark himself in the name of his sister, then Clark's

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purchase was fraudulent, and the decree below, setting aside the purchase, was proper. This is the rule prescribed by the 4th section of the bankrupt law: and which rule would be enforced by the general principles governing a court of equity, independently of the bankrupt law.

In his first schedule, the bankrupt did not mention the claim against the Republic of Mexico, but in an amendment filed in December, 1844, after he had received his discharge, this claim is alluded to in connection with others, as follows:

"United States government of Americia" claim
Spanish government, do.
Buenos Ayres government, do.
Mexican Republic subject to a mortgage."

This statement gave no information that the bankrupt claimed remuneration against the government of Mexico for an illegal seizure of the cargo of the schooner Louisiana. The proof is that Clark was prosecuting this claim before he applied for the benefit of the bankrupt law, which was in January, 1843, and relied on its ultimate recognition and payment through commissioners acting under treaties with Mexico. He continued to pursue the claim, steadily and earnestly, up to the time it was allowed in 1851, when there was awarded to him $86,-786 29/100

Clark's letters to Mr. Caustin, his agent in Washington, who prosecuted the claim, show, as does the deposition of Mr. Caustin 320*] *also, that in December, 1844, when the amended schedule was filed, the bankrupt had a right to expect ultimate success, and did rely on it with much confidence. Clark's papers and correspondence were extensive in regard to the matter, and which must have been concealed from the assignee in bankruptcy, or he would not have reported the assets as of no value in 1845, when they were sold.

From the obscurity of the schedule, and the concealment of the evidences of a right of property from the assignee and the creditors, we feel satisfied that the bankrupt intended to rid himself of his debts, and to secure to himself the effects in dispute by contrivance, and that part of the contrivance was a purchase in the name of his sister, for his own benefit.

Some minor objections to the decree below have been raised, which it is proper to notice.

First, it is insisted that the Circuit Court of the District of Columbia had no jurisdiction of the parties under the Act of March 3, 1849, sec. 8, to carry into effect our Treaty with Mexico of 1848. The 8th section provides that in all cases arising under the Act, where any person or persons other than those in whose favor the award was made, claimed the money awarded, should within thirty days after the date of the award notify the Secretary of the Treasury of his intention to contest the payment of the money to the party to whom it was awarded, and file with the district attorney a bond, etc., then the money should be retained in the Treasury, subject to legal investigation in the courts of justice; and the party claiming the fund might file his bill in the Circuit Court in the District of Columbia, which should have jurisdiction to determine the right of property. In this instance the award was made on the 15th day of April, 1851, and on the 15th day of May following, Benj. C. Clark, of Boston, a judgment creditor, filed his bill in the Circuit Court claiming the fund awarded to Ferdinand Clark, and gave the notice and bond required by the Act of 1849, sec. 8.

This was a creditor's bill, on behalf of the complainant and all other creditors of the bankrupt, and which alleged that the complainant had reason to believe the assignee, Palmer, was dead, and invites him, if living, or any subsequent assignee that might be appointed, to come in, etc. It was ascertained that Palmer was dead, and Hackett was appointed successor to Palmer, May 19, 1851, and on the 30th day of that month made himself a party to Benj. C. Clark's bill, by petition in the nature of an original bill. Other creditors came in likewise, but all of them after the thirty days had expired.

It is insisted that Benj. C. Clark, as a general creditor of the bankrupt, had no standing in court, his debt having been discharged *by the certificate of bankruptcy. Sec- [*321 ond, that Clark had never made himself a party to the bankrupt proceedings, by proving his debt, and therefore Hackett must stand on his own bill, and cannot connect himself with that of Clark.

3d. "That the Circuit Court of the District of Columbia had no jurisdiction in this case, except that conferred by said 8th section. The fund was in the Treasury of the United States, and the parties were non-residents. Inasmuch as Hackett, the assignee, had not given the bond nor filed the notice specified in said 8th section, upon which the jurisdiction of the court was, to attach, the bill should have been dismissed."

The bankrupt is personally discharged from his debts, and so are his future acquisitions, but the property and rights of property which vested in the assignee are subject to the creditors of the bankrupt, as they were liable in his hands before he applied for the benefit of the Act; and the money in controversy was held in trust for the creditors, in whatsoever hands it was found. Benjamin C. Clark was a cestui que trust, and the Treasury a stakeholder between Ferdinand Clark and his creditors; Palmer, the assignee, had died, and there being no trustee, the creditor had a right to file a bill and detain the fund for the creditors generally, to be administered by an assignee subsequently appointed by the Bankrupt Court.

The circumstance that Benjamin C. Clark has not proved his debt, and made himself a party to the proceedings in bankruptcy, is immaterial; the proof that debts were owing by Ferdinand Clark can be made at such times as the Bankrupt Court may prescribe by its rules and orders; and we are not aware that any objection can be interposed to reject Benjamin C. Clark's claim in the Bankrupt Court of New Hampshire. All the creditors seem to be in the same condition, no one having proved his debt. Benjamin C. Clark having the right to sue and detain the fund in the Treasury, Hackett could properly come in, and make himself a party to the proceeding.

It is also insisted that this action is barred by the 8th section of the Bankrupt Law, which provides that no suit shall be maintainable against any person claiming an adverse interest

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touching property or rights of property, surrendered by the bankrupt unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of action shall first have accrued.

The interest adversely claimed, and which the statute protects, if not sued for within two years, is an interest in a claimant other than the bankrupt; but supposing that Ferdinand Clark had been placed in that condition, as to the fund in the Treasury, by his pretended purchase of his own assets, yet as no cause of 322*] *action accrued to the assignee in bankruptcy against Clark, until he got possession of the money, and as he never held the fund adversely, it follows that the Act does not apply; but if it did, the fund had no existence till the award was made, which was only thirty days before the suit was brought. We order that the decree of the Circuit Court be affirmed.

Affirmed with costs.

WILLIAM FONTAIN, Appellant,
v.
WILLIAM RAVENEL.

(See S. C. 17 How. 369–399.)

Will—construction of—lapsed devise.

A person who had so lived in the two States of Pennsylvania and South Carolina, that his domicil might be claimed in either, died in Philadelphia in May, 1829, where his will was made and published, in April preceding his death, in which he declared himself to be of the City of Philadelphia.

By the residuary clause in said will "his executors or the survivor of them, after the decease of his said wife, was authorized to dispose of the property for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind."

His said wife and three others were appointed executors—she survived her co-executors some years and then died. No appointment was made or attempted to be made during the lifetime of the executors.

Held, that the devise lapsed, and the residuary property descended to the testator's heirs.

Argued Dec. 22, 1854. Decided Jan. 18, 1855.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

"The bill is filed in the name of the complainant by certain charitable societies of Pennsylvania and South Carolina, under the directions of the will, to recover from the defendant, as executor of Mrs. Kohne, so much of the property as came to her hands as the executrix of her husband's will, and which she distributed as undisposed-of property after the death of her co-executors. And the question in the case is, whether the residuary bequest in the will, which authorized his executors or the survivor of them, after the death of his wife, to dispose of the surplus for the use of such charitable institutions in Pennsylvania and South Carolina as they might deem most beneficial to mankind, 'has lapsed,' no such appointment having been made or attempted to be made during the lifetime of the executors."

See opinion of the court, in which appears a full statement of the case.

The bill having been dismissed in the court below, the case is now here on appeal.

Messrs. **Edward Hopper, Eli K. Price, and E. M. Meredith,** for appellant:

As to domicil. An intention to make a place his home, will determine the domicil. Greier v. O'Daniel, 1 Binn. 349. See opinion of Judge Rush, in a note, page 351.

If the surviving executrix has rightfully distributed among the next of kin, nothing more is to be said. If not, the administratrix is entitled.

Row v. Dawson, 1 Ves. Sen. 331; Ferran's Estate, 1 Ashmead, 319; Marshall v. Hoff, 1 Watts, 440; Act 1834; Executors and Administrators, Dunlap Pa. Dig. 524. The property here is held to abide the event of this suit.

The right of the administrator is exclusive. Com. v. Strohecker, opinion of Kennedy, J., 9 Watts, 480.

Will took effect in 1829, by which the personal estate became vested in the executors, and by reason of the power of sale in the will and our Act of Assembly, March 31, 1792, sec. 4 (3 Smith's Laws, 67), the title to the real estate became vested in them upon the trusts of the will; that is, to pay the legacies and annuities and invest for accumulation the surplus until the death of the widow, and then to distribute the surplus in charity.

The descent was broken. Silverthorn v. McKinsler, 2 Jones, 72.

The administrator is empowered to sell the real estate the same as the executor.

Act February 24th, 1834, sec. 13, 67 Dunlap, 518, 530, and Act of March 12th, 1800, sec. 3; 3 Smith, 434, Mr. Binney's opinion; Hood on Executors, 241.

The objects are not very extensive or difficult of attainment. They are incorporated institutes of the two States for the purposes of charity; some of which are for the relief of colored people, and do not include beneficial society. Blenon's Estate, Brightley, 340.

It is a settled principle that a trust shall never fail for want of a trustee. And the courts of equity will take upon themselves the execution of the trust.

2 Story's Eq., secs. 1059, 1061, 1191.

The administrator with the will annexed, is the trustee for the settlement of the estate, and under the direction of the Orphans' Court, the trust can be executed by him. He will have the personalty, etc., and can sell and get the proceeds of realty.

This power is in the Orphans' Court, Act 1832, sec. 4; Wimmer's Appeal, 1 Whart. 103, 104.

The personalty is under control of that court (Orphans' Court), and the moneys may be paid into that court for the uses of the estate. Act 34, sec. 19. It was so done in Tilghman's Estate, 5 Wheat. 44.

These provisions meet ordinary cases.

But here as in Engand the courts will go

NOTE.—What is a charity. Bequests valid for charitable purposes and those not. See note to Vidal v. Girard, 11 L. ed. U. S. 205.

Devise to trustees for charitable uses and to unincorporated associations. Validity of particular devises and bequests. Uncertain, vague, or indefinite legacies invalid. Validity of charitable endowments not governed by statute 4 Eliz. Ch. 4. Devise to U. S. void. When misnomer or misdescription of beneficiary will not invalidate. See *note to Inglis v. Trustees Sailor's Snug Harbor, 7 L. ed. U. S. 617.*

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farther in favor of charities, than in ordinary cases. Our law favors charitable uses.

Constitution of Penn. 1776 and of 1790; Girard Will case, 4 Rawle, 323; Acts 1730-31, Purd. 1010; 7 Sm. Laws, 43, 44.

Had the executors refused, they could have been compelled to execute the trust. It should not be lost by accident.

Pott's Petition, Ashmead, 346; see Welford Eq. Pl. 110, (Lib. Law and Eq.), as to information of Attorney-General.

The court will assume the exercise of the discretion to ascertain the objects where they are much less defined than here, and where the executor intrusted, died in the lifetime of the testator.

Boyle on Charities, 220; Bax v. Whitbread, 16 Ves. 15, see pp. 26, 27; Cole v. Wade, 16 Ves. 43; Brown v. Higgs, 8 Ves. 570; Moggridge v. Thackwell, 1 Ves. 464; 7 Ves. 36; affirmed, 13 Ves. 416.

The court could regulate and control the exercise of the discretion by the executor; and if so, when he cannot exercise it all, may it not do so for him?

Grandom's Estate, 6 W. & S. 551; Waldo v. Caley, 16 Ves. 210, 211.

Here the objects have not failed, and there is no occasion to resort to the doctrine of cy pres, or the royal prerogative.

The only question is, whether the court or administrator can select from the designated objects. If either can, then the trust is to be executed as if the executors had lived; or if either cannot, then all the charitable institutions incorporated by the two States must take.

In White v. White, 1 Bro. Ch. Cas. 12, the testator bequeathed to the Lying-in Hospital, and if more than one, to such of them as the executor should appoint, and named no executor. The court is to appoint.

A bequest to a charitable school to purchase Bibles, Testaments, and other religious books, held, not too indefinite. This directed a religious purpose which was sufficiently certain.

So here there is at least a definite purpose as to the objects in respect to the colored population besides the definitiveness of the charitable institutions of Pennsylvania and South Carolina, which define the objects to be the purposes for which these institutions have been established.

Orphan Asylum v. McCartee, 9 Cow. 440; King v. Woodhull, 3 Edw's Ch. 87.

A bequest is good where it is made to a class, as of such a parent, or to such of them and in such shares as an executor may appoint.

Bartlett v. King, 12 Mass. 541; Brown v. Higgs, 8 Ves. Jr. 570, 574.

It is not the case of a mere power, but of a trust accompanied by a power. In such case the trust is imperative and may be enforced; and is not lost by the refusal of the trustee to exercise his power, or by his death.

2 Sug. Pow. 173, 175, etc.

There is nothing in the will that looks to the charity ending upon any condition or contingency. The will gives not the property over in any event.

He gives to the next of kin all that he intends that they shall have, and means that they shall have no more.

As our law stood in 1829, the executor of the surviving executor would have taken the personalty, and administered it; or an administrator with the will annexed would have done so, and have also exercised the power to sell the lands and administer the proceeds. Act 1800, 3 Sm. Laws, 434, sec. 3.

The testator is presumed to have known the law of the place where the will was to be executed, and he is presumed to have known that the law provided a substitute for his executors to carry out the trust.

There was no condition, the breach of which would give the property to the next of kin, as in Porter's case, 1 Co. 21.

It was a trust and confidence, which the court will carry out, if the trustee faileth, as in Martindale v. Martin, Cites Cro. Eliz. 288.

And not only a trust, but a charity, "which never faileth," and not vague or indefinite, or to incorporated societies.

In Martindale v. Martin, Cites Cro. Eliza. 288, the executors refused the trusts, but it was held binding on them. See 7 Vt. 299, 300.

If the intention to give a charity be declared absolutely, and nothing is left uncertain but the mode of carrying it into effect, the court will supply the mode.

Mills v. Farmer, 1 Meriv. 54, 94, 101, 102.

Thus in that case the testator directed the residue to be divided for certain charitable purposes mentioned, "and other charitable purposes as I do intend to name hereafter," and afterwards named no further purposes. Held, a disposition in favor of charity, to be carried into execution by the court, having regard to the objects particularly pointed out by the will. Ib. 54.

There the objects pointed out were the promoting of the gospel in foreign parts, and the bringing up of ministers in different seminaries in England.

Here all the objects are pointed out, to wit: the charitable institutions of the two States, so as to include a benefit to part of the black population. Here is nothing to be supplied, but a leave given to select some only of those institutions.

Bequests made to two corporate bodies, for the relief of certain classes of poor persons, by paying their rents, and giving them gratuities according to selection. The societies renounced the legacies. Yet held that the discretion of the trustees was not of the essence of the trust, and that the court would carry the trust into effect by a scheme.

Reeve v. Atty.-Gen. 3 Hare, 191.

Where bequests are made to trustees for general charitable purposes, the trust must be the subject of a scheme before the master; but where the object is a charity without a trust interposed, the disposition is in the crown, and must be made according to the directions under the royal sign-manual.

Paice v. Archbishop of Canterbury, 14 Ves. 364, 371, 372.

This is not a case that in England would come under the King's sign-manual, but within the jurisdiction of chancery, as a trust. It does not depend upon the crown prerogative for its execution, but upon the law of the land. Boyle on Charities, ch. 14, p. 237, etc.

1827. In Pennsylvania, the law is settled in

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favor of charities far enough to sustain the present bequests.

In Whitman v. Lex, 17 Serg. & Rawle, 91, 92, it was decided that all that was contained in 43 Eliz., and more, was contained in the common law of Pennsylvania, though it was not then supposed, as afterwards found in the case of Sarah Zane's will, and of Vidal v. Girard's Executors, 4 Rawle, 323, that at the common law of England, the same breadth of law existed in favor of charity.

And the cases are there cited as authoritative here, where there was no trustee to take, but the court decreed the bequest a devise to corporations for the charitable objects pointed out. Ib. 92.

It is there said that so much more liberal is our system in favor of bequests, though not strictly charitable, that our courts would have no difficulty in ruling in favor of the legatee. Ib. 63; Morice v. Bishop of Durham, 2 Ves.; 399.

The bequest in 9 Ves. was for benevolent, not charitable purposes. Here, it is for charitable purposes only; for it is to go to charitable institutions for the purposes of their creation.

1829. In McGirr v. Aaron, 1 Pa. 49, there was no trustee at all that could take for the purpose of charity, but the devise was sustained and to become vested as soon as the charity should acquire a capacity to take.

Here there was a trustee until all the executors died, and the administrator de bonis non cum testamento annexo is the substituted trustee.

In the same year, the U. S. Supreme Court, in Beatty v. Kurtze, sustained the dedication of a lot for the Lutheran Church in Georgetown, without any deed, grantee, or trustee. 2 Pet. 566–583. And a committee of the congregation was held sufficient to maintain the bill. 584.

A trust may be created by will, to bind the title of the heir or personal representative, and make him a trustee, where no other is named.

Inglis v. Sailors' Snug Harbor, 3 Pet. 119.

But here were trustees named, and trustees who had no object to defeat the trust, though they had a selection within a limited range.

Id.; also, Malim v. Keighley, 2 Ves. Jr. 335.

1832. A trust in favor of an unincorporated religious society is an available one.

Meth. Ch. v. Remington, 1 Watts, 218.

1833. The case of Magill v. Brown, so elaborately discussed by Judge Baldwin, covers all this case. Brightley, 346.

Devises and bequests to unincorporated meetings of friends were held good; for the relief of poor members; of the Indians; inclosing a graveyard; purchasing a fire apparatus.

Charities are left free for the exercise of the jurisdiction of the courts, according to the intention of the testator, disregarding defects of form or designation of a party to take, and a devise to the church is transferred to the parson where the church cannot take in mortmain. Or if it be to the poor who cannot take, then to the hospital, which could, as in McGirr v. Aaron, from the priest, who could not take, to the congregation, when authorized. Brightley, 386.

The cases in which these principles were applied were before the 43 Eliz. on prior statutes or the common law. Ib. 387, 393.

Though there be none to take, the heirs and next of kin are bound. Ib. 407.

The administrator is the trustee, and this court will make the distribution to the legatees. Ib. 408, 409.

1836. Martin v. McCord was decided in Supreme Court. Charities are sustained. 5 Watts, 495.

1843. A devise to an association for religious purposes, unincorporated at the testator's bequest, but since incorporated, is good in Pennsylvania. Zimmerman v. Anders, 6 W. & S. 218.

1844. In Vidal v. The City of Phil., Girard Will, 2 How. 127, it was held that although the corporation had been incompetent to take, the heir could not take advantage of such inability, but the State only in its sovereign capacity.

At the common law of England and in Penn., such a trust would be sustained without a trustee. 2 How. 192. See cases in Binney's argument, Girard Will case, 176.

We are neither dependent upon the Statute, 43 Eliz. or the common law prerogative to sustain such a charity. 2 How. 195.

The general and undefined charities were sustained before the Statute 43 Eliz. by the inherent power of chancery at common law. Ib. 196.

And the law of the preceding cases is the law of S. C. Atty-Gen. v. Jolly, 1 Rich. Eq. 99.

1848—Beaver v. Filson, 8 Pa. St. 327, 335. A lot dedicated for a church and graveyard without deed and trustee, held a valid and charitable use. Wright v. Linn, 9 Pa. St. 435, etc. 437.

1850. Where a tenant for life has power of disposition by will with two subscribing witnesses, and disposes by will to a charity without witnesses, the devise will be sustained in favor of charity, though it would not in favor of an individual not for charity.

Pepper's Will, 1 Pars. Eq. Cas. 436, 450, 451.

Othe states.—4 Kent's Com. 6th ed. 509, note—where there is a trust for charitable purposes, the disposition is in chancery and not by the King under sign-manual.

The power to enforce charities is in the court of chancery, by virtue of the original constitution independent of the Statute of 43 Eliz.

Wright v. Trustees Meth. Ep. Ch. 1 Hoff. Ch. 202, 260; Dutch Ch. v. Mott, 7 Paige, 77.

Burr v. Smith, 7 Vt. 241, 294, 298, 396, 307, cites Atty-Gen. v. Hickman (where trustees died before testator), 308.

King v. Woodhull, 3 Edw. Ch. 79.

The jurisdiction rests upon the ground that such charities are trusts. 1 Sandf. Ch. 439.

Trusts for charitable uses are favored by courts of equity, and will be supported in the exercise of the extraordinary jurisdiction of the Chancellor, where the trusts would fail for uncertainty, were it not a charity.

The trust would be sustained, though there be no person in being capable of suing for the enforcement of the trust.

Dickson v. Montgomery, 1 Swan. (Tenn.), 348."

Messrs. J. L. Pettigru and B. Garhard, for appellee:

We shall endeavor to show:

1. The law of ordinary or of private trusts, and its difference from that of charitable trusts.

2. The cy pres doctrine of the English

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chancery; and in connection herewith, the impossibility of executing this trust as a charity, in any other way than by an application of the property under the sign-manual; and incidentally, it will be inquired, whether this trust is a charity within the Statute of 43 Eliz., which Statute defines the charities of the English law, though it did not originate the doctrine of charities, as recognized by that system of jurisprudence.

3. That the cy pres doctrine of the English Court of Chancery, has not been adopted in Pennsylvania, South Carolina or the other States of the Union, either as a part of the common law or as an inherent power of a court of chancery; and herein of the law of charitable trusts in the United States generally, but particularly in the States of Pennsylvania and South Carolina, and the whole of the difference between that law and the doctrine of private trusts; and incidentally, the impossibility of sustaining the case for the plaintiff under the law of charitable or private trusts in the United States, and particularly in either of the States just mentioned or in any other way than under the cy pres doctrine.

4. That the doctrine of powers, or the Pennsylvania Statutes in relation to executors and administrators, are entirely inapplicable to the present case.

5. That if a bequest or devise, like the present, fails or becomes void, it is like an ordinary lapsed legacy, and the next of kin or heirs at law will take the bequest or devise."

1. Ordinary or private trusts must be in every particular certain; certain as to the words creating the trust; certain as respects the subject matter of the trust; and certain as regards the objects or persons to be benefited by the trust. If this last is uncertain, there is a trust, but as there is no specified object, the trust fails. That this certainty is required is proved by the following cases:

Malim v. Keighley, 2 Ves. Jr. 333, 529; Lucas v. Lockhart, 10 Sm. & M. 466; Jackson v. Jackson, 2 Barr. 212; Atty-Gen. v. Hall, Fitzg. 314; Strange v. Barnard, 2 Brown, Ch. 586; Tibbits v. Tibbits, 19 Ves. 656; Briggs v. Penny, 8 Eng. L. & Eq. 231; Inglis v. Trustees S. S. Harbor, 3 Pet. 99; Erickson v. Willard, 1 N. H. 217; Harrison v. Harrison's Adm'r, 2 Gratt. 1.

There is only one kind of trust which the laws of England have excluded from the doctrines governing ordinary or private trusts.

The exception is the trust for technical charities.

In England, a technical charity is one defined in the law as a charity. If a technical charity is clearly intended in a trust, the object of the charity may be uncertain; yet chancery will, on account of the charitable intention, when clearly manifested, carry out that intention by executing or causing to be executed the charitable trust for some charitable object as near as may be (cy pres) to the object proposed by the donor. This may be done by the exercise of the royal prerogative which is vested in the crown as parens patriæ through the Chancellor, or by the direct application of this prerogative by the sovereign under the sign-manual.

2. This case is not a charity within the Statute of 43 Eliz. ch. 4.

If the bequest of Mr. Kohne be compared with the twenty-one objects there specified, it will be seen that it cannot be included within any of them; his bequest is to such "charitable institutions of Pennsylvania and South Carolina," as his executors shall "deem most beneficial to mankind," but a desire to benefit mankind is not so much indicative of charity as of benevolence, and it has been expressly decided in England that this is not sufficient to support a trust as a charity.

Olmaney v. Butcher, 1 Turner & R. 260; Chittenden v. Chittenden, 1 Am. Law Reg. 542.

But supposing this to be a charitable trust, it does not belong to that class of cases which would be executed cy pres under the extraordinary powers of the Lord Chancellor representing the person of his sovereign, but must be executed by the sovereign personally under the sign-manual.

Taking the law of charities in England as it existed at the time that the American Colonies became independent States, or even as it exists now, it would even be found a nice question to determine whether a trust for charity, which would be void as an ordinary trust, should be executed under the extraordinary powers of the Lord Chancellor by means of a scheme or by the sovereign personally under the sign-manual.

Atty.-Gen. v. Hickman, 2 Eq. Cas. Abr. 193; White v. White, 1 Brown Ch. 12; Atty.-Gen. v. Bolton, 3 Anstr. 820; Mills v. Farmer, 1 Mer. 55; Hayter v. Trego, 5 Rus. 113; Atty. Gen. v. Earl of Lonsdale, 1 Simons, 105; Atty.-Gen. v. Coopers' Co., 19 Ves. 187; Moggridge v. Thackwell, 1 Ves. Jr. 464; S. C. 7 Ves. Jr. 36; Story's Com. on Eq. Vol. II. sec. 1190; Atty.-Gen. v. Syderfen, 1 Vern. 224; Atty.-Gen. v. Baxter, 1 Vern. 248; Atty.-Gen. v. Matthews, 2 Lev. 167; The King v. Lady Portington, 1 Salk. 162.

3. The cy pres doctrine of English chancery has not been adopted in Pennsylvania, South Carolina or other States of the Union, either as a part of the common law or as an inherent power of a court of equity.

Our forefathers incorporated with our jurisprudence so much of the common law as accords with the alteration from a monarchy to a republic, and the cy pres principle could not have been admitted into our law. There being no king there can be no such prerogative.

If the power claimed for our laws exists, it will be found defined in our federal or state constitutions, and it will be easy to ascertain how much, if any, of this enormous power was really vested in the State.

No such power can be claimed for the executors in the constitution of the State of Pennsylvania.

By the words of the constitution, our tribunals have "the care of the person and the estates of those who are non compos mentis, and the Legislature may vest in the said courts such other powers to grant relief in equity as shall be found necessary." The Legislature of Pennsylvania has repeatedly exercised the power thus granted; but no cy pres doctrine can be found in any of its enactments. This ought to be conclusive, as it is direct negative proof; and as the power is an extraordinary one, it should be positively declared.

Again, we submit that the cy pres principle is entirely beyond the reach of proper execution by a state without an established religion.

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One large class of cases to which it is applied in Great Britain, "superstitious uses," as they are termed in the English law, is taken away by universal religious toleration; for a "superstitious use" is one which has for its object the propagation of the rights of a religion not tolerated by law.

Boyle on Charity, 242; M. E. Church v. Remington, 1 Watts, 224; Miller v. Lerch, 1 Wall. Jr. 215; Andrew v. N. Y. Bible and Com. Prayer Book Soc. 4 Sand. 156.

The appellant's counsel, however, contend that his case can be sustained under the doctrine of private or ordinary trusts; and under this head they assert that our courts will exercise the discretion in regard to the beneficial objects of a trust in the cases where those objects are much less certain than in the present instance. Nay, more, it is claimed that as the courts should control the discretion of the trustees in cases like the present, therefore they could act for the trustees where they did not act.

As they have not cited any precedents to sustain these assertions, we presume it is not necessary to do more than deny their correctness, and call for the proof of them. We do not find them in the book, and they are contrary to the whole tenor of the decisions upon the subject.

4. This is not the case of a power, but of a trust, and consequently does not fall within the law of powers. And if it were a power, this would not help the complainant; for it is a general rule, that although equity will aid the defective execution of a power, it will not supply a non-execution.

Robinson v. Smith, 6 Madd. Ch. 195; Brown v. Higgs, 4 Ves. 708; Lacey v. Philcox, 5 Jur. 453; S. C. Burrough v. Philcox, 5 Myl. & Cr. 73; Collins v. Carlisle's Heirs, 7 B. Mon. 14; Emery v. Judge of Probate, 7 N. H. 142; McKonkey's Appeal, 1 Harris, 253; Cathey v. Cathey, 9 Humph. 470; Maddison v. Andrews, 1 Ves. Sen. 57.

The personal discretion conferred on a trustee or donee of a power cannot be enforced by the court.

Meggison v. Moore, 2 Ves. Jr. 630.

Where a discretion is vested in trustees which they are not to exercise until a certain specified time, and they all die before that time arrives, the trust will fail.

Ray v. Adams, 3 Myl. & K. 237.

5. If a bequest or devise like the present fails or becomes void, it is like an ordinary lapsed legacy, and the next of kin or heirs at law will take the bequest or devise.

This position requires no proof, and is only submitted as a corollary to the preceding points in this brief, with a few citations from the numerous and uncontradicted authorities which sustain it.

Morice v. Bishop of Durham, 9 Ves. 399; James v. Allen, 3 Mer. 17; Buttler v. Onmaney, 4 Russ. 70; Atty-Gen. v. Sibthorp, 2 Russ. & M. 107; Ellis v. Selby, 7 Sim. Ch. 352, 392; 1 Myl. & Cr. 286; M. E. Church v. Remington, 1 Watts, 226.

Reply by counsel for appellant:

1. We think it very clear that the domicil of testator was in Pennsylvania, and of course the law of Pennsylvania is to govern in the construction of his will, except so far as regards any real estate which he had elsewhere.

Story's Confl. of Laws, sec. 47.

2. The provision here is "to such charitable institutions in Pennsylvania and South Carolina as the executors or the survivor of them may deem most beneficial to mankind, and so that part of the colored population in each of said States may partake of the benefit thereof."

Charitable institutions mean institutions incorporated for charitable purposes.

Blenon's Estate, Brightly, 338.

3. This disposition for the benefit of charitable institutions was a lawful disposition, and one which would be supported by the courts in England and Pennsylvania, and, it is believed, in South Carolina. The difficulty in treating questions of this kind is in avoiding a tedious repetition of things already familiar to the court. Since the decision of Vidal v. The City of Phil. 2 How. 127, the principle may be considered established, that the Statute of Elizabeth neither created nor enlarged the rule governing charitable bequests. The Statute itself does not purport to have done so, but merely to give an additional remedy. And it was established, in the case referred to, that from the earliest times, chancery had, in an unbroken course of precedents, constantly exercised jurisdiction over charities, and had supported them. It is enough to say that such a gift as this is perfectly valid; for which we refer to the cases stated in the original brief of the appellants, and in the brief of the appellee. The court will understand how far this principle is carried out in Pennsylvania; by what is said in Witman v. Lex, 17 S. & R. 93, that court would have found no difficulty in ruling in favor of the legatee in Morice v. Durham, 9 Ves. 399. There, the bequest was for the purposes of benevolence and liberality. In Beaver v. Filson, 8 Barr, 327, it is said: "In Pennsylvania, religious and charitable institutions have always been favored, without respect to forms, and it is immaterial how vague and uncertain the object may be, provided there be a discretionary power vested somewhere over the application of the testator's bounty to these objects." It is utterly impossible seriously to deny that this bequest is just as good in Pennsylvania as it would be in England, and that is perfectly valid in both.

4. We take it to be equally clear, that this is a case in which, in England, the court would itself superintend the proper application of the fund, and that it is not a case in which the crown, as parens patriæ, would administer it. And it is a case in which the courts of Pennsylvania, we contend, would have ample power to prevent a failure of the trust. But we are not to conclude that the courts of this country have no jurisdiction over charities, because in England the King is said to have a general superintending power over them. The question here is, whether, in this country, the Court of Chancery would superintend the execution of the trust. We conceive it to be so clear that it would, that we do not think it necessary to enter on the argument, that even if the disposition in this case would belong to the crown, the State would have the prerogative of the parens patriæ.

See 2 Sto. Eq. sec. 1190; Wright v. Methodist Church, 1 Hoff. Ch. 202; Going v. Emery, 16 Pick. 107; 2 Kent, 5th ed. 288, n. a; 4 Id. 508, n. b.; King v. Woodhull, 3 Edw. Ch. 79,

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The case of The Attorney-General v. Berryman, 1 Dickens, 168, can have but little application here. In that case, there appears to have been no controversy. Lord Hardwick decided that the legacy was good, and suggested that the King be applied to, who required that the Atty.-Gen. move the Court of Chancery to apply the money to such purposes as the deceased executor had named in his lifetime.

The Chancellor so ordered it. There appears to have been no contest, and no argument in the case upon the point in question.

The case of The Attorney-General v. Baxter, 1 Vernon, 248, has been strangely misunderstood by the learned counsel for the appellees. The King did, in that case, undertake to apply the money, and declared his pleasure to be that it should go toward the building of Chelsea College; but the Lord Keeper ultimately disregarded the act of the Crown, and decreed the fund for the maintenance of a chaplain of Chelsea College, as the report of the case in Vernon shows.

The authorities cited in the appellant's first brief, it is not necessary to report. Lord Eldon, in Moggridge v. Thackwell, 7 Ves. 86, makes a critical examination of all the previous authorities, and finds himself bound, by the precedents for two hundred years, to arrive at the conclusion which he states. In that case, which was precisely for the present purpose, this case, he affirms the authority of the court itself to administer the charity, and proceeded accordingly to do so. The only difference between Moggridge v. Thackwell and the present case is, that in the former the devise was for objects not defined, as they are in this case.

In our first brief, when it is stated that it is not necessary to resort to the doctrine of cy pres, the context sufficiently shows that the phrase "cy pres" is used, as it frequently has been, to express the principle by which, when the objects designated by the testator have failed, by reason of illegality or otherwise, the fund has been applied to purposes different from those which he expressed or intended. In this sense, the phrase is used in all our Pennsylvania cases, in which the doctrine of cy pres is disclaimed. Thus, in Witman v. Lex, 17 Serg. & R. 93, where the doctrine of cy pres is disclaimed, the Chief Justice uses this emphatic language: "At the common law of England these bequests could not be sustained, even where there is no uncertainty as to the person. If the bequest be of a trust not defined with reasonable certainty, it will fail; for it is clear the testator did not intend that the trustee should have the beneficial interest. Such a bequest, however, would take effect under the 43 Eliz. ch. 4; and this has driven the counsel to argue against the extension of that statute to this country a point that must be conceded. But we consider the principles which chancery has adopted in the application of its principles to particular cases as obtaining here, not indeed by force of the statute, but as part of our own common law; and there the object is defined and we are not restrained by the inadequacy of the instrument which we are compelled to employ nearly, if not altogether. We give relief to the extent that *chancery does in England; and this part of our system has been produced by causes* which work as powerfully here as did those which produce the system of relief that sprung from the statute of charitable uses. The simplicity which marked the lives of our forefathers, enabled them to do without many institutions that in the present state of society are absolutely indispensable. Incorporations were wholly unknown; yet to all sorts of pious and charitable associations in every part of the province, valuable bequests were made by those who were ignorant of the niceties of expression necessary to accomplish the object at the common law, and who were not impressed with the opinion that it was at all necessary to consult counsel. Of this, the will of the celebrated Dr. Franklin, which contains a bequest of money, to be loaned for five years to young mechanics, is a striking instance. Yet such bequests have hitherto taken effect, without a question as to their validity. There are few worshiping congregations, of any pretensions to antiquity, who have not derived a part of their property from testamentary donations, that would have failed on the principles of the English common law. Nothing was more frequent than bequests to unincorporated congregations without the intervention of trustees; and even when there was a corporation, it frequently happened that the corporate designation was mistaken, or the trust vaguely defined; notwithstanding which, the testator's bounty was uniformly applied to its objects. Surely a usage of such early origin and extensive application, may claim the sanction of a law resting as it does on the basis of our own laws of domestic origin—the legislation of common consent."

See, also Wright v. Linn, 9 Barr, 433; Martin v. McCord, 5 Watts, 493; Morrison v. Beirer, 2 Watts & Serg. 87; Burton's Compend. 420; Pickering v. Shotwell, 10 Barr. 26; Mills v. Farmer, 1 Meriv. 54.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in chancery, from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case involves the construction of the will of Frederick Kohne. He first settled in Charleston, South Carolina, where he engaged in active business and accumulated a large fortune. For many years before his death, his residence was divided between Charleston and Philadelphia. At the latter place he added much to his wealth, in the acquisition of real and personal property. He had furnished houses in both cities, and a country house in the neighborhood of Philadelphia. Until his health became infirm, he resided a part of the year in the South, and the other part in the North. In May, 1829, he died in Philadelphia, where his will was made and published, in the month of April preceding his death. In his will, he declared himself to be of the City of Philadelphia.

After giving several annuities to his wife and others, and legacies to his friends in this country and in foreign countries, to charitable objects, and providing for the payment of them he declares: "Forasmuch as there will be a surplus income of my estate, beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income,

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and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, in the purchase of such stocks or securities of the United States, or the State of Pennsylvania, or of any other state or states of the United States, or of the City of Philadelphia, bearing an interest, as they, in their discretion, may see fit; and from and immediately after the decease of my said wife, then all the rest, residue and remainder of all my estate, including the fund which shall have arisen from the said surplus income aforesaid, after payment of the legacies hereinbefore directed to be paid, after the decease of my said wife, and providing for the payment of the annuities hereinbefore given, of those annuitants who may then be still living, I authorize and empower my executors, or the 383*] survivor *of them, after the decease of my said wife, to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefits thereof." His wife, Eliza Kohne, John Bohlen, and Robert Vaux, of the City of Philadelphia, and Robert Maxwell, of the City of Charleston, were appointed executors.

Mrs. Kohne survived her co-executors some years, and then died, having made her last will and testament, and appointed James L. Petigru and William Ravenel, the defendant, executors, the latter of whom obtained letters testamentary in the County of Philadelphia. And on the 15th of October, 1852, William Fontain, the complainant, obtained letters of administration de bonis non, on the estate of Frederick Kohne, deceased; he being the nearest of kin to the deceased, and one of his heirs at law.

The bill is filed in the name of the complainant by certain charitable societies of Pennsylvania and South Carolina, under the directions of the will, to recover from the defendant, as executor of Mrs. Kohne, so much of the property as came to her hands as the executrix of her husband's will, and which she distributed, as undisposed of property, after the death of her co-executors. And the question in the case is, whether the residuary bequest in the will, which authorized his executors, or the survivor of them, after the death of his wife, to dispose of the surplus "for the use of such charitable institutions in Pennsylvania and South Carolina, as they might deem most beneficial to mankind," has lapsed, no such appointment having been made, or attempted to be made, during the lifetime of the executors. This part of the property is understood to have amounted to a large sum.

The domicil of the testator, at the time of his death, seems not to be a controverted question. He had so lived in the two States of Pennsylvania and South Carolina, and amassed property in both, that his domicil might be claimed in either. There is no evidence in which if in either, he exercised the right of suffrage. For two years previous to his death he resided in Pennsylvania.

The bequest under consideration was intended to be a charity. The donor, having entire confidence in his executors, substituted their judgment for his own. They, or the survivor of them, was to designate such objects of his charity in the two States "as would be most beneficial to mankind." It was to be placed on the broadest foundations of human sympathy, not *excluding the colored race. [*384 It is no charity to give to a friend. In the books, it is said the thing given becomes a charity where the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field, for the needy and passing stranger.

It may be admitted that this bequest would be executed in England. A charity rarely, if ever, fails in that country. The only question there is, whether it shall be administered by the Chancellor, in the exercise of his ordinary jurisdiction, or under the sign-manual of the Crown. Thus furnished with the judicial and prerogative powers, the intent of the testator, however vaguely and remotely expressed, if it be construed into a charity, effect is generally given to it. It is true, this is not always done in the spirit of the donor; for sectarian prejudices, or the arbitrary will of the king's instruments, sometimes pay little or no regard to the expressed will of the testator.

The appellants endeavor to sustain this charity under the laws of Pennsylvania. This is according to the course of the court. The case of The Philadelphia Baptist Association v. Hart's Executors, 4 Wheat. 1, was decided under the laws of Virginia, which had repealed the Statute of 43 Elizabeth. In Beatty v. Kurtz, 2 Pet. 566, the pious use of a burial-ground was sustained under the bill of rights of Maryland. The case of Wheeler v. Smith, 9 How. 55, was ruled under the laws of Virginia. And in the case of Vidal v. Girard's Executors, the laws of Pennsylvania governed.

In Wheeler v. Smith, this court said: when this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The State as a sovereign, is the parens patriæ.

There can be no doubt that decisions have been made in this country, on the subject of charities, under the influence of English decrees, without carefully discriminating whether they resulted from the ordinary exercise of chancery powers, or the prerogatives of the Crown.

The courts of the United States cannot exercise any equity powers, except those conferred by Acts of Congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the Constitution of the United States. Powers not judicial, exercised by the Chancellor merely as the representative of the sovereign, and by virtue of the King's prerogative as parens patriæ are not possessed by the Circuit Courts.

*In 2 Story's Eq., sec. 1189, it is said: [*385 "But as the court of chancery may also proceed in many, although in not all cases of charities by original bill, as well as by commission under the Statute of Elizabeth, the jurisdiction has become mixed in practice; that is to say, the jurisdiction of bringing informations

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in the name of the Attorney-General, has been mixed with the jurisdiction given to the Chancellor by the statute. So that it is not always easy to ascertain in what cases he acts as a judge, administering the common duties of a court of equity; and in what cases he acts as a mere delegate of the Crown, administering its peculiar duties and prerogatives. And again there is a distinction between cases of charity, where the Chancellor is to act in the court of chancery, and cases where the charity is to be administered by the King, by his sign-manual. But in practice, the cases have often been confounded from similar causes."

"It is a principle in England, that the King, as *parens patriæ, enforces public charities, when no other person is intrusted with the right. Where there is no trustee, the King, by his Lord Chancellor, administers the trust, as the keeper of the King's conscience; and it is not important whether the Chancellor acts as the special delegate of the Crown, or the King acts under the sign-manual, his discretion being guided by the Chancellor."

It may be well again to state the precise question before us. "The executors, or the survivor of them, after the decease of the testator's wife, was authorized to dispose of the property, for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind."

No special trust is vested in the executors, by reason of this power of appointment. It is separable and distinct from their ordinary duties and trust as executors. It was to be exercised after the death of Mrs. Kohne; but the executors died before her decease, and consequently they had no power to make the appointment. The conditions annexed by the testator rendered the appointment impossible. Had the contingency of the death of Mrs. Kohne happened, as the testator from her advanced age contemplated, during the life of the executors or the survivor of them, the appointment might have been made at his or their discretion. But had they or the survivor of them failed to make it, it might have become a question whether he or they could have been coerced to do so by the exercise of any known chancery power in this country. The will contained no provision for such a contingency, and it could not be brought under the trust of executorship. Chancery will not compel the execution of a mere naked power. 386*] 1 Story's Eq. sec. 169. But it will, *under equitable circumstances, aid a defective execution of a power. A power when coupled with a trust, if not executed before the death of the trustee, at law the power is extinguished, but the trust, in chancery, is held to survive.

The testator was unwilling to give this discretion to select the objects of his bounty, except to his executors. He relied on their discrimination, their judgment, their integrity and fitness, to carry out so delicate and important a power. He made no provision for a failure in this respect, by his executors or the survivor of them, nor for the contingency of their deaths before Mrs. Kohne's decease. They died before they had the power to appoint, and now what remains of this bequest, on which a court *of chancery can act?*

There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of his charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken. Can any power now speak for him, except the parens patriæ? Had he declared that the residue of his estate should be applied to certain charitable purposes, under the Statute of 43 Eliz., or on principles similar to those of the statute, effect might be given to the bequest, as a charity, in the State of Pennsylvania. The words as to the residue of his property were used in reference to the discretion to be exercised by his executors. Without their action, he did not intend to dispose of the residue of his property.

It is argued, "that in England the Chancellor, in administering charities, acts as a delegate of the Crown, inasmuch as he discharges all his judicial functions in that capacity." If, by this, it is intended to assert that the Chancellor, in fixing the sign-manual of the King, or when he acts under the cy pres power, is in the discharge of his ordinary chancery powers, it does not command our assent.

The Statute of 43 Eliz., though not technically in force in Pennsylvania, yet, by common usage and constitutional recognition, the principles of the statute are acted upon in cases involving charities. Witman v. Lex, Serg. & R. 88.

In the argument, the case of Moggridge v. Thackwell, 7 Ves. 86, was cited, as identical with the case before us. "The only difference between that case and this one, it is said, is, that in the former the devise was for objects not defined, as they are in this case." In this the counsel are somewhat mistaken, as the case of Moggridge will show.

*The devise in the will of Ann Cam [*387 was, "And I give all the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentlemen, his executors and administrators, desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters; and I appoint the said John Moggridge and Mr. Vaston, before mentioned, executors of this my will.

In the final decree, "upon a motion to vary the minutes, Lord Thurlow declared, that the residue of the testatrix's personal estate passed by her will, and ought to go and be applied to charity," etc.

Now, here was a trust created not only in Vaston, but in his executors and administrators, to whom the residue of the estate was bequeathed for the purposes of the charity. In this view, Lord Thurlow might well say, "the residue of the personal estate passed by the will." This was true, though Vaston was dead when the will took effect. This being the case, it is difficult to say that that case is identical with the one before us.

The case of Moggridge v. Thackwell was before Lord Eldon on a rehearing. He entered into a general view of the subject of charities, by the citation of authorities, which showed

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the unreasonableness of the doctrine maintained by the courts, the inconsistencies in the decisions in such cases, and the gross perversions of charities by the exercise of the prerogative power; but at last he says: "Therefore I rather think the decree is right. I have conversed with many upon it. I have great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the king by sign-manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust. But," he observes, "it must be recollected that I am called upon to reverse the decree of a predecessor, and of a predecessor who, all the reports inform us, had great occasion to consider this subject. I should hesitate with reference to that circumstance; but where authority meets authority, and precedent clashes with precedent, I doubt whether I could make a decree more satisfactory to my own mind than that which has been made."

It will be perceived that this decision was made reluctantly, and after much balancing of the law and the force of precedents, and chiefly, as it would seem, in respect to the decree of Lord Thurlow. This decision of Lord Eldon was made in 1802, and it is not known to have been recognized in this country.

388*] *Neither the doctrines on which this decision is founded, nor the doubts expressed by the Chancellor, are calculated very strongly to recommend it to judicial consideration. The case, however, is different from the one before us, in this: the residuary estate of Mrs. Cam passed to the trustee; that of Mrs. Kohne remained as a part of his estate in the hands of the executors, and descended to his heirs at law on the death of Mrs. Kohne. The beneficiaries were not more definitely described in the one case than in the other. In Kohne's case no trust was created, except that which was connected with the executorship.

Where there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if there be no act on his part, the property never having passed out of the testator, it necessarily remains as a part of his estate. To meet such cases, and others, the perogative power of the King, in England, has been invoked; and he, through the Chancellor, give effect to the charity.

It would be curious, as well as instructive, on a proper occasion, to consider the principles, if principles they can be called, which were first applied in England to charities. Their most learned chancellors express themselves, in some degree, as ignorant on this subject. Lord Eldon said, in the case of Moggridge, "in what the doctrine originated, whether, as Lord Thurlow supposed, in the principles of the civil law, as applied to charities, or in *the religious* notions entertained formerly *in this country, I know not;* but we all know there was a period when a portion of the residue of every man's estate was appropriated to charity, and the ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator.

In the above case, Lord Eldon again says: "In Clifford v. Francis, this doctrine is laid down: that when money is given to charity, without expressing what charity, there the king is the disposer of the charity; and a bill ought to be preferred in the Attorney-General's name. I cite this (he says) to show that it contains a doctrine precisely the same as The Attorney-General v. Syderfin, and The Attorney-General v. Matthews. So those three cases (he says) seemed to have established, in the year 1679, that the doctrine of this court was, that where the property was not vested in trustee, and the gift was to charity generally, not to be ascertained by the act of individuals referred to, the charity was to be disposed of not by a scheme before the master, but by the King, the disposer of such charities in his character of parens patriæ.

*Some late decisions in England, in- [*389 volving charities, evince a disposition rather to restrict than to enlarge the powers exercised on this subject. An arbitrary rule in regard to property, whether by a King or Chancellor, or both, leads to uncertainty and injustice.

In a late case of Clark v. Taylor, 21 Eng. Law and Eq. 308, a gift by will to a particular charitable institution maintained voluntarily by private means, the particular intention having ceased: held, that the gift was not to be disposed of as a charitable gift cy pres, but failed and fell into the residue.

In the case of The Baptist Association Chief Justice Marshall says, there can be no doubt that the power of the crown to superintend and enforce charities existed in very early times; and there is much "difficulty in making the extent of this branch of the royal prerogative before the statute. That it is a branch of prerogative, and not a part of the ordinary powers of the Chancellor, is sufficiently certain." And in the case of The Attorney-General v. Flood, Hayne, 630, it is said: "The Court of Chancery has always exercised jurisdiction in matters of charity, derived from the crown as parens patriæ."

In the provisions of the Act of Pennsylvania defining the powers of a court of chancery, in 1836, it is declared, "that in every case in which any court, as aforesaid, shall exercise any of the powers of a court of chancery, the same shall be exercised according to the practice in equity, prescribed or adopted by the Supreme Court of the United States."

In June, 1840, an Act extended the jurisdiction of the Supreme Court within the City and County of Philadelphia, in chancery, in cases of "fraud, accident, mistake or account;" and since then an Act has been passed giving the Orphans' Court power where a vacancy exists in a trust to fill it, and also to dismiss trustees, executors, etc., for abuse of their trusts, etc. But no statutory provision is found embracing the case before us.

The chancery powers are of comparatively recent establishment in the State of Pennsylvania, and it does not appear that the cy pres

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power is given, and in the exercise of jurisdiction it seems to be disclaimed.

In King v. Rundle, 15 Barb. 139, "there being a number of charitable bequests to several charitable bodies, the remainder was bequeathed or devised to the Protestant Episcopal Society, for certain purposes, etc.; the bequests to the religious bodies were held invalid, and so of the remainder over, as not being statutory tests. In Yates v. Yates, 9 Barb. 324, the court say: "We come to the conclusion that, as a court of equity, we possess no original inherent jurisdiction, to enforce the execution of a charitable trust void in law, as con- 390*] travening the *statute against perpetuities, as being authorized. In this case, where the use is a pious one, additional reasons might be urged against the exercise of such jurisdiction, were it important. Unless this trust will stand the statutory test to be applied to it, it must fall.

In the will of Sarah Zane, Mr. Justice Baldwin, sitting in Pennsylvania, and speaking of trustees, says: "They will be considered as trustees, acting under the supervision of this court, as a court of chancery, with the same powers over trusts as courts of equity in England, and the courts of this State profess and exercise." "When the fund shall be so ascertained as to be capable of a final distribution, it will be directed to be applied exclusively to the objects designated in the will, as they existed at the time of her death, and shall continue until a final decree; if any shall then appear to have become extinct, the portion bequeathed to such object must fall into the residuary fund as a lapsed legacy. Its appointment to other purposes or cestuis que trust than those which can, by equitable construction, be brought within the intention of the will of the donor, is an exercise of that branch of the jurisdiction of the Chancellor of England which has been conferred on this court by no law, and cannot be exercised, virtute officii, under our forms of government."

And again, in Wright v. Linn, 9 Barr, 433, Bell, J., says: "Though the Statute of 43 Elizabeth, ch. 4, relating to charitable uses, has not, in terms, been recognized as extending to Pennsylvania, we have adopted, not only the principles that properly emanate from it, but, with perhaps the single exception of cy pres, those which, by an exceedingly liberal construction, the English courts have engrafted upon it."

In The Methodist Church v. Remington, 1 Watts, 226, the court says: "The original trust, though void, was not a superstitious one; nor if it were, would the property, as in England, revert to the State for the purpose of being appropriated in eadem genera, as no court here possesses the specific power necessary to give effect to the principle of cy pres, even were the principle itself not too grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment."

In Ray v. Adams, 3 Myl. & K. 237, it was held, "that where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate.

*In the case of Ommanney v. Butcher, [*391 1 Turn. & Russ. 260, a testator concluded his will, "in case there is any money remaining, I should wish it to be given in private charity." Held, "if the testator meant to create a trust, and the trust is not effectually created, or fails, the next of kin must take."

There appears to be no law or usage in South Carolina that can materially affect the question under consideration. It seems to be conceded that if this charity cannot be administered by this court, in the State of Pennsylvania, it cannot be made available by the laws of South Carolina.

After the investigation we have been able to give to this important case, embracing the English chancery decisions on charities, as well as our own, and the cases decided in Pennsylvania, we are not satisfied that the fund in question ought to be withdrawn from those who are in possession of it, as the heirs of Frederick Kohne. There does not appear to us to be any safe and established principle, in Pennsylvania, which, under the circumstances, enables a court of chancery to administer the fund. It has not fallen back into the estate of the testator, because it was not separated from it. It remains unaffected by the bequest, because the means through which it was to be given and applied have failed.

The decre of the Circuit Court is therefore affirmed.

Mr. Chief Justice Taney:

I concur in the judgment of the court. But I do not for myself desire to express an opinion upon either the law of Pennsylvania or of South Carolina, in relation to charitable bequests. For assuming everything to be true that is stated in the complainant's bill, and that the bequest is valid by the laws of Pennsylvania, and would be carried into execution by the tribunals of the State, yet I think the Circuit Court of the United States had not jurisdiction to establish and enforce it, and was right, therefore, in dismissing the bill. I propose to show, very briefly, the grounds on which this opinion is formed.

Undoubtedly a charitable bequest of this description would be maintained in the English Court of Chancery. The death of the executors in the lifetime of the widow would make no difference. The bequest would still be good against the heirs or representatives of the testator, and the fund applied to charitable purposes according to a scheme approved by the Chancellor, or authorized under the sign-manual of the King.

*But the power which the Chancellor [*392 exercises over donations to charitable uses, so far as it differs from the power he exercises in other cases of trust, does not belong to the Court of Chancery as a court of equity, nor is it a part of its judicial power and jurisdiction. It is a branch of the prerogative power of the King as parens patriæ, which he exercises by the Chancellor.

Blackstone, in his Commentaries, 3d vol. 47, enumerating what he states to be the extraordinary powers of the Chancellor, says: "He is

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the general guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable uses in the kingdom; and all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery." And in the same volume, page 437, he says: "The King, as parens patriæ, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the Chancellor; and, therefore, whenever it is necessary, the Attorney-General at the relation of some informant, files an ex officio information in the Court of chancery to have the charity properly established."

So, too, Cooper, in his chapter on the jurisdiction of the court, says: "The jurisdiction, however, in the three cases of infants, idiots, or lunatics and charities, does not belong to the Court of Chancery as a court of equity, but as administering the prerogative and duties of the crown."

And in the case of The Baptist Association v. Hart's Executors, 4 Wh. 1, this court, after examining many English authorities upon the subject, affirm the same doctrine. And Chief Justice Marshall, who delivered the opinion of the court, expresses it in the following strong and decisive language (p. 48):

"It would be a waste of time," says the Chief Justice, "to multiply authorities to this point, because the principle is familiar to the profession. It is impossible to look into the subject without perceiving and admitting it. Its extent may be less obvious.

"We now find," he continues, "this prerogative employed in enforcing donations to charitable uses, which would not be valid if made to other uses; in applying them to different objects than those designated by the donor, and in supplying all defects in the instrument by which the donation is conveyed, or in that by which it is administered."

Resting my opinion upon the English authorities above referred to, and upon the emphatic language just quoted from the decision of this court, I think I may safely conclude that the power exercised by the English Court [*393] of Chancery "in *enforcing donations to charitable uses, which would not be valid if made to other uses," is not a part of its jurisdiction as a court of equity, but a prerogative power exercised by that court.

It remains to inquire whether the Constitution has conferred this prerogative power on the courts of equity of the United States.

The 2d section of the article of the Constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power and nothing more; and cannot, upon any fair construction, be held to embrace the prerogative powers, which the King, as parens patriæ, in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the constitution, extends only to cases over which the courts of chancery had jurisdiction in its judicial character as a court of equity. The wide discretionary power which the Chancellor of England exercises over infants or idiots, or charities, has not been conferred.

These prerogative powers which belong to the sovereign as parens patriæ, remain with the States. They may legalize charitable bequests within their own respective dominions, to the extent to which the law upon that subject has been carried in England; and they may require any tribunal of the State, which they think proper to select for that purpose, to establish such charities, and to carry them into execution. But state laws will not authorize the courts of the United States to exercise any power that is not in its nature judicial; nor can they confer on them the prerogative powers over minors, idiots, and lunatics, or charities, which the English Chancellor possesses. Nobody will for a moment suppose that a court of equity of the United States could, in virtue of a state law, take upon itself the guardianship over all the minors, idiots, or lunatics in the State. Yet these powers in the English Chancellor stand upon the same ground, and are derived from the same authority, as its power in cases of charitable bequests.

State laws cannot enlarge the powers of the courts of the United States beyond the limits marked out by the constitution. It is true that the courts of chancery of the United States, in administering the law of a State, may sometimes be called on to exercise powers which do not belong to courts of equity in England. And, in such cases, if the power is judicial in its character, and capable of being regulated by the established rules and principles of a court of equity, there can be no good objection to its exercise. It falls within the just interpretation *of the grant in the Constitu- [*394 tion. But, beyond this, the state laws can confer no jurisdiction on the courts of equity of the United States.

In the cases in relation to charities which have come before this court, there has been a good deal of discussion upon the question, whether the power of the chancery court of England was derived from 43d. Elizabeth, or was exercised by the court before that Act was passed. And there has been a diversity of opinion upon this subject in England, as well as in this country. In the case of the Baptist Association v. Hart's Executors, Chief Justice Marshall, who delivered the opinion of the court, (4 Wh. 49), and Mr. Justice Story, who wrote out his own opinion, and afterward published it in the appendix to 3 Pet. p. 487, were both at that time of opinion, that it was derived from the statute. But in Vidal v. Girard's Executors, 2 How. 127, Mr. Justice Story changed his opinion, chiefly upon the authority of cases found in the old English records, which had been printed a short time before by the commissioners on public records in England. It appeared from these records that the power had been exercised in many cases long before the statute was passed.

But this circumstance does not affect the question I am now considering; for whether exercised before or not, yet, whenever exercised it was in virtue of the prerogative power, and not as a part of the jurisdiction of the court as a court of equity. The statute conferred no new prerogative on the Crown. And Lord Redesdale, 1 Bli. 347, while he held that the power existed in the Chancellor before the statute, and had been frequently exercised, declares it

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to be a prerogative power, and says: "The King, as parens patriæ, has a right by his proper officer (the attorney-general), to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases."

Besides, if it could be shown that at some remote period of time the court of chancery exercised this power as a part of its ordinary jurisdiction as a court of equity, it would not influence the construction of the words used in the Constitution. For at the time that instrument was adopted, it was universally admitted by the jurists in England and in this country, as will appear by the references above made, that this extraordinary and unregulated power in relation to charities was not judicial, and did not belong to the court as a court of equity. The Constitution of the United States, as I have before said, grants only judicial power at law and in equity to its courts; that is, the powers at that time understood and exercised 395*] as judicial, in the *courts of common law and equity in England. And it must be construed according to the meaning which the words used conveyed at the time of its adoption; and the grant of power cannot be enlarged by resorting to a jurisdiction which the court of chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the Constitution was adopted.

Cases may arise in a circuit court of the United States, in which it would be necessary to decide whether the English doctrine, as to charities, was founded on the statute, or was a part of the law of England before the statute was passed. And in a suit by an heir or representation of the testator (authorized from his place of residence to sue in a court of the United States), to recover property or money bequeathed to a charity, the court must of necessity examine whether the bequest was valid or not by the laws of the State, and barred the claim of the heir or representative. And if in such a case it appeared that the State had not adopted the statute, it would be necessary to inquire whether the law in relation to these bequests was a part of the common law before the statute, and administered as such by the English court of chancery, and whether it had been adopted by the State as a part of its common law. For the prerogative powers of the English Crown in relation law to minors, idiots or lunatics, and charities, are a part of the common law of England; and the people of any State, who deemed it proper to do so, might vest these powers in the courts of the State.

Such an inquiry was necessary in the case of Vidal v. Girard's Executors, and of Wheeler v. Smith. But the question of jurisdiction is a very different one when a court of the United States is called upon to execute the duties of the sovereignty, the State, and to take upon itself the discretionary powers which, if they exist at all by its common law or statutes, belong to the official representatives of the parens patriæ, *that is, the state sovereignty.* And in the case of the Baptist Association v. Hart, although the court did not expressly deny its jurisdiction to establish the charity, if it had been valid by the laws of Virginia, yet it expressed its doubts upon the subject saying that the question could only arise where the attorney-general was a party.

For these reasons a court of chancery of the United States must, in my opinion, deal with bequests and trusts for charity as they deal with bequests and trusts for other lawful purposes; and decide them upon the same principles and by the same *rules. And if the [*396 object to be benefited is so indefinite and so vaguely described, that the bequest could not be supported in the case of an ordinary trust, it cannot be established in a court of the United States upon the ground that it is a charity. And if, from any cause, the cestui que trust, in an ordinary case of trust, would be incapable of maintaining a suit in equity to establish his claim, the same rule must be applied where the charity is the object, and the complainant claims to be recognized as one of its beneficiaries.

I concur, therefore, in affirming the judgment of the circuit court, dismissing the bill; but I concur upon the ground that the court had no jurisdiction of the case stated by the complainant, and express no opinion as to the validity or invalidity of this bequest, whether in this respect it be governed by the laws of Pennsylvania or of South Carolina.

Mr. Justice Daniel:

Whilst I concur in the decision of this court in affirming the decree of the circuit court dismissing the bill of the appellants, in portions of the argument by which this court have come to their conclusion, I cannot concur. In expressing my dissent, I shall not follow the protracted argument throughout "its entire length;" my purpose is, chiefly, to free myself on any future occasion from the trammels of an assent, either expressed or implied, to what are deemed by me the untenable, and in this case the irrelevant, positions which that argument propounds.

I readily admit that the courts of chancery of the United States are vested with no prerogative power, can exercise no power or function similar to those derived to the Lord Chancellor in England, either by commission under the sign manual of the king, as parens patriæ, or in the application of the often abused and oppressive doctrine of cy press, or in virtue of the Statute of 43 Elizabeth. But this concession, taken in its broadest extent, by no means establishes the inference that the court of chancery in England as a court of equity by the virtue of its inherent, and if may so speak, constitutional powers, apart from the prerogative and apart from the Statute of Elizabeth could not take jurisdiction of trusts, either in the establishment or maintenance of those trusts, because they expressed or implied a charitable end or purpose, or because the charitable objects were not defined with perfect precision. And if such a power inhered and existed constitutionally in the court of chancery in England as a court of equity, does it not follow, ex consequenti, that the Constitution and laws of the United States, constituting the courts of

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equity of the United States with express refer-
397*] ence to the character and *functions of the court of chancery as a court of equity in England, have conferred upon the former the regular inherent powers of the latter?

Much of the learned and elaborate opinion of this court delivered by the late Justice Story, in the case of Vidal v. Girard's Executors, 2 How. 127, nay, the great end and stress of that opinion, as correctly apprehended, consisted in the maintenance of the position that, apart from the prerogative power with which the Lord Chancellor was clothed, and independently of the Statute of Elizabeth, and long anterior to the enactment of that Statute, wherever there was a devise or bequest to a person, natural or artificial, capable of taking and a beneficiary under the devise or bequest sufficiently certain and defined to be made the recipient of such a gift, the Court of Chancery, in the exercise of its regular and inherent jurisdiction as a court of equity in relation to trusts (one of the great heads of equity jurisdiction), would establish and protect such devise or bequest, even in cases where the objects thereof were somewhat vague in their character and although such devise contained a charity. To this express point, too, are the numerous decisions produced by the industry of the learned and able and distinguished counsel for the devisee, as the result of the researches made in the records of the Chancery Court, by a commission created under the authority of the British Parliament. Indeed, the decision of this court in the case of Vidal v. Girard's Ex'rs, would seem to be incomprehensible and without purpose, unless interpreted as asserting and maintaining, both upon reason and authority, the regular jurisdiction of equity over devises, wherever the devisee was capable of taking, and the beneficiaries were sufficiently defined to render the directions of the testator practicable, although these directions declared or implied a charity.

It is somewhat curious to observe that the opinion of Lord Redesdale, in the case of The Attorney-General v. The Mayor of Dublin, 1 Bli. 312, is appealed to in support of the doctrine now promulged, when that same case is avouched and relied on in the case of Vidal v. Girard's Ex'rs, in support of the legitimate and regular powers of the courts of equity. This application of the language of Lord Redesdale would seem to grow out of the simple fact that in the case before him the Attorney-General was a party. But what is the declaration of his Lordship, in reference to the power of a court of equity over subjects like the one under his consideration? After denying that the Statute of Elizabeth created any new law, and asserting that it only created a jurisdiction merely ancillary to that previously existing in the Chancery Court, he observes that
398*] *the proceedings under that commission were still subject to appeal to the Lord Chancellor, and he might reverse or affirm what had been one, or make such order as he might think fit, reserving the controlling jurisdiction of the Court of Chancery as it existed before the Statute. He then continues as pointing out a different mode of effecting the same objects, and from a different source of power, to declare, *that the same thing might* be done by the Attorney-General by information, in virtue of the prerogative.

So, too, it is affirmed by this court, nemine contradicente, in the case of Vidal v. Girard's Ex'rs, that Lord Chancellor Sugden, in the case of The Incorporated Society v. Richards, 1 Dru. & War. 258, upon a full survey of all the authorities where the point was directly before him, held the same doctrine as Lord Redesdale, and expressly decided that there was an inherent jurisdiction in equity in cases of charity, anterior to and independently of the Statute of Elizabeth.

Upon a just understanding of the opinion of the court in the case of Vidal v. Girard's Ex'rs, and of the interpretation given in that opinion to the English authorities relied on, it seems impossible to escape from the conclusions that devises to persons capable of taking in trust for beneficiaries sufficiently defined, and for purposes neither illegal nor immoral, and where there exist no objections to parties such as would exclude the jurisdiction of the courts in other cases, the courts of the United States as courts of equity, in the exercise of regular, inherent equity powers in relation to trusts, will sustain and enforce such devises. These conclusions seem to follow inevitably from the ruling of this court in the case of Vidal v. Girard's Ex'rs. Indeed, they seem to be comprised within the literal terms of that decision; and the decision now made seems to me incomprehensible, unless understood as designed to overrule that case, and every authority from the English chancery cited and commented upon in its support. For such an assault upon the previous decision of this court, wielding a blow so trenchant and fatal at one great and acknowledged head of equity jurisprudence, the head of trusts, my mind is not prepared.

There is a principle, and, in my opinion, the correct principle, on which the decision of this court may be placed, without the innovation which is objected to. It is that on which my concurrence in the decree of this court is founded, and one, too, which steers entirely clear of what is by me deemed exceptionable. That principle is this: that by the will of Frederick Kohne, the devisees in trust were clothed with a merely naked power, to be exercised by them as the special and exclusive *depositaries[*399 of the testator's confidence, and that power to be dependent on conditions upon which, and on which alone, they should have authority to act. In the progress of events to which the devise was necessarily incident, the powers to be created and to be executed by the devisees in trust, have become impracticable and void. These depositaries of the testator's confidence are all dead. The conditions on which their powers were made dependent, never did occur, and can by no possibility ever occur. It follows, therefore, that, in conformity with the will, there is no person who can act, and no subject to be acted upon, and no beneficiaries of the contemplated action. My opinion therefore is, that the devise has lapsed, or rather, that no right ever came into existence under it: that nothing was ever passed by it from the estate, which descends, of course, to the testator's heirs.

Decree of the Circuit Court affirmed, with costs.

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1*] *THE WIDOW AND HEIRS OF BENJAMIN POYDRAS DE LA LANDE, Pl'ffs in Er.,

v.

THE TREASURER OF THE STATE OF LOUISIANA.

(See S. C. 17 How. 1-3.)

Writ of error, citation, how served—on officer, not on State.

The Treasurer of Louisiana brought proceeding in State Court to collect a tax, and obtained judgment: on writ of error by defendant, held that the citation was properly served on the Treasurer, and not on the Chief Executive Magistrate and Attorney-General.

The Treasurer is the "adverse party" and not the State, and the party to the record, under the 10th rule of this court, and chapter 20 of the Judiciary Act of 1789.

Argued Jan'y 19, 1855. Decided Jan'y 23, 1855.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Motion to dismiss the case on the ground that the State is the real party, and that the citation should have been served on the Governor and Attorney-General.

Mr. J. P. Benjamin for the plaintiffs in error. Mr. Louis Janin for the defendant in error.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought here by writ of error directed to the Supreme Court of the State of Louisiana, under the 25th section of the Act of 1789.

2*] *It appears that a proceeding was instituted in the State Court by the Treasurer of the State to recover certain taxes, alleged to be due from the plaintiffs in error under a law of Louisiana, which imposes a tax of ten per cent. upon the amount of property inherited by aliens in that State.

The payment of the tax was resisted by the plaintiffs in error; but the case was finally decided against them in the Supreme Court of Louisiana; and they thereupon brought this writ of error, upon the ground that the authority exercised under the state law was contrary to the Constitution and Treaties of the United States.

The citation required by the Act of 1789, was served on the Treasurer, by whom and in whose name as Treasurer, the proceedings had been instituted and conducted, and in whose favor the judgment was entered.

A motion is now made to dismiss this writ of error upon the ground that the State is the real party to the suit in the name of the Treasurer; and that the citation ought, therefore, to have been served on the Chief Executive Magistrate and Attorney-General of the State, according to the provisions of the 10th rule of this court.

But that rule applies to those cases only in which the State is a party on the record. It is intended to point out the officers who shall be held to represent the State when process is issued against it, so far as the service of the process is concerned. The only mode in which a state can be cited to appear is by serving the process on some one or more of its officers; and those above named in the rule were considered by the court to be its appropriate representatives in a summons or citation to appear in this court.

But the citation must be directed to the party on the record, and served on him. And when an officer of the State is the party prosecuting the suit for the State, the citation must be served on him. In this case a notice or citation on the Chief Executive Officer or Attorney-General would not be sufficient. For the Treasurer is the person who has obtained the judgment, and has the right to receive the money. He is the actor; the plaintiff in the suit. And the Chief Executive Officer and Attorney-General do not represent him, and may or may not support his proceedings.

This rule of practice has been uniformly followed in this court. There have been many cases in which an officer of the State acting in behalf of the State has been one of the parties. And the 10th rule has never been applied to a case of that kind; and the citation has always been served on the officer, whether conducting the proceedings in his own name, or that *of his office. The practice is found- [*3 ed upon the language of the Act of 1789, ch. 20, which directs the "adverse party" to be cited, on a writ of error or appeal. The "adverse party" is the one which appeared in the suit, and who prosecuted or defended it, and in whose favor the judgment was rendered, which the plaintiff in the writ of error seeks to reverse.

The motion to dismiss this writ of error must therefore be overruled.

Motion to dismiss overruled.

JOHN G. SHIELDS

v.

ISAAC THOMAS, and Mary, his Wife; Nancy Pirtle, John B. Goldsbury, Thomas Starks, and Elizabeth, his Wife; James Picket, and Ann, his Wife.

(See S. C. 17 How. 3-6.)

Jurisdiction—sufficient if aggregate judgment is over $2,000, though to be apportioned among several.

Where the representatives of a deceased intestate recover in the court below a judgment against the administrator for over $2,000, under the same title, and for a common and undivided interest, this court has jurisdiction, although the amount decreed to be distributed to each representative, is less than $2,000.

Argued Jan'y 19, 1855. Decided Jan'y 23, 1855.

APPEAL from the District Court of the United States for the Northern District of Iowa.

The bill in this case was filed in the District Court of the United States for the Northern District of Iowa, exercising the powers of a circuit court, by the appellees, on a foreign decree, to recover certain sums of money al-

NOTE.—Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy. See note to Gordon v. Ogden, 7 L. ed. U. S. 592.

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leged to be due the various complainants. The decree of the court below having been in favor of the complainants, the defendant took an appeal to this court.

A further statement appears in the opinion of the court, on motion to dismiss.

Mr. R. H. Gillett for appellant.

Mr. Platt Smith for appellees.

Mr. Chief Justice Taney delivered the opinion of the court:

This is an appeal from the decree of the District Court of the United States, exercising the powers of a circuit court for the District of Iowa. A motion has been made on behalf of 4*] *Isaac Thomas, one of the appellees, to dismiss it upon the ground that the sum in controversy with him is less than $2,000.

The facts in the case may be stated in a few words so far as they are material to the decision of the motion.

John Goldsberry, of Kentucky, died intestate, leaving a large personal estate, to which the present appellees together with other persons named in the proceedings were entitled as his legal representatives in the proportions set out in the proceedings. The widow of Goldsberry obtained letters of administration on his estate, and afterwards intermarried with Shields, the appellant, who thereby obtained possession of the property of the deceased.

The representatives of John Goldsberry (of whom Isaac Thomas, in right of his wife, is one) filed a bill in the Chancery Court of Kentucky against Shields, charging that he had converted to his own use a large amount of the property, to which these representatives were entitled. And in that proceeding they obtained a decree against him for a large sum of money; the shares of the respective complainants being apportioned to them in the decree; and the appellant was directed to pay to each the specific sum to which he was entitled, as his proportion of the property misappropriated by Shields.

The appellant Shields lived in Iowa when this decree was made; and the present appellees, who are a portion of the representatives of John Goldsberry, united in the bill in equity now before us to enforce the decree of the Kentucky court; and praying that Shields might be compelled to pay to them respectively the several sums decreed in their favor in the proceedings in Kentucky; and they obtained the decree in question according to the prayer of their bill.

The whole amount recovered against Shields in the proceeding in Iowa exceeds $2,000. But the sum allotted to each representative who joined in the bill was less. And the motion is made to dismiss, upon the ground that the sum due to each complainant is severally and specifically decreed to him; and that the amount thus decreed is the sum in controversy between each representative and the appellant; and not the whole amount for which he has been held liable. And if this view of the matter in controversy be correct, the sum is undoubtedly below the jurisdiction of the court, and the appeal must be dismissed.

But the court think the matter in controversy in the Kentucky court was the sum due *to the representatives of* the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them *according to the [*5 laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant, how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him.

It is like a contract with several to pay a sum of money. It may be that the money when recovered is to be divided between them in equal or unequal proportions. Yet if a controversy arises on the contract, and the sum in dispute upon it exceeds $2,000, an appeal would clearly lie to this court, although the interest of each individual was less than that sum.

This being the controversy in Kentucky, the decree of that court apportioning the sum recovered among the several representatives does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part, and the amount exceeds $2,000. We think the court, therefore, has jurisdiction on the appeal.

The cases referred to stand on different principles. The case of Oliver et al. v. Alexander et al. 4 Pet. 143, was a suit for a seamen's wages. And although the crew are allowed by law (for the sake of convenience and to save cost) to join in a suit for wages, yet the right of each seaman is separate and distinct from his associates. His contract is separate, and his recovery does not depend on the recovery of others, but rests altogether upon its own evidence and merits. And he does not recover a portion of the common fund to be distributed among the claimants, but the amount due to himself on his own separate contract. The case of Rich et al v. Lambert et al. 12 How. 352, was decided on the same ground. The several shippers who owned the goods which had been damaged, had no common interest in the goods. The interest of each was separate, and his contract of affreightment separate. And the libel of each was upon his own contract with the ship owner, and for his own individual and separate property.

The cases of Stratton v. Jarvis & Brown, 8 Pet. 8; and of Spear v. Place, 11 How. 525, were both salvage cases, where the property of each owner is chargeable with its own amount *of salvage. The salvage service is entire; [*6 but the goods of each owner are liable only for the salvage with which they are charged, and have no common liability for the amounts due from the ship or other portions of the cargo. It is a separate and distinct controversy between himself and the salvors; and not a common and undivided one, for which the property is jointly liable.

The cases relied on are therefore distinguishable from the one before us; and the motion to

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dismiss for want of jurisdiction must be overruled.

Motion to dismiss overruled.

SEBRA M. BOGART, William J. Wilcox, and Leonard F. Fitch, Libelants,

v.

THE STEAMBOAT JOHN JAY, Her Tackle, etc., George Logan, Claimant.

(See S. C. 17 How. 399-403.)

Court of admiralty—jurisdiction—mortgage of ship.

A court of admiralty has no jurisdiction to decree the sale of a ship for an unpaid mortgage; and cannot, on that account, declare a ship to be the property of the mortgagees and direct the possession of her to be given to them.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

On December 13, 1850, appellants filed their libel in rem in the District Court of the United States for the Southern District of New York, against the Steamboat "John Jay" to enforce payment of a certain note secured by mortgage on the said boat. The claimant duly appeared and filed his claim and answer, setting forth his ownership and denying the jurisdiction of the court, because no maritime contract or cause of action was shown in the libel.

The Circuit Court having affirmed the decree of the District Court, dismissing the libel, the case is now here on appeal.

Messrs. F. B. Cutting, Logan, and Frances Byrne, for the appellee:

First. The District Court in Admiralty had no jurisdiction of the cause of action set forth in the libel, it not being a maritime contract, or a maritime cause of action, or dependent on maritime risk.

Hurry v. The Ship John & Alice, 1 Wash. 293; The Steamboat Orleans v. Phœbus, 11 Pet. 175; The Atlas, 2 Hagg. Adm. 48, 73; Abb. on Sh. old paging, 153, new, 205.

Second. A Court of Admiralty has no power to enforce payment of a mortgage.

The Dowthorpe, 2 W. Rob. 83; The Highlander, 2 W. Rob. 109; Leland v. The Medora. 2 Woodb. & M. 87, 92, 118.

Neither has it jurisdiction to decree possession, as between mortgagee and mortgagor.

The Fruit Preserver, 2 Hagg. 181; The Neptune, 3 Hagg. 132.

An inquiry as to the mortgagee's right of possession necessarily involves an accounting under the mortgage, and a Court of Admiralty does not hold cognizance of action for an account. The remedy appertains to a court of equity exclusively.

The New Orelans v. Phœbus, 11 Pet. 175.

Mr. Justice Wayne delivered the opinion of the court:

We will confine ourselves in this opinion to the inquiry, whether or not a Court of Admiralty has jurisdiction to decree the sale of a ship for an unpaid mortgage, or can, on that account, declare a ship to be the property of the mortgagees, and direct the possession of her to be given to them. The questions of pleading made in the case, and the other points argued, we shall not notice. The conclusion at which we have arrived makes that unnecessary.

The libelants were the owners of the steamer John Jay. They sold her to Joseph McMurray for the sum of $6,000; $1,000 in cash, and the residue of $5,000 upon a credit, for which promissory notes were given, payable to their order, in three, six, nine, twelve, fifteen, eighteen, twenty-one, and twenty-four months. On the day of sale, McMurray, the purchaser, executed in a single deed, containing the whole contract between himself and the libelants, a transfer of the boat to the latter as a security for the payment of his notes, with the proviso "that this instrument is intended to operate only as a mortgage to secure the full and just payment of the eight promissory notes given in consideration of the purchase money of said vessel or steamboat." McMurray failed to pay the second note. Upon such failure the libel was filed. The libelants set up the contract; *allege that it was to operate as a mort- [*401 gage to secure the payment of McMurray's notes; state his failure to pay the second note; claim, in the 5th article of their libel, that McMurray's failure to pay had revested them with the title to the boat, and that McMurray's had become forfeited, from his non-compliance with the condition contained in the contract of sale. Their prayer is, that they may have a decree for the amount of the unpaid purchase money, with interest and costs, and that The John Jay and her equipments may be condemned to pay the same. Afterwards, upon their appeal in the Circuit Court, they moved to amend their libel by inserting the words, "or that the steamboat John Jay may be decreed to be their property, and the possession be directed to be delivered to them."

To this libel George Logan, by way of answer, put in a claim of ownership of The John Jay, by a bona fide purchase from McMurray; and he further denies the jurisdiction of the court, upon ground that the contract between the libelants and McMurray was not maritime, or a case of admiralty and maritime jurisdiction. It appears that McMurray had received the possession of the boat; that she had been enrolled at the custom house in his name; that he first sold one fourth of her to Logan, and afterwards, on the 2d December, executed a bill of sale for the whole of her to Logan, which was recorded in the custom-house; and that thereupon. The John Jay was enrolled and licensed in the name of Logan.

Upon the hearing of the cause in the district court, the libel was dismissed. It was carried by appeal to the circuit court, and the judgment of the district court having been affirmed, it is now here upon appeal from the circuit court. We think that the affirmance of the judgment of the district court was right, and will here briefly give our reasons for that opinion.

NOTE.—Admiralty jurisdiction of contracts—see note, 66 L.R.A. 193.

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It has been repeatedly decided in the admiralty and common law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of The Neptune, 3 Hagg. Adm. Rep. 132, Sir John Nicholl, in giving his judgment, observes: "Now, upon questions of mortgage, the Court of Admiralty has no jurisdiction, whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed. the decision of these questions belongs to other courts; they are not within the jurisdiction or 402*] *province of the courts of admiralty, which never decide on questions of property between the mortgagee and owner."

This is not so, because such a jurisdiction had been denied by the jealously of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain; and whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime. A debt secured by the mortgage of a ship does not give the ownership of it to the mortgagee. He may use the legal title to make the ship available for its payment. A legal title passes conditionally to the mortgagee. Where there has been a failure to pay, he cannot take the ship manu forti, but he must resort either to a court of equity or to statutory remedies for the same purpose when they exist, to bar the mortgagor's right of redemption by a foreclosure, which is to operate at such time afterward, when there shall be a foreclosure without a sale, as the circumstances of the case may make it equitable to allow. Indeed, after a final order of foreclosure has been signed and enrolled, and the time fixed by it for the payment of the money has passed, the decree may be opened to give further time, if there are circumstances to make it equitable to do so, with an ability in the mortgagor to make prompt payment.

Thornhill v. Manning, 7 Eng. Rep. 79, 99, 100.

Courts of Admiralty have always taken the same view of a mortgage of a ship, and of the remedies for the enforcement of them, that courts of chancery have done of such a mortgage and of any other mortgaged chattel. But, from the organization of the former and its modes of proceeding, they cannot secure to the parties to such a mortgage the remedies and protection which they have in a court of chancery. They have, therefore, never taken jurisdiction of such a contract to enforce its payment, or by a possessory action to try the title, or a right to the possession of the ship. It is true that the policy of commerce and its exigencies in England have given to its Admiralty Courts *a more ample jurisdiction in [*403 respect to mortgages of ships, than they had under its former rule, as that has been given in this opinion. But this enlarged cognizance of mortgages of ships has been given there by Statute 3 and 4 Vic. ch. 65. Until that shall be done in the United States, by Congress, the rule in this particular must continue in the Admiralty Courts of the United States, as it has been. We affirm the decree of the court below.

Decree of the Circuit Court affirmed, with costs.

PETER J. BURCHELL, Appellant,

v.

STEWART C. MARSH, Alexander Frear, and William M. Arbuckle.

(See S. C. 17 How. 344–352.)

Arbitration—award, when set aside—fraud, corruption, or gross mistake.

1 Arbitration, as a mode of settling disputes, should receive every encouragement from courts of equity.

2 To induce the court to interfere, there must be more than error of judgment, such as corruption, or gross mistake, apparent on the face of the award, or by the evidence.

3 Every presumption is in favor of the award. It cannot be inferred that the arbitrators went beyond the submission, merely because they may have admitted illegal evidence about the subject matter of it.

4 Although this court would not have assessed so large damages, or so divided them, yet the estimate of the arbitrators is not so outrageous as to be conclusive evidence of fraud or corruption.

5 The admission of witnesses to prove their estimate of damages, even if objected to, and an error of judgment, is no cause for setting aside the award.

6 Nor is the admission of illegal evidence, or taking the opinion of third persons, misbehavior in the arbitrators to affect their award.

7 If they have given their honest, incorrupt judgment, on the subject matter submitted to them, after a full and fair hearing of the parties, they are bound by it; and a Court of Chancery has no right to annul their award because it thinks it could have made a better.

Mr. Chief Justice TANEY and Mr. Justice WAYNE did not sit in this cause.

Argued Jan. 15, 1854. Decided Jan. 23, 1855.

THIS was a bill filed in the Circuit Court of the United States for the District of Illinois by the present appellees against the appellant,

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NOTE.—Arbitrament and award. See note to Carnochan v. Christie, 6 L. ed. U. S. 516.

When awards will be set aside by a court of equity, and when not.

When an award is put in suit at law, no extrinsic circumstance, nor any matter of fact, dehors, can be given in evidence to impeach it; if it be open, therefore, to any objection of this kind, the defend-

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for an injunction to prevent the appellant from suing upon, or taking advantage of, a certain award purporting to be made by arbitrators in pursuance of a certain submission between the parties; and to have the said award vacated and annulled.

The submission and award are admitted in the pleadings.

By the submission it is recited that the appellees being two mercantile firms, had sued the appellant to recover certain debts alleged to be owing by him to the said firms respectively, and that appellant claimed "to have sustained damages by reason of having been sued by said firms as aforesaid;" and "to put an end to all further controversies," etc. The parties thereby submitted "all demands, suits, claims, causes of action, controversies, and disputes between them," etc.; and agreed that the arbitrators should "hear all matters of claim of either party, upon or against the other, founded in law or equity:" and that the arbitrators shall "hear the proofs of the parties appertaining to matters submitted," etc.; and that said award should "direct and determine what, if anything, is due or owing from said Burchell to the firm of Marsh & Frear," and also "what, if anything, is due from said Burchell to the firm of Frear & Co.," or "what, if anything, should be due from either, or both of said firms to the said Burchell," and should "award the manner and time of payment of any such indebtedness."

The answer admits Burchell's indebtedness to Marsh & Frear, to the amount of $3,822 and interest, and to Frear & Co., $1,014.80, being less than the amounts claimed in the bill.

There is no pretense in the record of any debt by the appellees, or either of them, to Burchell; nor of any demand against them, or either of them, except such as may have accrued by reason of an alleged anticipation of the maturity of his debts to them respectively, and the alleged premature institution of suits against him thereon.

The award (as alleged and admitted) was as follows:

"1. That all claims, demands, controversies and disputes between the respective parties, or between the said Burchell and the firm of Marsh & Frear, and also between the firm of Frear & Co., and the said Burchell shall cease and be determined by the said award.

2. That as between Marsh & Frear and said Burchell, there was due from said firm to said Burchell the sum of $100; which sum should be paid, etc.

3. That as between Frear & Co. and said Burchell, there was due from said firm to said Burchell $25, to be paid, etc.

4. That the appellees should pay the costs.

The court below having decreed in favor of the complainants, that the said award should be set aside, the defendant brought the case here on appeal.

A further statement of the case appears in the opinion of the court.

Messrs. **R. H. Gillet** and **J. F. Farnsworth**, for the appellant:

1. The arbitrators had full power to act upon all "demands, suits, claims, causes of action, controversies, and disputes between the parties."

2. Under this submission, the arbitrators were constituted by the parties, sole judges of the facts, and the law and equity arising from them.

"An arbitrator is a judge of all matters of law and fact included in the case submitted to him, and being a judge chosen by the parties themselves, his decision generally is absolutely final."

1 Burrill's Law Dic. 86; Billings on Awards, 55–65; Russell, Arbitrator, 112; Morgan v. Mather, 2 Ves. Jr. 15.

Award upon a general reference cannot be impeached for erroneous judgment upon facts.

Knox v. Symmonds, 1 Ves. Jr. 369.

Where a cause is submitted to arbitration without a rule of court, this court will not interfere to set aside the award; nor if made a rule of court will the award be set aside unless for corruption or misconduct.

Cranston v. Kenny, 9 Johns. 212; see, also, Mitchell v. Bush, 7 Cow. 185; Jackson v. Ambler, 14 Johns. 96; Campbell v. Weltern, 3 Paige, 124, 138; Underhill v. Van Cortlandt, 2 Johns. Ch. 339; S. C. 17 Johns. 405; Todd v. Barlow, 2 Johns. Ch. 551; Vaughan v. Graham, 11 Mo. 575; Smith v. Cutter, 10 Wend. 589; Chase v. Westmore, 13 East, 357; Merritt v. Merritt, 11 Ill. 565.

3. That an award is made in ignorance of the rights of the parties and of the duties and powers of the arbitrators, is not ground for setting it aside.

4. A court of equity will only interfere to set aside an award on a voluntary submission,

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ant must apply for relief either to a court of equity by bill, or, if the submission has been made a rule of any court of law, to the summary and equitable jurisdiction of that court. Wills v. Maccormick, 2 Wils. 148; Newland v. Douglas, 2 Johns. 62; Barlow v. Todd, 3 Johns. 367; Todd v. Barlow, 2 Johns. Ch. 551; Head v. Muir, 3 Rand. 122.

On a bill in equity, to set aside an award, if it appear that the arbitrators went upon a plain mistake either as to the law or the fact, the same is an error appearing on the face of the award, and is sufficient to set it aside; aliter upon a doubtful point of law, though the court, on deliberation, should be of a different opinion. 2 Vern. 705; Lyle v. Clason, 1 Caines, 341; Smith v. Richardson, 3 Caines, 219; Emery v. Wase, 5 Ves. 846; Shermer v. Beale, 1 Wash. 14; 3 Atk. 495; Young v. Walter, 9 Ves. 364.

When there is a mistake in fact apparent on the face of the award, or clearly appearing by affidavits, and admitted by the arbitrator, the courts of equity will relieve, or courts of common law, wherein the reference is a rule of court, set aside the award. Ives v. Metcalf, 1 Atk. 62; Anon. 3 Atk. 644; Knox v. Simonds, 1 Ves. Jr. 369; Morgan v. Mather, 2 Ves. Jr. 18; Anderson v. Darcey, 18 Ves. 449; Perkins v. Wing, 10 Johns. 143.

Equity will not interfere to set aside an award upon the ground that the arbitrators have evinced an erroneous judgment as to questions either of law or fact, if they acted honestly and fairly in the matter. Campbell v. Western, 3 Paige, 124; Morris v. Ross, 2 Hen. & M. 408; Bell v. Price, 21 N. J. Law, 32; Herrick v. Blair, 1 Johns. Ch. 101; Neal v. Shields, 2 Pen. & W. 300; Curley v. Dean, 4 Conn. 259; Cromwell v. Owings, 6 Harr. & J. 10; Locke v. Filley, 14 Hun, 139; Riddle's Est. 19 Penn St. 431; Merritt v. Merritt, 11 Ill. 565; Moore v. Barnett, 17 Ind. 349; Fudicker v. Guard, Mut. L. Ins. Co. 62 N. Y. 392; Burroughs v. David, 7 Iowa, 154.

The award must show willfulness, fraud, or corruption—not erroneous judgment merely. Cases last cited, and Todd v. Barlow, 2 Johns. Ch. 551; S. C. 3 Johns. 367.

A bill in equity for relief from a judgment entered on an award of referees will not be sustained where the grounds assigned are such as the party

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for corruption or improper conduct of the arbitrators; and on a hearing upon bill and answer, where these are charged and denied, the award cannot be set aside.

In this case "improper and corrupt motives" are only charged in the alternative, provided the arbitrators were not ignorant of the rights of the parties and of their powers and duties. The whole charge in both alternatives is expressly denied in a sworn answer responsive to the bill. As no testimony was taken in the cause, this settles conclusively the question that there was no fraud, ignorance, or improper or corrupt motives.

Blake's Chancery Practice, 127; Smith v. Brush, 1 Johns. Ch. 459; Walton v. Hobbs, 2 Atk. 19; Pember v. Mathers, 1 Brown, 52; 7 Johns. Ch. 222; 2 Cow. 126; Clarke v. Bank, etc. Riemsdyk, 9 Cr. 153; Hughes v. Blake, 6 Wh. 453; Union Bank v. Geary, 5 Pet. 98; Carpenter v. Prov. W. Ins. Co. 4 How. 185, 217, 218.

5. Everything is to be presumed and every legal intendment made in favor of an award.

All tribunals are presumed to perform their duty until the contrary is shown. This rule applies with peculiar force to arbitrators.

Jackson v. Ambler, 14 Johns. 96, 103; Karthaus v. Ferrer, 1 Pet. 222, 228; 1 Texas. 497; 5 Greenl. 38; Lutz v. Linthicum, 8 Pet. 165, 179; Merritt v. Merritt, 11 Ill. 565.

6. Where the submission is general, the power to award costs is a necessary incident to the power of the arbitrators.

7. Where an award covers matters not submitted, but is good in other respects, such matters will be rejected as surplusage, and the residue of the award will be good.

8. Where the whole or a part of an award is not within the terms of the submission, the party can obtain redress at law, and a court of equity has no jurisdiction.

Kyd on Awards, 241; Champion v. Whenham, Amb. 245; 1 Bac. Abr. 240; Billings on Awards, 149, 26 Law L. 93; Davy's Ex. v. Faw, 7 Cranch, 171.

Messrs. E. B. Washburne and J. M. Carlisle, for the appellees:

For the appellees it is submitted:

First. That their relief, if any, must be in equity; because, as will presently be shown, it is principally claimed upon matters dehors the award, and which, therefore, could not be taken advantage of at law.

Story's Eq. Jur. sec. 1452, and cases there cited; 2 Willes, 148; 3 Johns. 367; 8 East, 344; McCormick v. Gray, 13 How. 27.

2. The record shows a case of gross partiality and misconduct on the part of the arbitrators, and this is ground for relief in equity.

I. As to the law.

Story's Eq. Jur. sec. 1452; Herrick v. Blair, 1 Johns. Ch. 101; Walker v. Frobisher, 6 Ves. 70; Van Cortlandt v. Underhill, 17 Johns. 411, per Spencer, Ch. J.

II. As to the facts.

These appear upon the allegations of the bill, and the admissions of the answer in part; and in other part by the insufficient and evasive denials of the answer.

From all which it clearly appears, that no evidence whatever was offered to the arbitrators of the damages sustained by Burchell, "by reason of having been sued by said firms as aforesaid, or by reason of the doings of said firms toward him." Evidence was received and heard, under objection by the appellees, of certain offensive language and harsh proceedings, by one Cross, an attorney employed by the appellees for the collection of their debts, against the appellants, and witnesses, who appear to have been certain bystanders for that purpose, were sworn that they "should think, judging from the evidence they had heard given before said arbitrators, that said Burchell had sustained damages by reason of being sued as aforesaid, and by the statements of said Cross, in injury to his business and credit, to the amount of $10,000."

Upon this evidence the arbitrators made their award, which does not ascertain the amount of Burchell's debts to the two firms; nor does it assess its damages against them severally or collectively; but determines that the action, etc., shall cease; in fact mulcts the two firms on the same evidence, the one in four times as much as the other, by way of forfeiture of their respective claims; and directs that one of them shall pay $100 and the other $25, with costs, respectively.

If this be not partiality and misconduct in the arbitrators, it would be difficult to imagine a case to that effect. In the language of Ch. J. Spencer, in 17 Johns., where they had refused to hear certain evidence: "It is a cheap and peaceable method of settling disputes; but to uphold and maintain the awards of arbitrators where they are guilty of such gross and

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could have availed himself of at law by filing exceptions to the award. Hurst v. Hurst, 2 Wash. 127.

Neither a court of law nor of equity will interfere to set aside an award, unless corruption, partiality, misconduct, or irregularity is distinctly proved against the arbitrator; mere suspicion is not sufficient. Moseley v. Simpson, 42 L. J. Ch. 730; 16 L. R. Eq. 226; 21 W. R. 694; 28 L. T. N. S. 727; Atkinson v. Townley, 1 N. J. Law. 388; Hardeman v. Burge, 10 Yerg. 202; Hamilton v. Wort, 3 Blackf. 68; Callant v. Downey, 2 J. J. Marsh. 346.

Equity will grant relief against an award in case of gross and palpable mistake of the law or the fact. Crissman v. Crissman, 5 Ired. L. 498; Muldrow v. Norris, 2 Cal. 74; Herrick v. Blair, 1 Johns. Ch. 101; Roosevelt v. Thurman, 1 Johns. Ch. 220; Bouck v. Wilber, 4 Johns. Ch. 405; Bumpass v. Webb, 4 Port. 65; Sumpter v. Murrell, 3 Bay. 450; or where the award is obtained by the *partiality and corruption* of the arbitrators. Van-*Cortlandt v. Underhill, 17 Johns.* 405.

An award obtained by fraud of the party, or by reason of fraud, corruption, partiality, or gross misconduct of the arbitrators, will be set aside by a court of equity, where courts of law do not possess the power, as being against equity and good conscience. Spurk v. Crook, 19 Ill. 415; Buckley v. Starr, 2 Day, 552; Emerson v. Udall, 13 Vt. 477; Baird v. Crutchfield, 6 Humph. 171; Rand v. Redington, 13 N. H. 72; Conway v. Duncan, 28 Ohio St. 102.

A court of equity will set aside an award for fraud, or corruption on the part of the arbitrators, or where the award is so grossly wrong as to evince fraud or corruption on their part. Tracy v. Herrick, 25 N. H. 381; Snyder v. Rouse, 1 Met. 625; Halstead v. Seaman, 52 How. Pr. (N. Y.) 415.

Generally, a court of equity may interfere to set aside awards in cases of fraud, mistake or accident, upon the same principles, and for the same reasons which will authorize its interference in regard to other matters where the law does not afford an adequate remedy. Story's Eq. Jur. sec. 1451; Duncan v. Lyon, 3 Johns. Ch. 351; Knox v. Symonds, 1 Ves. Jr. 369.

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scandalous misbehavior as to refuse to hear material evidence, would produce a universal dread of that mode of adjusting differences."

This record presents a stronger case than that.

III. The arbitrators undertook to decide the claims of the parties, one against the other, according to law and equity. They have manifestly been guilty of a "perverse misconstruction of the law," and their award has no foundation whatever in equity, and ought, therefore, to be set aside.

Sharman v. Bell, 5 Maule & S. 584; Chase v. Westmore, 13 East, 357.

Mr. Justice Grier delivered the opinion of the court:

This case was submitted on bill and answer. The appellees, who were complainants below, pray the court to set aside an award made between the parties as "fraudulent and void." The bill charges that "the award was made either from improper and corrupt motives, with the design of favoring said Burchell, or in ignorance of the rights of the parties to said submission, and of the duties and powers of the arbitrators who signed the said award."

The answer denies "that the arbitrators acted unjustly, or with partiality or ignorance in making their award; but avers that they acted justly, fairly, and with a due consideration of the rights of the parties." This allegation of the answer must be taken to be true, unless it appears, from other facts admitted by it, that this conclusion or averment founded on them is incorrect.

In the consideration of this case, it will not be necessary to incumber it with a history of the facts charged and admitted or denied by the pleadings, except as they shall be incidentally noticed. The general principles, upon which courts of equity interfere to set aside awards, are too well settled by numerous decisions to admit of doubt. There are, it is true, some anomalous cases, which, depending on their peculiar circumstances, cannot be exactly reconciled with any general rule; but such cases can seldom be used as precedents.

Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or fact. A contrary course would be a substitution of the judgment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. In order, says Lord Thurlow, Knox v. Symmonds, 1 Ves. Jr. 369, "to induce the 350*] *court to interfere, there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened he should have made a different award."

Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality, merely because their award is not such an one as the Chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.

1. The first objection to the award in this case is, that it is not within the submission. But we are of opinion this objection is without foundation.

The submission recites that controversies and disputes had arisen between the firm of Marsh & Freer, and of Freer & Arbuckle, with Burchell. It states the controversies to have arisen from suits brought by said firms against Burchell, to recover certain debts claimed to be due by him to the firms, respectively, "and the said Burchell claims to have sustained damages by reason of having been sued by said firms and by reason of the doings of the said firms towards him." The parties, therefore, agreed to submit "all demands, suits, claims, causes of action, controversies and disputes between them, to the arbitration and award of F. B. Mosley, etc., who are to hear all matters of claim of either party, upon or against the other, in law or equity."

On the hearing, the arbitrators received evidence of the debts alleged to be due from Burchell to the two firms, and of the alleged oppressive and ruinous suits brought against him by one Cross, who acted as agent of the firms. The witnesses, in proving these transactions, were permitted to state certain slanderous language used by Cross in speaking to and of Burchell, charging him with dishonesty and perjury. When this testimony was offered, the complainants' counsel agreed that it might be received, subject to exceptions.

It has been argued, that because the arbitrators received evidence of the slanderous language used by Cross, that, therefore, they included in their award damages for his slanders, for which his principals would be liable; and that, therefore, they had taken into consideration matters not contained in the submission. But the answer to this allegation is, that the record shows no admission or proof that the arbitrators allowed any damages *for [*351 the slanders of Cross. Whether the complainants were liable, and how far they were justly answerable for the conduct of their agent, were questions of law and fact submitted to the arbitrators. All these questions were fully argued before them by counsel. Whether their decision on them was erroneous, does not appear. The transactions which were testified to with regard to the suits brought against Burchell, and whether they were oppressive, wrongful and ruinous to him, was one of the very matters submitted to the arbitrators. The words as well as the acts of Cross made part of the res gestæ, and could not well be severed in giving a history of them. Every presumption is in favor of the validity of the award. If it had stated an account, by which it appeared that the arbitrators had made a specific allowance of damages for the slanders of Cross, it would have been annulled to that extent at least, as beyond the submission. But it cannot be in-

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ferred that the arbitrators went beyond the submission, merely because they may have admitted illegal evidence about the subject matter of it.

We are of opinion, therefore, that there is nothing on the record to show that the arbitrators, in making this award, exceeded their authority, or went beyond the limits of the submission.

2. The charges of fraud, corruption, or improper conduct in the arbitrators, as we have seen, are wholly denied by the answer, which must be assumed to be true, unless facts are admitted from which they are a necessary or legal inference. We can see nothing in the admitted facts of the case from which any such inference can be justly made. The damages allowed for the alleged oppression of Burchell, and the ruin of his business as a merchant, may seem large to some, while others may think the sum of four, or even five thousand dollars as no extravagant compensation for such injuries. It may be admitted that, on the facts appearing on the face of the record, this court would not have assessed damages to so large an amount, nor have divided them so arbitrarily between the parties; but we cannot say that the estimate of the arbitrators is so outrageous as of itself to constitute conclusive evidence of fraud or corruption. Damages for injuries of this sort cannot be measured by any rules, nor can the court properly impute corruption to others, because they differ with them in their estimation of a matter which depends on discretion rather than calculation. It is enough that the parties have agreed to trust the discretion and judgment of neighbors acquainted with them, and their relative standing and credit. The admission of witnesses to prove their estimate of the damages (even if it had been in the face of the objection of counsel, and not by consent), 352*] may have *been an error in judgment, but it is no cause for setting aside the award, nor can the admission of illegal evidence, or taking the opinion of third persons, be alleged as a misbehavior in the arbitrators which will affect their award. If they have given their honest, incorrupt judgment on the subject matters submitted to them, after a full and fair hearing of the parties, they are bound by it; and a court of chancery have no right to annul their award because it thinks it could have made a better.

In fine, we are of opinion that this record furnishes no evidence of corruption or misbehavior in the arbitrators, nor of "ignorance" (as charged in the bill), or of any such mistake as would justify a court of chancery in annulling it.

The decree of the court below is, therefore, reversed, and the record remitted with directions to dismiss the bill of complaint, with costs; but without prejudice to any legal defense.

Dissenting: Mr. Justice Nelson.

I do not agree to the judgment of the court in this case. I think the damages allowed against the complainants by the arbitrators are so extravagant, disproportioned and gross as to afford evidence of passion and prejudice, and justified the judgment of the court below in setting aside the award. It is difficult, if not impossible, to see, upon any other ground, how between four and five thousand dollars should have been allowed against one of the firms in the submission, and but some one thousand dollars against the other, under the circumstances of the case.

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*EDWARD HERNDON, App't, [*424

v.

JAMES C. RIDGWAY, Eri T. Ridgway, William H. Gasque, and Henry Davis.

(See S. C. 17 How. 424, 425.)

District Court—jurisdiction—practice.

The jurisdiction of the District Court over parties, is acquired only by service of process, or their voluntary appearance.

It has no authority to issue process to another state.

Where absent defendants, essential parties, decline to appear, and process cannot be served, the court is without jurisdiction, and must dismiss on motion.

Argued Jan. 22, 1855. Decided Feb. 1, 1855.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

In the court below Messrs. Dowd and Murphy moved to dismiss the case because Henry Davis had not been served with process personally, and denying that they were his attorneys of record. The motion was granted and the bill dismissed, whereupon the plaintiff appealed to this court.

The statement of the case appears in the opinion of the court:

Mr. S. Adams for appellant.

Mr. P. Phillips, for appellee, insisted that there was no evidence of any kind that Dowd and Murphy ever appeared or intended to appear as the attorneys of Davis. That their employment by Davis as his attorneys in prosecuting a suit in the state courts of Mississippi, did not invest them with the whole power of the principal over the subject matter; and that in order to make a substituted service good, the authority in the agent or attorney must apply to the specific suit. Bond v. Duke of Newcastle, 3 Bro. ch. 386; 2 Cox, 389; also, that the court had no jurisdiction over the subject matter, as it could not enjoin proceedings in the State Court of Mississippi.

Peck v. Jenness, 7 How. 624.

*Mr. Justice Campbell delivered the [*425 opinion of the court:

The plaintiff complains, that in 1849 he purchased from James C. Ridgway a number of slaves, for whom he gave his bond to the vendor; that this was transferred to E. T. Ridgway for the use of Wm. H. Gasque, and that a suit is pending in the District Court of the United States for that district, to collect the sum due; that the slaves are in the possession of Wm. P. Givan, to whom he sold them with a warranty of the title. That one Davis claims the slaves under a title paramount to that derived from Ridgway, and had brought

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suit for them in the State Court which had proved ineffective, and now threatens to renew it. The object of the bill is to require the two Ridgways and Gasque on the one part, and Davis on the other, to interplead in the District Court of the United States, to settle their right to the slaves, so that he may pay the purchase-money to the proper person. He alleges that the vendor, Ridgway, is insolvent.

The four defendants are citizens of Alabama. Notice of the motion for injunction was served on the attorneys for the plaintiff, in the suit in the District Court, and upon the attorneys who prosecuted the suit against Givan for Davis in the State Court. The attorneys for Davis disclaim any connection with him in this controversy, and move to dismiss the bill for want of jurisdiction. Gasque appears and demurs to the bill for the same cause, and no notice or appearance exists in the record for the vendor, Ridgway. The District Court retained the bill twelve months, and then dismissed it on these motions.

The jurisdiction of the District Court over parties is acquired only by a service of process or their voluntary appearance. It has no authority to issue process to another state. In the present case, the absent defendants decline to appear, and process cannot be served, so that the court is without any jurisdiction over the essential parties to the bill. There was no course open to it, except to dismiss it for want of jurisdiction, upon the motions submitted for that object.

Toland v. Sprague, 12 Pet. 300.

There is no error in the record, and the decree is affirmed.

Ex-parte in the Matter of JOSIAH S. STAFFORD and Jeanette Kirkland, his Wife, App'ts,

v.

THE UNION BANK OF LOUISIANA.

(See S. C. 17 How. 275-282.)

Motion to dismiss appeal for want of proper bond—mandamus issued to court below to execute its decree.

Motion to dismiss for want of sufficient bond.

Where security is given sufficient to bring the cause before the court by appeal, the court will not dismiss, although the security is not sufficient to stay the execution of the decree below.

Order to show cause.' Court below cannot refuse to carry its decree into execution, unless security in the sum decreed is given on appeal.

Peremptory mandamus was issued commanding the judge below to carry the decree into effect.

Appeal subsequently dismissed on stipulation.

Argued Dec. 15, 1854. Decided Dec. —, 1854.

APPEAL from the District Court of the United States for the District of Texas.

On motion for peremptory mandamus or for a rule to show cause, etc.

At the last term a motion was made to dismiss this cause and to award a procedendo on the ground that the appeal bond was insufficient.

The court held that the bond for $10,000 given on appeal from a decree for a payment of $65,000 was insufficient.

The court overruled the motion to dismiss the appeal and award a procedendo for the reason that, from the time the appeal was taken, the appellant was not bound to enter the appeal on the docket of this court before the present term.

During the same term, on motion, a rule was ordered on the District Judge to show cause at the present term, why a mandamus should not be issued, commanding him to cause the decree entered by him on February 25, 1854, to be carried into execution according to the terms thereof.

The said District Judge having filed a return to the said ruling, the question now arises on the sufficiency thereof, and whether the rule for a mandamus should not be made absolute. A motion is also made for the appellees to dismiss the appeal because the defendants have filed no sufficient bond.

A further statement of the case appears in the opinion of the court. See, also, 16 How. 135; 12 How. 327.

Mr. **Robert Hughes**, for the respondent, Judge Watrous:

The District Judge, had and has no authority to make any order in regard to the matters as to which it is attempted to compel him to act; because an appeal was prayed for, granted, perfected, and the cause was no longer in the District Court, but was, and is in this court.

After an appeal is entered in the court below the authority of that court over the cause ceases, and if the appellant fails to bring it up, the appellee may.

Suggs v. Suggs, 1 Over. (Tenn.), 21.

After an appeal the property is removed from the legal custody of the District Court, and is no longer subject to its interlocutory order.

The Grotius, 1 Gall. 503; The Collector, 6 Wh. 194; The Seneca, Gilp. 34; Catlett v. Brodie, 9 Wh. 553.

It is insisted that the appeal bond is strictly in conformity with the requirements of the law; and we deem it a misconception of the authorities to suppose that not only in all cases of writs of error, but also as to all appeals in chancery, the penalty of the bond is to equal the amount of judgment at law and the decree in chancery.

By the last clause of the 22d sec. of the Judicial Act of Congress of 1789, "every justice or judge signing a citation or any writ in error," "shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fails to make his plea good."

1 Stat. at L. 84, 85. See, also, Catlett v. Brodie, 9 Wh. 553; 1 Mon. 66; Stark v. Mercer, 3 How. Miss. 377; Dunkley v. Van Buren, 3 Johns. Ch. 330; 1 Maddock, Ch. 530, n. 4.

Messrs. **Hale** and **Coxe** for appellee.

Mr. Justice **McLean** delivered the opinion of the court:

This is an appeal in chancery from the District Court of Texas.

A motion is made by the counsel for the appellees to dismiss the appeal, because the defendants have filed no sufficient bond.

Also, that a rule on the District Judge, to show cause why a peremptory mandamus should not be issued, granted at the last term, be made absolute.

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At the last term, a motion was made to dismiss this cause, and to award a procedendo, on the ground that the appeal bond was insufficient.

On consideration of that motion, the court held that the bond for $10,000, given on the appeal from a decree for the payment of $65,000, was insufficient, as the Act of Congress requires a bond in the amount of a judgment or decree, to prosecute the appeal, or writ of error, with effect.

But the court overruled the motion to dismiss the appeal and award a procedendo, for the reason that from the time the appeal was taken, the appellant was not bound, under the Acts of Congress and the rules of court, to enter the appeal on the docket of this court, before the present term.

During the same term, on motion, a rule was ordered on the District Judge to show cause at the present term why a mandamus should not be issued commanding him to cause the decree entered by the said District Judge, on the 25th of February, 1854, between the above parties, to be carried into execution according to the terms thereof.

In answer to the rule the judge states that having taken what he considered to be good and sufficient security, as the law required, the cause was appealed to the Supreme Court, which removed it from his jurisdiction, and that he had no power to make an order in the case.

It was the duty of the judge, in allowing the appeal, to take security on the appeal in the sum decreed, and not having done so, the appellant was not entitled to a supersedeas of any process necessary to carry the decree into effect, 278*] and the judge was *bound to issue it, on the application of the plaintiff. The court, therefore, order that a peremptory mandamus issue, commanding the judge forthwith to carry the decree into effect.

But as the security given was sufficient to bring the cause before the court by appeal, though not sufficient to suspend the execution of the same, the court overruled the motion to dismiss the appeal.

In the Matter of John S. STAFFORD and Jeanette Kirkland, his Wife, Appellants,

v.

THE NEW ORLEANS CANAL AND BANKING COMPANY.

(See S. C. 17 How. 283, 284.)

This case is like the preceding, and the same orders made therein.

APPEAL from the District Court of the United States for the District of Texas.

On motion for peremptory mandamus, or for a rule to show cause, etc.

Mr. Benjamin, for appellants. Mr. Coxe, for appellee.

Mr. Justice McLean delivered the opinion of the court:

This appeal is subject in principle to the objections stated in the above case of Stafford and Wife v. The Union Bank of Louisiana, and for the reasons stated in that case, a peremptory mandamus is ordered in this one, to carry into effect the decree entered in the District Court.

The motion to dismiss this appeal is overruled.

The court made the following order:

The Honorable John C. Watrous, District Judge of the United States for the District of Texas, having failed to file any return to the rule granted at the last term in this case, requiring him to appear and show cause, if any he had, why a mandamus should not be awarded, requiring and commanding him to cause the decree rendered by the said court, on the 2d day of March, A. D. 1854, in a certain case therein then depending, between the said New Orelans Canal and Banking Company, as complainant, and Josiah S. Stafford and Jeannette Kirkland, his wife, as defendants, to be at once carried into execution, according to the terms thereof, notwithstanding the appeal from said decree taken by the said defendants to this court, and the order of the said court that the appeal bond, filed by the said defendants on the said appeal, operated as a supersedeas to the said decree of the said court; and after due deliberation thereupon had, it appearing to the court that it was the duty of the judge, in allowing the appeal, to take security on the appeal in the sum decreed, and not having done so, that the appellant was not entitled to a supersedeas of any process necessary to carry the decree into execution, and that the judge was bound to issue the proper process, on the application of the complainant. *It is, [*284 therefore, now here directed and ordered by this court, that a mandamus be awarded to the District Judge of the United States for the District of Texas, requiring and commanding the said Judge forthwith to carry the aforesaid decree of the said District Court, of the 2d of March, A. D. 1854, into effect.

The court made a subsequent order, to wit: It appearing to the court here that a stipulation, by the counsel of the respective parties, to dismiss this appeal, at the costs of the appellants, has been filed in this cause, it is thereupon, on the motion of Mr. Coxe, of counsel for the appellee, ordered and decreed by this court, that this appeal be, and the same is hereby dismissed, with costs.

THE UNITED STATES, at Relation of AARON GOODRICH, Plaintiff in Error,

v.

JAMES GUTHRIE, Secretary of the Treasury of the United States.

(See S. C. 17 How. 284-314.)

Mandamus—for removed judge's salary—no power to issue.

There is no power in the Circuit Court, or in this court, to command the withdrawal of moneys from the United States Treasury to be applied in satisfaction of disputed claims against the United States.

The only acts to which the power of the courts, by mandamus, extends, are such as are purely min-

NOTE.—When mandamus will issue—see notes, 39 L. ed. U. S. 160; 46 L. ed. U. S. 263. Mandamus to compel payment of salary to public officer whose title is disputed—see note, 1 L.R.A.(N.S.) 588.

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isterial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer—such as are required of the individual rather than of the functionary.

These principles applied to application for mandamus to compel Secretary of Treasury to pay salary of a judge of a Territory after his removal.

Mr Justice McLean dissented, on the grounds that the President had no power to remove such judge, and that the payment of the salary was a mere ministerial duty.

Argued Jan. 19, 1855. Decided Feb. 6, 1855.

IN ERROR to the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

The case is stated by the court.

Mr. C. Cushing, Att'y-Gen., for the defendant in error:

The Statute creating the Supreme Court for the Territory of Minnesota was approved March 3, 1849. 9 Stat. at L. 406, ch. 121, sec. 10.

The power of appointing the justices of this territorial court is vested in the President, by and with the advice and consent of the Senate, by sec. 11.

The commission to Mr. Goodrich follows the Statute, and is limited to four years from the day of the date, 19th March, 1851.

The question arose at the first session of the First Congress under the Constitution, as to the President's power of removal of all officers whose tenure of office was not by the Constitution itself declared to be during good behavior.

The opinions of the distinguished men who then composed the House of Representatives have been reported. 4 Elliott's Debates, Part 2, 141 to 203.

The power of the President to remove all officers who by the Constitution itself were not declared to hold their offices during good behavior, was sustained by both houses. They concurred in passing an Act constituting the Department of Foreign Affairs, which was approved by President Washington, July 27, 1789, in the second section of which the President's power of removal is acknowledged. 1 Stat. at L. 29, ch. 4, sec. 2.

So, likewise, in an Act constituting the War Department, approved 7th August, 1789. Same vol. p. 50, ch. 7, sec. 2.

So, also, in the Act constituting the Department of Treasury, approved 2d Sept., 1789. Same vol. p. 67, ch. 12, sec. 7. So, likewise, in the Act constituting the Navy Department, approved 30th April, 1798. Same vol. p. 554, ch. 35; sec. 1. And also in "Act to establish the postoffice of the United States," approved 2d March, 1799. Same vol. p. 733, ch. 43, sec. 1. And in the Act establishing the Home Department, approved 3d March, 1849. Vol. IX. p. 395, ch. 108, sec. 1. It is enacted that the Secretary of the Interior shall be appointed by the President, by and with the advice and consent of the Senate, "who shall hold his office by the same tenure as the secretaries of the other executive departments."

The construction of the Constitution, as concurred in by the two houses of the First Congress, and approved by President Washington, resolved these points:

1. That in a republican government, public officers are created for the benefit of the people.

2. That the Constitution contains the power of removal.

3. That the power of removal from office is incident to the power of appointment.

4. That impeachment was not, and ought not to be, the only mode of removing officers.

5. That the duty imposed by the Constitution on the President, to "take care that the laws be faithfully executed," absolutely requires that he should have the power of removing unfit, negligent, disobedient or faithless officers.

Such was the construction of the United States Constitution by the wise, good and great men who framed it and put it in practical operation. That construction has prevailed in use and practice from the beginning of the government for more than three score years, through all the administrations of all the Presidents, with the continually recurring advice and consent of the Senate, to nominations of officers, stated expressly to be in the place of others to be removed, and with full knowledge of the House of Representatives and of the community at large.

This construction of the Constitution, prevailing for more than sixty years, cannot now be overturned without serious mischief.

It is acknowledged and approved by this court in Ex-parte Hennen, 13 Pet. 230, 259.

The governments of the territories of the United States are mere legislative governments, created at the will and pleasure of the legislative power.

Neither the law creating the office, nor the commission issued to Mr. Goodrich under that law, has given the tenure during good behavior.

The various persons appointed to judicial functions by the President of the United States, are distinguished into two great classes, so far as regards the present question, namely the judges of constitutional courts, and those of legislative courts.

Constitutional courts are such as are intended by the provisions of the third article of the Constitution. It comprehends the Judges of the Supreme Court and the various judicial circuits and districts into which the United States are subdivided.

Legislative courts are such as Congress establishes. The jurisdiction with which the courts of the territories are invested, is not a part of the judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territory of the United States.

Am. Ins. Co. v. Canter, 1 Pet. 511, 546; see, also, State of Pa. v. Wheeling Bridge Co. 13 How. 518, 563.

The judges of the territorial courts are not subject to impeachment and trial before the Senate of the United States (Mr. Grundy's Opinion, 1st Feb. 1839), and are subject to removal from office at the discretion of the President of the United States.

Mr. Crittenden's Opinion, 23d Jan. 1851.

The action of Congress in many cases has given to the judges of the territories a tenure of four years, subject, of course, to removal by the President.

Louisiana, 2 Stat. at L. 284; Arkansas, 3

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Ibid. 495; Florida, 3 Ibid. 657; Iowa, 5 Ibid. 238; Minnesota, 9 Ibid. 406; New Mexico, 9 Ibid. 449; Utah, 9 Ibid. 455, though in one case at least it has been a tenure by good behavior.

Wisconsin, 5 Stat. at L. 13.

In the older cases, reference was made to the Ordinance of July 13, 1787, one of the earliest Acts of Congress, that of August 7, 1789; and the same power of appointment and removal was thereby given to the President, and had previously belonged to the United States in Congress assembled.

N. W. Territory, 1 Stat. at L. 52; Illinois, 2 Ibid. 514; Indiana, 2 Ibid. 59; Mississippi, 1 Ibid. 550.

We have the concurring opinions and Acts of eight Congresses and seven Presidents of the United States, that the judges of the courts of the territorial government may be appointed to hold their offices for four years only.

The Supreme Court of the United States have also concurred in that construction of the Constitution.

In the case of The Am. Ins. Co. v. Canter, 1 Pet. 511, 546, the court decided that these territorial courts "are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are legislative courts. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States."

The decisions of the Supreme Court before cited, 1 Pet. 511, and 13 Pet. 230, seem to be conclusive against the claims of the plaintiff, Goodrich.

The general rule, "that an office is held at the will of either party, unless a different tenure is expressed in the appointment, or is implied by the nature of the office, or results from ancient usage," is stated by the Supreme Court of the United States in Ex-parte Hennen, 13 Pet. 260.

Mr. A. H. Lawrence, for plaintiff in error:

Two questions arise from the facts in this case: 1st, whether the President had the power to remove the relator during the four years for which he was appointed; and 2d, if he had not, whether a mandamus is proper for the purpose and under the circumstances stated in the petition.

1. The President had not the power to remove the relator, during the four years, from his appointment.

The Act of Congress (9 Stat. at L. 406, sec. 9), creating the judges, is peremptory and unrepealed. They "shall hold their offices for the period of four years." The commission pursues the same terms. Upon these terms the office was accepted.

It therefore would appear difficult to understand how any doubt could have arisen as to the absolute right of the relator to office for the four years—he not having been impeached, and the law not having been repealed—had not the Attorney-General given an official opinion that the Chief Justice of Minnesota was removable by the President. Opinions, 2d vol. 2122.

The conclusion of that officer is supposed to be legitimately drawn from, and entirely founded on, the opinion of this court in the case of The Am. Ins. Co. v. Canter, 1 Pet. 540.

And in the debate of 1789, upon the power of the removal to which the Attorney-General appeals, there is not found any support for the doctrine that a judge (whether constitutional or legislative) may be removed by the President during the period for which the Constitutive Act of the Legislature declares that he shall hold his office. The whole of that debate was upon the power of the President to remove an executive officer, and the principal argument in favor of removal was, that the executive power was vested in the President, and for it he was responsible, whether performed by himself in person, or by subordinates in office, who were simply his agents; and from the responsibility of the President, for the acts of the executive officers, the power of removal was particularly derived.

4 Elliott's Debates, 342, 350, 351, 362, 370, 376, 377, 384, 386.

But it was nowhere intimated that where no constitutional impediment existed, the Legislature could not create an office with any limitation or tenure they might choose to attach to it. The very contrary was assumed.

4 Elliott's Debates, 361, 369-398, 401.

The contrary of this doctrine has also been assumed by this court.

Marbury v. Madison, 1 Cr. 154, 162; Ex-parte Hennan, 13 Pet. 259, 260.

It has been said, it is true, by some, that the executive power has been committed to the President; that the power of removal is incident to the power of appointment; that both are, in their nature, executive acts, and that Congress can neither take away nor abridge the executive power.

It is true the executive power is committed to the President. What executive power? Not executive power in the abstract, but such executive power as arises out of the Constitution and laws of the United States. In the instance of judges in the courts of the United States, the executive power consists of the power of appointment without the power of removal. So, too, where an act of Congress creates an office with a fixed and determined tenure, the executive power as to that act consists only in the power of appointment without the power of removal.

The different departments of the government of the United States are not in hostility to each other; they are co-ordinate branches of the same sovereignty. The sovereignty of the United States, like every other sovereignty, is an unit. The Legislature is the creating element from which originates that which the President is to execute and the judiciary to expound.

2. The second question is, whether a mandamus is the proper remedy.

If it is not, then the relator, although illegally deprived of his office and its emoluments, is utterly without remedy.

The fact that the relator is without any other legal remedy, is of itself good ground for a mandamus, where the right is clear.

Tappan on Mandamus, pp. 5, 9, 10.

It is no objection that the mandamus is to

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compel the payment of moneys, if there are no other means of compulsion.

3 Nev. & Perry, 280; 8 Ad. & E. 176; 4 Barn. & A. 360; 6 Bing. 668.

In the present case, the act was purely ministerial. By the 11th section of the Act of Congress, 9 Stat. at L. 407, each judge was to receive an annual salary of $1,800.

An appropriation has in each year been made for the payment of these judges.

See 9 Stat. at L. 532, 611.

The salary was fixed by law, the time of payment fixed, the place of payment fixed, and the money lay in the Treasury, appropriated for that payment.

See the case of Kendall, 12 Pet. 611, 613.

This case is clearly distinguishable from Decatur v. Paulding, 14 Pet. 497, and Brashear v. Mason, 6 How. 92.

In each of those cases there was a fair case for discretion to be exercised, both in regard to the real meaning of Congress, and also in regard to the fund out of which the money was to be paid.

Nor is this an indirect mode of suing the government, which it is forbidden to do directly. This proceeding is neither to establish a claim by the judgment of a court, nor to enforce against the government the payment of a claim. The government has, by its proper legislative department (the only department which in this particular province represents the government), declared that the judges of the Minnesota Territory shall receive a certain salary, to be paid quarterly at the Treasury. It is the Secretary of the Treasury, and not the government of the United States, that refuses to pay; and the mandamus is to command him to make this payment, not as the representative of the government, but as the mere officer on whom devolves the duty of executing this law which the government by its Legislature has passed—to do what the law specifically requires.

Mr. Justice **Daniel** delivered the opinion of the court:

This case comes before us upon a writ of error to the Circuit Court of the United States for the District of Columbia and County of Washington. It originated in the denial by the court above mentioned of a writ of mandamus, by which the Secretary of the Treasury should be ordered to pay to the relator a sum of money claimed by the latter as a portion of the salary due to him as Chief Justice of the Territory of Minnesota.

The facts which constituted the grounds of the application, few and simple in their character, were these:

That on the 19th of March, 1849, the relator had, with the advice and consent of the Senate, been commissioned by President Taylor, Chief Justice of the Supreme Court of the Territory of Minnesota, to which office there had been annexed (by the Act of Congress organizing the territorial government) a compensation or salary of $1,800 per annum, payable quarterly. That the tenure of the appointment was, by the language both of the Act of Congress and of the commission of the relator, declared to be for the term and duration of four years from the date of the commission. That the relator, having accepted his commission, was afterwards, viz.: on 22d of October, 1851, informed by J. J. Crittenden, acting Secretary of State, that the President had thought it proper to remove him from office, and to substitute in his place Jerome Fuller.

That the relator, insisting upon the tenure of his office according to the literal terms of the commission, preferred a *claim be- [*302 fore the first Auditor of the Treasury, for the sum of $2,343, as compensation from the period of his dismission, up to the expiration of four years from the date of his appointment.

That the first auditor having rejected the claim in these words, "That Aaron Goodrich is not entitled to the salary claimed by him," an appeal was taken by the relator to the Comptroller of the Treasury, by whom the decision of the first auditor was sustained, and by whom, in adjudging, it is remarked, that "There can be only one Chief Justice of the Supreme Court in the Territory; and the President of the United States having thought proper to remove Chief Justice Goodrich, and having nominated, and by and with the consent of the Senate appointed Jerome Fuller Chief Justice in the room and stead of the said Chief Justice Goodrich, he (that is the comptroller) was bound to consider the said removal and appointment legal." And in consideration of the facts and the law, his decision was, that the United States were not indebted to the said Aaron Goodrich as Chief Justice of the Supreme Court of the Territory of Minnesota, and that the decision of the first auditor in the premises was confirmed and established.

Upon the foundation of the facts above recited, and in opposition to the decisions of the auditor and comptroller, and with the view of coercing the allowance, by the Secretary of the Treasury, of the claim preferred by the relator, the application, which has been refused by the Circuit Court, was made.

In considering this case, it may be remarked, at the threshold, that it exhibits the anomalous predicament of a prosecution by and in the name of the United States, adversary to the United States, and to their authority; for it must be admitted that the Secretary of the Treasury can have no relation whatever, and is clothed with no powers and sustains no obligation incident to the present controversy, except as he is the representative of the United States, or the guardian or custodian of their interests committed to his charge.

In their discussion of this cause, the counsel on the other side have deemed themselves called upon to take a more extensive range of inquiry than is that by which we consider this controversy to be properly limited. They have supposed that in the regular line of this controversy, and therefore, in its correct adjudication, were involved necessarily the tenure and character of the judicial power, as created either by the Constitution or by the legislation of Congress, as likewise the powers of the Executive Department, in the exercise of its constitutional functions, to control or influence the judicial power, and in their examination, by the counsel, of these deeply important topics, *much of research and ingenuity have [*303 been evinced. But within what we conceive to be the correct apprehension of this cause, neither of those important topics is embraced; and

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although, when regularly and directly presented for consideration, the responsibility of passing upon them can no more be avoided than can the adjudication of any minor subject of judicial cognizance, yet their very importance furnishes a cogent reason why any unauthorized proceeding, in reference to them, should be cautiously avoided; why there should be no attempt to affect them by proceedings extrajudicial in their character, and such as would deprive of binding authority the action of the court in matters even of trivial concernment.

The true question presented for our consideration here, relates neither to the tenure of the judicial office, as created and defined by the Constitution or by Acts of Congress, nor to the powers and functions of the President, as vested with the executive power of the government.

The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the federal government or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States. This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation—unless this should be presented by some positive and controlling command; for it would occur, a priori, to every mind, that a treasury not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a regime, or rather, under such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests.

But the question proper for consideration here has not been left for its solution upon theoretical reasoning merely. It has already been authoritatively determined.

The power of the courts of the United States 304*] to command *the perfomance of any duty by either of the principal Executive Departments, or such as is incumbent upon any executive officer of the government, has been strongly contested in this court; and in so far as that power may be supposed to have been conceded, the concession has been restricted by qualifications which would seem to limit it to acts or proceedings by the officer not implied in the several and inherent functions or duties incident to his office; acts of a character rather extraneous, and required of the individual rather than of the functionary.

Thus it has been ruled that the only acts to which the power of the courts by mandamus extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer; but that wherever the right of judgment or decision exists in him, it is he, and not the courts, who can regulate its exercise.

These are the doctrines expressly ruled by this court in the case of Kendall v. U. S. 12 Pet. 524; in that of Decatur v. Paulding, 14 Pet. 497; and in the more recent case of Brashear v. Mason, 6 How. 92; principles regarded as fundamental and essential, and apart from which the administration of the government would be impracticable. These principles, just stated, are clearly conclusive upon the case before us. The Secretary of the Treasury is inhibited from directing the payment of moneys not specifically appropriated by law. Claims against the Treasury of the United States like the present, are, according to the organization of that Department, to be examined by the first auditor; from this officer they pass, either under his approval or by appeal from him to the comptroller, and from the latter they are carried before the Secretary of the Treasury, without whose approbation they cannot be paid; and who cannot, even by the concurring opinions of the inferior officers of the Department, be deprived of his own judgment upon the justice or legality of demands upon public money confided to his care. Opposed to the claim under consideration, we have the decisions of three different functionaries, to each of whom has been assigned by law the power and the duty of judging of its justice and legality. By what process of reasoning, then, the authority to make those decisions, or those decisions themselves, can be reconciled or identified with the performance of acts merely ministerial, we are unable to perceive; and unless so identified, or there could have been shown some power in the Circuit Court competent to the repealing of the legislation by Congress, in the organization of the Treasury Department—competent, too, to the annulling of the explicit rulings of this *court in the cases hereinbefore cited— [*305 the Circuit Court could have no jurisdiction to entertain the application for a writ of mandamus in this instance. As no such power has been shown, nor in our opinion, could have been shown, or ever had existence, the decision of the Circuit Court overruling the application, is approved and affirmed.

Mr. Justice Curtis:

I assent to the judgment of the court in this case, upon the ground that a writ of mandamus to the Secretary of the Treasury is not a legal remedy to try the title of the relator to the office claimed by him; and that until that title has been legally tried and determined, he can take no step to compel the payment of the salary attached by law to that office. I desire to be understood as expressing no opinion upon any other question argued by the counsel in this case.

Concurring, Messrs. Justices Campbell and Grier.

Dissenting: Mr. Justice McLean.

As this case involves important principles, and as I differ from the opinion of the court, I shall state my views.

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The first inquiry that naturally arises in the case is, whether the President had power to make the removal complained of. This is not the object of the mandamus applied for, but it is incidental to it.

The 2d section of the 2d article of the Constitution provides, "That the President shall have power, by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law."

In his argument the Attorney-General says: "That the power of the President was discussed and settled by Congress in the commencement of the federal government: that the power to remove all officers, who, by the Constitution itself, were not declared to hold their offices during good behavior, was sustained by both houses; and that this power was recognized in the establishment of the Department for Foreign Affairs."

306*] *In the 2d section of the Act referred to it was provided, "When the principal officer of the Department should be removed, the chief clerk, during the vacancy, shall have custody of the records of the Department." And a similar provision is contained in the other Acts, to establish the Principal Departments of the government. The heads of these Departments constituted the Cabinet of the President, and as they were not only his advisers, but discharged their duties under his direction, there was a peculiar propriety that their office should be held at the will of the Executive.

There was great contrariety of opinion in Congress on this power. With the experience we now have in regard to its exercise, there is great doubt whether the most enlightened statesmen would not come to a different conclusion.

The Attorney-General calls this a constitutional power. There is no such power given in the Constitution. It is presumed to be in the President, from the power of appointment. This presumption, I think, is unwise and illogical. The reasoning is: the President and Senate appoint to office, therefore the President may remove from office. Now, the argument would be legitimate if the power to remove were inferred to be the same that appoints.

It was supposed that the exercise of this power by the President was necessary for the efficient discharge of executive duties. That to consult the Senate in making removals, the same as in making appointments, would be too tardy for the correction of abuses. By a temporary appointment the public service is now provided for in case of death, and the same provision could be made where immediate removals are necessary. The Senate, when called to fill the vacancy, would pass upon the demerits of the late incumbent.

This, I have never doubted, was the true construction of the Constitution, and I am able to say it was the opinion of the late Supreme Court with Marshall at its head.

The numbers of the Federalist, though written before the Constitution was adopted, have been considered as among its ablest expositors. Publius, in one of his numbers, says: "It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the offices of the government as might be expected if he were the sole disposer of offices. Where a man in any station has given satisfactory evidence of his fitness for it, a new President would be restrained *from at- [*307 tempting a change in favor of a person more agreeable to him, by the apprehension that the discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision, which connects the official existence of public men, with the approbation or disapprobation of that body, which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government."

In this discussion in Congress, Mr. Madison, one of the ablest and most enlightened statesmen of which our country can boast, considered the removal from office was an executive power, and that Congress could not restrict its exercise. He also considered the power of appointment an executive power, and that had not the Constitution so provided, the concurrent action of the Senate could not have been required by Act of Congress in making appointments. If this were admitted, it would not give strength to the argument in favor of the exercise of the power by the President.

If the power to remove from office be inferred from the power to appoint, both the elements of the appointing power are necessarily included. The Constitution has declared what shall be the executive power to appoint, and by consequence, the same power should be exercised in a removal. But this power of removal has been, perhaps, too long established and exercised to be now questioned. The voluntary action of the Senate and the President would be necessary to change the practice, and as this would require the relinquishment of a power by one of the parties, to be exercised in conjunction with the other, it can scarcely be expected.

The Attorney-General says that "the construction of the Constitution concurred in by the two houses of the First Congress, and approved by President Washington, resolved, among others, the following point:

"That in a republican government, public offices are wanted for the benefit of the people; that the officer does not hold a private estate and property in the office, and when the officer is unfit, for any cause whatever, he ought to be displaced and another appointed for the benefit of the people and their security; or if the office itself be found, upon experience, to be unnecessary, it should be abolished." The soundness of the policy expressed in this resolution must be admitted by every intelligent individual who understands and appreciates our system of government; and if the power had been exercised under the limitations expressed in the

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308*] resolution it would have had a *most salutary effect on office holders and on the public. For the truth of this, a reference may be made to the history of the earlier administrations.

But this power of removal from office by the President, was neither exercised nor supposed to apply, until recently, to the judicial office.

In the establishment of the Territories, the "Northwestern," "Indiana," "Illinois," "Mississippi," "Michigan," and "Wisconson," it was provided that the judges should hold their offices during good behavior. The Governor, Secretary, and the other officers of these Territories were appointed under the law, for a term of years "unless sooner removed."

By the Act of Congress of August, 1789, to provide the government of these territories, certain changes were made in the Ordinance of 1787, to adapt it to the Constitution of the United States. It was provided that the President shall nominate and by and with the advice and consent of the Senate, shall appoint all officers which by the said Ordinance were to have been appointed by the United States in Congress assembled; and all officers so appointed shall be commissioned by him; and all cases where the United States, "in Congress assembled, might, by the said Ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same power of revocation and removal."

In the Territories of "New Orleans," "Florida," "Iowa," Oregon," "Washington," "Utah," "New Mexico," "Minnesota," "Nebraska," and "Kansas," the judges were appointed for four years; and the Governor and all other officers of the Territories were appointed for a term of years "unless sooner removed."

In the "Missouri" and "Arkansas" Territories only, were the judges appointed for four years, "if not sooner removed."

In the Constitution no express provision was made for the government of territories. This, no doubt, was deemed unnecessary, as the Ordinance of 1787, which was passed before the Constitution was adopted, provided for the government of all the territory then claimed by the United States.

Territorial judges are said not be appointed under the Constitution, but by virtue of an Act of Congress. In the Am. Ins. Co. v. Canter, 1 Pet. 546, Chief Justice Marshall said: "The judges of the superior courts of Florida held their offices for four years. These courts, then, are not constitutional courts, in which the judicial power, conferred by the Constitution on the general government, can be deposited." But all the judges of the territories, from 1787 to 1804, were appointed for good behavior, so that the term of service was not a safe criterion by which to determine the character of territorial judges.

309*] *It is admitted that the Judges of the Supreme Court cannot be appointed for a less period than good behavior; and the same may be said of the district judges.

The power under which the territorial governments are organized, is a matter of some controversy. In the case above cited, Chief Justice Marshall said: "Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property belonging to the United States." This is the prevailing view of those who have examined the subject. But the Chief Justice proceeds: "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. These facts exist in every territorial government, but it does not show the source of the power, unless by the doctrine of necessity, which does not seem to be a legitimate foundation for a civil government under our system. The Chief Justice further says: "The right to govern may be the inevitable consequence of the right to acquire territory." There is no special power given in the Constitution to acquire territory. This does not seem to have been within the view of the framers of the government; and the right was much contended in the acquisition of Louisiana, when the power was first exercised.

It seems to me that the power to govern a territory is a necessary consequence of the power given "to make all needful rules and regulations respecting the territory or other property belonging to the United States." No one doubts the power of Congress to sell the public lands beyond the limits of any state; and this renders necessary the organization of a government for the protection of the persons and property of the purchasers. This is an implied power, but it necessarily results from the power to sell the public lands.

It is difficult to say that any power can be exercised by Congress which is not derived from the Constitution. Without that instrument, it is as powerless as any other association of men. The laws of the Union protect our commerce wherever the flag of the country may float, and in some instances our own citizens may be made responsible for acts done in foreign seas and countries; but this is the exercise of powers given by the Constitution. Under the legislative power of Congress, territorial governments are organized, and their functionaries are appointed by the President and Senate. Their laws emanate from Congress, or are passed by a territorial Legislature, subject *to the approval of Congress. [*310 The government of the territory is a government of the United States; and although its courts do not exercise the judicial power to the same extent as the other courts of the United States, still they are courts of the United States and exercise such judicial powers as are conferred on them by law.

It is argued, that, as the President is bound to see the laws faithfully executed, the power to remove unfaithful or incompetent officers is necessary. This may be admitted to be a legitimate argument, as commonly applied to executive officers. My own view is, that the power to see that the laws are faithfully executed, applies chiefly to the giving effect to the decisions of the courts when resisted by physical force. But, however strongly this

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may refer to the political officers of the government, how can it apply to the judicial office?

In the nature of his office, the President must superintend the Executive Department of the government. But the judiciary constitutes a co-ordinate branch of the government over which the President has no superintendence, and can exercise no control. So far from this Department being subject to the Executive, it may be called to pass on the legality of his acts. The President, like all the other officers of the government, is subject to the law, and cannot violate it with impunity. He is responsible for the infraction of private rights, and before a territorial court, the same as before the other courts of the Union. In no just and proper sense can the President be required to see that the judicial power shall be carried out, except as controlling the physical power of the Union.

The effects of the control of the judicial by the executive power, are seen in the history of England, during the reign of the Stuarts. The most insupportable tyranny and corruption were realized under this paramount power of the executive government. It has always been the corrupting power of all free government. This, in a great degree, arises from the extent of its powers and patronage. And in the formation of our government great care was taken to place the judicial power on an independent basis. Being without patronage, and discharging the most onerous and delicate duties, nothing but a high and impartial discharge of its functions can sustain it.

Whenever any portion of the judicial power shall become subject to the executive, there will be an end of its independence and purity. It will become the register of executive decrees and of a party policy. What could create a deeper degradation than to see any branch of the judiciary, which stands between the executive power and rights of the citizen, become the mere instrument of that power?

311*] *There can be little or no difficulty in coming to a correct conclusion on this important question, by an examination of the Acts of Congress creating the tenure of the judicial office in the territories. In the seven Territories first enumerated, the judges were appointed during good behavior; the other officers were appointed for a term of years "if not sooner removed."

In ten Territories the law authorized the appointment of judges for the term of four years, and the other officers for a term of years "if not sooner removed." Whether in the above Acts the judicial tenure was fixed for good behavior or a term of years, no one can fail to see the difference in regard to the tenure of the judges, and of the other officers. The judges were appointed absolutely for good behavior, or a term of years, whilst the other officers were appointed for a term of years "unless sooner removed." By the terms of the appointment the political officers, such as the governor, secretary, marshal, etc., were removable, but the judges were not. In this respect these appointments stand in contrast, and show the unmistakable intention of Congress.

It is true that for the Territories of Missouri and Arkansas, the judges were appointed for the term of four years, "unless sooner removed." This language was first used for the Missouri Territory, and as the Arkansas Territory was taken from Missouri, the same language was incorporated into the organic law of Arkansas. These two Territories out of the nineteen above named, would imply the power to remove the judges. But whether this language was the result of accident or design, it cannot authorize the construction of the law establishing the other Territories, among which the Territory of Minnesota is included, as though the power of removal applied to them. The words used will not allow this construction, especially when taken in connection with the words in the same Acts in relation to the appointment of officers in the Territories, other than the judges.

This view is greatly strengthened by the usage of the government. There have been, it is believed, but two judges of Territories removed, and those recently—since the organization of the Union. And we may rely on the early practice of the government to show its true theory in the exercise of federal powers. The great principles of our system were then understood and adhered to, and our safest axioms are found in this part of our history.

It is said the Act of 1789, which modified the Ordinance of 1787, so as to adapt it to the Constitution, gave the same powers to the President, in regard to appointments and removals, which, under the confederation, was exercised by Congress. This is *true, [*312 but it can apply only to those officers which, under the confederation, were removable by Congress. Under the Ordinance, as above stated, the judges were appointed during good behavior, while all the other officers were appointed for a term of years "unless sooner removed."

If Congress have the power to create the territorial courts, of which no one doubts, it has the power to fix the tenure of office. This being done, the President has no more power to remove a territorial judge than he has to repeal a law. The duties of a judge of a territory are discharged as independently, and as free from executive control as are the duties of a judge of this court. This territorial judicial power was intended to be a check upon the executive power. And it would be inconsistent with the principles of our government for the judges to be subject to removal by the Executive.

This is a great question, though it can only affect, as now maintained, the territorial bench. And I regret that from the want of jurisdiction, in the opinion of my brethren, they are not required to express an opinion as to the power asserted.

The other question in the case is, whether the remedy by mandamus is appropriate and legal. In the case of Kendall v. The U. S. 12 Pet. 608, which, in my judgment, is not distinguishable from this, the question was settled.

In that case, under a special Act of Congress, a matter of controversy between William B. Stokes et al., and the Postmaster-General, was referred to a commissioner, to examine the account and report any balance he might find due to the relators, from the Postmaster-General; and the Postmaster-General was required to pay such balance, by entering a credit on the books of the Department,

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The duties of the commissioner were performed, and he reported in favor of the relators, $161,563.89, all of which sum was credited by the Postmaster-General, except the sum of $39,462.43, which he refused to place to the credit of the relators on the books of the Department. The petitioners prayed the Circuit Court of the District of Columbia to award a mandamus, directed to the Postmaster-General, commanding him to enter the credit.

A peremptory mandamus was issued by the Circuit Court, which decision was brought before this court by a writ of error. All the members of this court held that it was a proper case for mandamus, as the duty imposed was ministerial and positive, there being no other adequate remedy. Three only of the judges dissented, on the ground that the Circuit Court of the District of Columbia had not power to issue the writ; but the other six judges held that it was not only a case for a mandamus, but that the Circuit Court had the power to issue 313*] it. *The credit was required to be entered on the books of the Auditor of the Postoffice Department, whose duties were performed under the Treasury Department. But as the accounts were examined in the Postoffice Department, the credit was required to be entered by the Postmaster-General on the books of the Auditor. It was known that an order of the Postmaster-General requiring the credit to be entered would be obeyed by the Auditor.

In the case before us the salary of the judge was fixed by law, and payable at the Treasury Department, where application for payment has been frequently made by the relator and refused by the Secretary of the Treasury. It is shown that an appropriation of the salary was made by Act of Congress, and in such a case the payment is a ministerial act, and the Secretary has no discretion to withhold it. This would not be controverted, it is supposed, if the judge who demanded payment had remained in office. If, in such case, the Secretary may, at his discretion, refuse to pay the salaries of officers, he might suspend the action of the government. The duty to pay is enjoined on the Secretary by law; it is a ministerial duty, in which he can exercise no discretion, the appropriation having been made by law.

By the Act of 2d September, 1789, the Secretary of the Treasury is required to "grant all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law." And in the same act, the Treasurer is required to "receive and keep the moneys of the United States, and to disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by the Comptroller, recorded by the register, and not otherwise." These are all ministerial duties performed under the Secretary of the Treasury. The money having been appropriated by law for the salary of the judge, the Secretary was bound to pay it.

The justification for the non-payment by the Secretary is, that the relator had been removed from office by the President, and that by the President and Senate, his successor had been appointed, who, having entered upon the discharge of his duties, was entitled to the salary, and to whom it had been paid.

If the act of removal by the President was unauthorized, this can afford no justification for withholding the salary. It is admitted that, by mandamus, no act of an executive officer can be examined, which involves the exercise of his judgment or discretion. The payment of the salary, being a mere ministerial duty, positively enjoined by law, is subject to no such objection. But may not the objection apply to the removal of *the judge? If such a [*314 power were within the exercise of the discretion of the President, it would be conclusive. But if the act be without authority and against law, it is void; and such was the act complained of. The President could exercise no discretion on the subject; the removal was beyond his power; and the act being void, it cannot be considered as the exercise of an executive discretion. The judgment and discretion which may not be interfered with by mandamus, must be in the discharge of executive duties. These do not come within the judicial power. But an unlawful, and consequently void act, by the President, by which an injury is done to an individual, cannot be covered by executive discretion. And in this case the question is incidental to the object of the mandamus, which is to require the Secretary to perform a ministerial duty. The removal of the judge is set up by the Secretary as a reason why the relator has not been paid; and if the act of removal be void, it fails to justify the refusal to pay.

The case of Decatur v. Paulding, 14 Pet. 513, is altogether different from the one under consideration. In the opinion of the court in this case, the Chief Justice showed that it was materially distinguishable from Kendall's case.

It would be difficult to imagine a clearer case for a mandamus than the one before us in my judgment; and I think it should be issued. If the salary has been paid to the new judge, it has been illegally paid, and that is no reason why it should not be paid to the rightful claimant.

We have nothing to do with the conduct of the judge, nor had the President. The judge was liable to be impeached and removed from office, in that form.

Judgment of Circuit Court confirmed, with costs.

EDWARD M. WEST, Plaintiff in Error,
v.
JOSEPH COCHRAN.

(See S. C. 17 How. 403–416.)

Spanish land grant—construction of statute—when title perfect.

By the Act of March 3, 1807, Congress did not intend that a final legal title to lands held under Spanish and French grants should be made to vague grants, until the bounds had been ascertained, and the particular tract defined by survey.

Until the survey was made, the plaintiff's title attached to no land, nor could a court ascertain its boundaries, as this power was reserved to the Executive Department.

The plaintiff's land not being surveyed when the action was commenced, he had no title that would support an action of ejectment.

(Mr. Justice WAYNE did not sit in this cause.)

NOTE.—What title or interest will support the action of ejectment—see note, 18 L.R.A. 781.

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Argued Jan. 10, 1855. Decided Feb. 6, 1855.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This is an action of ejectment for the recovery of a lot of ground in the northern part of the city of St. Louis, which the plaintiff alleges to be part of the land confirmed to Joseph Brazeau, whose title he held by the board of commissioners on September 22, 1810.

The defendant claimed, under a similar confirmation of the same date to Louis Labeaume, and the lot in question being embraced within the survey and patent of Labeaume, and not within the survey and patent to Brazeau, the Circuit Court decided that the plaintiff below, who is also plaintiff in error, could not recover.

The case is fully stated by the court.

Messrs. T. Ewing and M. Blair, for the plaintiff in error:

Brazeau claims under a confirmation by the United States Commissioners, pursuant to the Act of March 30, 1807.

The confirmation passes the absolute legal title, and though a patent may issue, it is merely evidence of a title already complete. U. S. Stats. Vol. II. p. 441, sec. 4.

The operative words of a statute are "which decision of the commissioners, when in favor of the claimant, shall be final against the United States, any Act of Congress to the contrary notwithstanding."

The Act of 1805 provides (sec. 5), that such "decisions shall be laid before Congress in the manner hereinafter directed and be subject to their determination thereon."

The Act of 1807 does not submit the case to the action of Congress, but declares that a decision of the commissioners, when in favor of the claimant, "shall be final against the United States."

The confirmation is complete in the one case with the action of Congress on each particular claim; in the other by the action of the commissioners without the action of Congress. In both cases a patent is to issue; but in one of these cases the legal title passes without the patent.

Doe v. Eslava, 9 How. 446, 447; Stoddard v. Chambers, 2 How. 307.

The United States can as well pass titles by the act of commissioners as by the act of the President.

The reasons of policy are indeed against a distinction between the two classes of cases. In this case confusion is guarded against by the required report of the commissioners, in that the General Land Office must issue a patent if required, precisely as they must in cases confirmed by the direct act of Congress. There is a dictum in Burgess v. Gray, 16 How. 63, opposed to our view, which we respectfully ask the court to reconsider. But we may, under the statutes of Missouri adopted in practice by the Circuit Court, maintain our action of ejectment under the confirmation.

Our title is final against the United States. It is conclusive and absolute, subject to no conditions or contingencies. The land confirmed to Brazeau belongs to him. The United States could not take it from him nor transfer it in title to another. But in case of a controversy, the question as to existing title is not for the Executive Department, but for the courts. This was practically denied by the instructions.

But it is contended that as Brazeau did not file his claim in writing with the Recorder, the confirmation to him is void, the whole matter being coram non judice.

If the legal title did not pass to Brazeau, by his confirmation, neither did it pass to Labeaume by his. The parties, therefore, on January 27, 1852, held by equal titles on which ejectment lies by the laws of Missouri adopted in practice by the Circuit Court of Missouri.

The rights of Brazeau under the location of his land were questions for a court and jury to determine. And because the court instructed the jury that the act of an executive officer, in issuing a patent after the commencement of a suit, was conclusive of their rights; we claim that the judgment ought to be reversed, and this, irrespective of the merits of the case.

Messrs. C. Cushing and Britton A. Hill, for the defendant in error:

1. Under the Statute of Missouri (Rev. Code, 1845, title Ejectment) an action of ejectment may be maintained under the laws of the United States, against a person not having a better title.

The confirmation to Brazeau of 1810 did not vest the legal title in him. The fee was still in the United States. The plaintiff cannot recover at law upon this equity, the fee remaining in the government, against a patent of the United States, which vests the fee in the defendant.

The patent is the better title.

Patterson v. Win, 5 Pet. 241; Bagnell v. Broderick, 13 Pet. 450.

The complainant, in ejectment, must have been clothed, at the commencement of his suit, with a legal title; no equitable title will avail.

Doe ex dem. Hodsden v. Staple, 2 T. R. 696; Doe ex dem. Reade v. Reade, 8 T. R. 122; Robinson v. Campbell, 3 Wh. 220.

See further, as to the conclusive effect of a patent as evidence in a court of law.

Paterson v. Jenks et al. 2 Pet. 216; 4 Wheat. 488; 16 Wheat. 580; Stringer v. Young et al. 3 Pet. 320; U. S. v. Arredondo, 6 Pet. 728, 738; Wilcox v. Jackson, 13 Pet. 499.

It may be considered as conclusively settled by repeated adjudications of this court that a party cannot recover in an action of ejectment upon a confirmation by the old board of commissioners against a party holding under a patent from the United States.

2. Brazeau had no confirmation under the Acts of Congress of 1805, 1806 or 1807, under which the confirmation to him purports to have been made, for the reason that no notice of his claim was filed by him according to the requirements of said Acts of Congress so as to give the board of commissioners jurisdiction of his case.

Strother v. Lucas, 6 Pet. 771, 772; S. C. 12 Pet. 453, 454, 458; Bissell v. Penrose, 8 How. 333, 338.

All the title that the United States had in this land on February 26, 1806, the date of Labeaume's claim, has been vested in Labeaume and his legal representatives by the patent.

Green v. Liter et al. 8 Cr. 229; Landes v. Brant, 10 How. 373.

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3. It is not admissible for the plaintiff to locate the reservation in another place, or allege that it was located by Brazeau by mistake. It is too late to allege any such mistake, if any was made, for innocent purchasers have bought the land of Labeaume, and the title to these purchasers cannot be affected by the present scheme of relocation. Brazeau and his representatives, if they ever had any right in equity, have lost it by their laches for half a century. They have suffered Labeaume and his representatives to possess the land according to the deed, for fifty-four years prior to the suit; and now the plaintiff asks the court to correct the alleged mistake in the deed, after the property has been in the possession of innocent purchasers for thirty-six years. A court of equity has always refused its aid to stale demands where a party has slept upon his rights or acquiesced for a great length of time.

Piatt v. Vattier et al. 9 Pet. 416; Smith v. Clay, 3 Brown, Ch. 640; Cane v. Bloodgood, 7 Johns. Ch. 93; Hughes v. Edwards, 9 Wh. 489; Willison v. Watkins, 3 Pet. 44.

4. The confirmation to Brazeau was subject to a condition of survey by the United States. In the completion of the grant to Brazeau under the confirmation, the United States has surveyed the tract confirmed to him, and a patent thereon has issued to his legal representatives, locating the land south of and adjoining Labeaume's tract. This is conclusive upon Brazeau's representatives, and they cannot dispute this location, thus made in accordance with law.

Menard's Heirs v. Massey, 8 How. 313; Mackay v. Dillon, 4 How. 421; Le Bois v. Bramell, 4 How. 450, 464.

5. The defendant has the elder title; for the patent to Labeaume's representatives relates back to the filing of his claim in February, 1806, and passed the title as of that date by relation for the land described in the patent.

Landes v. Brent, 10 How. 348.

6. All the title that the representatives of Brazeau claim within the Labeaume patent, the plaintiff is barred from recovering upon by the Spanish law of prescription, which remained in force in Missouri until December, 1818.

Strother v. Lucas, 12 Pet. 424, 461.

The evidence conclusively proves that Labeaume entered under a just title, upon which he could lawfully prescribe under the Spanish law, and possess in good faith. A possession of ten years under such a title passes the title by prescription under the Spanish law then in force.

2 Martin, 79; 5 Martin, 197; 8 Martin, N. S. 278; 11 Martin, N. S. 207; 7 Martin, N. S. 578; Strother v. Lucas, 12 Pet. 789, 790.

Mr. Justice Catron delivered the opinion of the court:

To understand the application of the instruction given to the jury which controlled the verdict in this case, a minute statement of the facts is necessary.

On the 1st June, 1794, Joseph Brazeau, by petition, requested the Lt.-Governor of Upper Louisiana to grant to him a tract of land near the then village of St. Louis, "situated beyond the foot of the mound called the Grange de Terre, four arpents in width, which are to extend from the steep bank or beach of the Mississippi in the W. ¼ S. W. by about twenty arpents in depth, that shall begin at the foot of the hill where stands the Grange de Terre, ascending in a N. N. W. course to the vicinity of the Stony Creek, so that the said tract hereby asked for be bounded on the east by the bank of the Mississippi, on the other side in part by the King's domain, and in part by land re-united to the said domain."

The grant was made by the Governor in the following terms: "We do certify to have put Joseph Brazeau in possession of *the [*409 parcel of land designated in his petition, of four arpents, by twenty deep, which shall extend in a N. N. W. course from the foot of the hill where stands the Grange de Terre, ascending to the vicinity of the Stony Creek, bounded on one side by the bank of the Mississippi, and on the opposite side by the lands not conceded or re-united to His Majesty's domain; and at the two ends bounded on the N. N. W. by the vicinity of the Rocky Creek, and at the other, in the S. S. E., shall be bounded by the land granted to the free mulattress Esther." This concession was made June 10, 1794.

On the 25th of the same month, the Governor amended his former concession, in which he declares that the four arpents front by twenty deep "shall begin beyond the mound called La Grange de Terre, extending N. N. W. to the vicinity of the Rocky Branch, bounded on one side by the banks of the Mississippi River, and on the opposite side by lands re-united to the King's domain, through which lands passes this present concession, of which one end is to be bounded by the concession of the free mulattress Esther."

The application of Esther above referred to, was made October 2, 1793. She petitioned for a piece of land lying on the borders of the Mississippi; the northern portion of the concession to be situated between the small mound called the Grange de Terre and the beach of the Mississippi, having at its two extremities four arpents front, that shall bear about from E. N. E. to W. S. W., by twenty arpents in extent or depth, that shall run from about N. N. W. to S. S. E.

On the 3d October, 1793, the Governor granted the land to Esther, in the terms of her petition, with this addition: That the land should descend to the river and be limited on three sides by the King's domain, and on the other side by the bank of the Mississippi, as shown by the plat on the back of the concession. This plat was a rude sketch, affording no material aid in locating the land.

On the 5th of October, 1793, the Governor certifies that he had in person put Esther in possession of the land granted, the locality of which he again describes, in the terms as above set forth, except that he declares that the eastern boundary on the river shall be limited by the edge of the beach.

Esther's concession was not surveyed by the Spanish authorities.

On the 9th of May, 1798, Joseph Brazeau sold to Louis Labeaume part of the land granted to Brazeau in June, 1794, reserving for himself four arpents to be taken at the foot of the mound on the south part of the concession;

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Brazeau selling only sixteen arpents in depth to 410*] Labeaume, who accepted the *sale with this reservation. In 1799, Labeaume applied to the Governor to enlarge his tract acquired from Brazeau. "He asks that you will be pleased to grant him 360 arpents of land, including the land which he, the petitioner, bought of M. Brazeau; that is, twenty arpents in depth from the Mississippi in ascending the Rocky Branch, West ¼ S. by 16 arpents in front along the Mississippi, to be taken from the descending road into the creek; which is the same front of the petitioner's land, the angle (triangle) formed by the perpendicular from the road to the river by the creek, and by the river shall complete, or about, the tract asked for."

In February, 1799, the Governor granted the land to Labeaume, with the boundaries asked for, and ordered that Soulard, the surveyor, should put Labeaume into possession, and execute a survey to serve the interested party, to obtain a complete title from the Governor-General, which was wished for by the petitioner.

On the 20th March, 1799, Soulard proceeded to survey the land granted to Labeaume, from which the larger quantity of 374 arpents was found to be within the boundaries described in Labeaume's petition. The survey was regularly certified, April 10, 1799, and accompanied by a figurative plat.

The line marks of this survey have been retraced in the survey recently made by the United States, and the patent to Labeaume or his legal representatives, of the 25th of March, 1852, is founded on it. But it is insisted that the survey includes the 16 arpents reserved by Brazeau in his deed of May, 1798, to Labeaume; and on the existence of this fact the title of the plaintiff in the present controversy depends, as the land demanded lies within the bounds of the patent. Labeaume filed his title papers with the recorder of land titles, to be registered in February, 1806; and in his notice of claim, the tract partly in dispute is thus described: "Louis Labeaume, 374 arpents of land, conceded in part to Joseph Brazeau, the 20th of June, 1794, and the other part to Louis Labeaume the 15th February, 1779, settled and cultivated since both these dates."

On the 3d of September, 1806, the board of commissioners appointed to adjudicate claims to lands under the Act of 1805 passed on Labeaume's claim. The clerk of the board gives a description of it in these terms: Louis Labeaume claiming 374 arpents of land situate on the Mississippi, a distance of about two miles from the Town of St. Louis, produces a concession (duly registered) from Zenon Trudeau, for four by twenty arpents, dated the 20th June, 1798 (25th June, 1794), granted to one Joseph Brazeau, and another concession from said Zenon Trudeau to claimant, for the 411*] said 374 arpents, including the said *four by twenty arpents, dated the 15th February, 1799; a survey of the same taken the 2d March and certified the 10th April, 1799, together with a certificate by Zenon Trudeau of the sale of the said four by twenty arpents by said Joseph Brazeau, reserving to himself four arpents in superficies; said certificate dated the 12th May, 1798."

This entry is so confused as to be unmeaning without reference to the title papers of record. The board at that time rejected the claim because the concession had not been duly registered.

On the 22d of September, 1810, the board confirmed the claim in the following terms: "Louis Labeaume claims three hundred and seventy-four arpents of land. See book No. 1, page 517. The board confirms to Louis Labeaume 356 arpents, and 4 arpents to Joseph Brazeau, and order that the same be surveyed agreeably to the concession from Zenon Trudeau to Louis Lebeaume, and as respects the four arpents, agreeably to a reserve made in a sale from Joseph Brazeau to said Louis Lebeaume, recorded in book C, page 336, in the recorder's office."

On the 14th of June, 1811, the board ordered both tracts to be surveyed at the expense of the United States, and to this end gave the following certificate to the parties respectively:

"Commissioners' Certificate, No. 982, June 14, 1811.

We, the undersigned commissioners for adjusting the titles to lands in the Territory of Louisiana have decided that Louis Labeaume, original claimant, is entitled to a patent under the provisions of the 4th section of an Act of Congress of the United States, entitled 'An Act respecting claims to lands in the Territories of Orleans and Louisiana, passed the 3d day of March, 1807, for 356 arpents of land, situate in the District of St. Louis, on the Mississippi, and order that the same be surveyed agreeably to a concession from Zenon Trudeau to Louis Labeaume, recorded in book C, page 339 of the recorder's office, by virtue of a concession or order of survey from Zenon Trudeau, Lieutenant-Governor. Signed by the commissioners.

"Commissioners' Certificate, No. 983, June 14, 1811.

We, the undersigned commissioners for ascertaining and adjusting the titles and claims to lands in the Territory of Louisiana, have decided that Joseph Brazeau, original claimant, is entitled to a patent under the provisions of the 4th section of an Act of Congress of the United States, entitled 'An Act *respect- [*412 ing claims to land in the Territories of Orleans and Louisiana,' passed the 3d day of March, 1807, for four arpents of land situate in the District of St. Louis, on the Mississippi, and order that the same be surveyed agreeably to a reserve made in a sale from Joseph Brazeau to Louis Lebeaume, recorded in book C, page 339, of the recorder's office."

"By virtue of a concession, or order of survey, from Zenon Trudeau, Lieutenant-Governor." Signed by the commissioners.

Owing partly to a contest between the parties in this cause, before the Department of Public Lands, the surveys were not executed and finally settled so that patents could be issued thereon, till the 26th of February, 1852; and the patents for both tracts were issued on the 26th of March following; that to Labeaume or his legal representatives, embracing the land in Soulard's survey; and the survey and patent made for Joseph Brazeau, or his legal representatives, are located on the southern boundary of Labeaume's tract. This suit had been

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brought in the Circuit Court before the surveys were approved, or a patent issued to either party.

The representatives of Brazeau have refused to receive the patent issued to them, and protest against the binding force of the survey; insisting that the confirmation by the commissioners conferred a perfect title for different land from that covered by the patent. On this state of facts the Circuit Court instructed the jury as follows:

"We have been engaged in this cause for the last fifteen days, endeavoring to ascertain the fact whether the tract of land confirmed to Louis Labeaume, according to Soulard's survey of 1799, embraces the 16 arpents confirmed to Joseph Brazeau. Brazeau got a concession for 20 arpents in front on the Mississippi by 4 arpents back, and sold the northern 16 arpents front to Labeaume, reserving four by four, or 16 arpents, at the southern end of the tract granted by the concession. In 1799, Labeaume got his tract enlarged by an additional concession, including the 16 arpents front purchased from Brazeau. This latter concession was surveyed by Soulard, the proper Spanish surveyor, in 1799, and the survey was recorded.

In 1810, the Board of Commissioners confirmed the grant to Labeaume, according to Soulard's survey. This being the effect of the confirmation; at the same time that the board confirmed Labeaume's claim, including the 16 arpents front, the claim of Brazeau was also confirmed, and a survey in each case was ordered by the board.

Recently, the surveys of these tracts were 413*] made according to *the precise instructions as to their boundaries, coming from the General Land Office at Washington, and pursuant to the order of the Secretary of the Interior; and on these surveys patents have issued, one to the legal representatives of Labeaume, and the other to the legal representatives of Brazeau; which tracts adjoin each other, on the southern boundary of Labeaume's tract, as described in the patent; and one question is, whether the plaintiff to this suit can claim land elsewhere than that described in his patent; in other words, whether he can abandon the land surveyed for him, and granted by patent, and go further north and recover land there which never had been surveyed in conformity to the concession. We are of opinion that the United States reserved the power to locate by survey the land conveyed to Brazeau, and by such survey to separate it from the public lands, and from the lands claimed by others, and to issue a patent therefor, as was done in this instance; that this reserved power was vested in the Executive Department, whose acts in this instance bound Brazeau, and those claiming under him; nor can they extend their claim and recover land beyond the boundaries described in the patent to Brazeau or his legal representatives. The jury are further informed that all instructions heretofore given inconsistent with the foregoing are withdrawn from their consideration; this instruction having been given at the request of the jury, because they could not agree according to the instructions heretofore given to them by the court."

To the giving of which instruction to the jury, the plaintiff, by his counsel, at the time duly excepted. A verdict was, of course, returned for the defendant.

To comprehend the scope of the foregoing instruction to the jury, we must consider the condition of claims to land derived from France and Spain before the United States acquired Louisiana; and with but few exceptions they were possessed and cultivated in the upper province, at the date of the treaty, by virtue of concessions from the lieutenant-governors and commandants of posts, in which no definite boundaries were prescribed by the concessions themselves, but the Surveyor-General of the Province was instructed to measure the land, and mark out the boundaries, and to put the interested party into possession. As a general rule, a survey was required before possession was given. Often, however, and probably in most instances, no survey had in fact been made when the United States acquired the country in 1803; and of this unsurveyed class was the concession to Joseph Brazeau. As these unlocated claims were usually surrounded in part by public lands, and in other part by the vague and unlocated claims of others, it became necessary that definite boundaries should be established by legal surveys, *so that the [*414 limits of the public domain might be known, and private adjoining owners be exempt from disturbance and litigation.

It has often been held by this court that the judicial tribunals, in the ordinary administration of justice, had no jurisdiction or power to deal with these incipient claims either as to fixing boundaries by survey, or for any other purpose; but that claimants were compelled to rely upon Congress, on which power was conferred by the Constitution to dispose of, and make all needful rules and regulations respecting the territory and property of the United States. Among these needful regulations was that of providing that these unlocated claims should be surveyed by lawful authority; a consideration that has occupied a prominent place in the legislation of Congress from an early day.

The Act of March 3, 1807, sec. 4, was the first that gave a board of commissioners power to adjudicate claims against the United States, and conclude the government as to the question of right in the claimant. The judgments of the board on all claims for less than a league square were to a large degree judicial, but as their powers and duties depended on the Acts of 1805, 1806, and more especially on that of 1807, when they confirmed Brazeau's claim, we must ascertain from these laws whether more was to be done to conclude the United States as to any definite and distinct tract of land.

By the 6th section of the Act of 1807, the Commissioners were bound to transmit to the Secretary of the Treasury, and to the Surveyor-General of the District where the land lay, transcripts of their final decisions, made in favor of each claimant, and were required to deliver to him a certificate stating the circumstances of the case, and that he was entitled to a patent for the tract therein designated; which certificate was to be filed with the recorder, if

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the land lay in the District of Louisiana, and with the Register of the Land Office, when the land lay in the Orleans Territory.

In all cases where tracts of land were granted by the board, which had not been previously surveyed, the 7th section of the Act of 1807 declared that they should be surveyed under the directions of the Surveyor-General; and that he should transmit general and particular plats of the tracts thus surveyed to the proper register or recorder, and also transmit copies to the Secretary of the Treasury. The certificate and plat being filed with the register or recorder, he was thereupon required to issue a patent certificate in favor of the claimant, which, being transmitted to the Secretary of the Treasury, entitled the party to a patent in like manner as patents were issued on lands sold by the United States.

415*] *By the Act of April 29, 1816, a surveyor-general was appointed for the territories of Illinois and Missouri, with general powers to survey the public lands into sections; and also to survey all lands confirmed by acts of Congress, and to perform the duties imposed on his predecessor, the principal deputy for Missouri Territory, whose duty it was to survey the claims confirmed by commissioners, in all cases where they have not been previously surveyed according to law.

The commissioners having given Brazeau a certificate that he was entitled to a patent, according to his confirmation, pursuant thereto, several surveys were made by deputy-surveyors, under instructions from the Surveyor-General, but they were rejected as improper and unlawful, either by him or at the General Land Office. Finally, in March, 1852, as above stated, the claim was surveyed according to the instructions of the Secretary of the Interior, and a patent issued conforming to this survey.

The Circuit Court charged the jury, in substance, that in this case of confirmation by the board sitting at St. Louis, in 1810, the claim being unlocated and vague, power was reserved to the United States to locate the tract by survey.

It was competent for Congress to take up these titles or rights, and act on them either by legislating directly that each claimant should be confirmed, and have a perfect title to his actual possession lawfully acquired under France or Spain, without ascertaining, in the act of confirmation, or by any special means provided therein, the bounds of claims confirmed. But it was also competent for Congress to provide that before a title should be given to any possessor, the exact limits of his possession, and the title which the United States was to give, should be defined, and that this should be done by such agencies, and in such manner as might be fixed by Congress. This is in entire accordance with the provisions of the Treaty, which guarantees to the inhabitants the right of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced —these being left to the nation to whose powers they were confided; so that the question is, what has Congress deemed expedient? Now, the policy which is so obvious, and which has been acted on by the United States ever since they began to exercise power over the public lands, namely: to give defined limits to grants, may well be supposed to have actuated Congress in 1807. The provisions of that Act clearly show, that although Congress intended that the commissioners should adjudge the existence of good titles to lands held *under [*416 French and Spanish possessors, yet they did not intend that a final legal title, as against the United States, should be made to vague grants, until their bounds had been ascertained by the means there designated, and the particular tract defined by survey.

Congress might have said, as was done in case of the St. Louis town lots and out lots, by the Act of 1812, that each man should own what he had lawfully possessed under the former government; and if Congress had done so, then the question would have been, in this instance, a matter of fact, to be tried by a jury, as to what the plaintiff did formerly possess, and consequently own. But Congress having said, by the Act of 1807, that he shall be confirmed in what shall be designated by a survey made under the authority of the United States, according to the direction of the Board of Commissioners, and such direction to survey being a condition which the judgment of confirmation carried along with it, until the survey was made, the plaintiff's title attached to no land, nor could a court of justice ascertain its boundaries, as this power was reserved to the Executive Department of the federal government; it follows that the legal representative of Brazeau, who brings suit, had no title at the time it was brought that would support an action of ejectment.

It is ordered that the judgment of the Circuit Court be affirmed.

Affirmed with costs.

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*MARCELIN HAYDEL, Plff. in Err., [*23
v.
FRANÇOIS DUFRESNE.

(See S. C. 17 How. 23-30.)

Public lands—preference given to front owner in purchase of back lands—surveyor's decision.

Where Congress gave certain owners of land bordering on any river or water-course in a territory, a preference in purchasing vacant tracts back of and adjacent, and authorized the surveyor of public lands to divide the vacant land applicable to that object, between the several claimants, front owners, in such manner as to him may appear the most equitable, whenever each owner could not obtain a tract equal to his front tract, held, that the courts could not interfere to control the act of the surveyor in making such division, if honestly performed.

The party aggrieved could appeal from the surveyor's decision, to the Commissioner of the General Land Office; and from his decision, to the Secretary of the Treasury.

Argued Dec. 7, 1854. Decided Feb. 6, 1855.

IN ERROR to the Supreme Court of the State of Louisiana.

A petition was filed in Circuit Court of the United States, to change apportionment of public lands made by United States Surveyor. The District Court denied the relief asked. On appeal to the Supreme Court of the State, that court reversed the judgment of the Circuit

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Court, holding that the act of the surveyor was ministerial and could be reviewed by the court.

In error to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Mr. Louis Janin, for plaintiff in error:

The defendant in error contends that the apportionment is erroneous; that it is still open for correction by the court; that the whole back lands on the point should be ratably distributed among the front proprietors as if each of them had appealed for a back concession; and that by this means 121 13/100 acres should be allotted to her and 201 21/100 to the defendant.

The defense is obvious.

1. The power of Congress over the public lands is unlimited.

Bagnell v. Broderick, 13 Pet. 437; Wilcox v. Jackson, 13 Pet. 498; Foley v. Harrison, 15 How. 433.

By the 5th section of the Act of March 13, 1811, Congress prescribed that extent and boundaries should be determined in certain cases, such as this, by the deputy-surveyor of the district and the surveyor of the district south of Tennessee River. These officers are therefore the exclusive judges of the matter now brought before this court by the plaintiff, subject only to the supervision of the General Land Office.

Wilcox v. Jackson, 13 Pet. 511.

The principle upon this subject is concisely and accurately stated by this court in the case of Elliott v. Peirsol, 1 Pet. 340.

The case of Jourdan v. Barrett, 4 How. 169, is very analogous to this, and conclusive on the authority of the surveyors. See p. 182-184.

That the surveyors acted within the scope of their authority is not questioned; and from the authorities just quoted, it appears that the propriety or correctness of their decisions is beyond the reach of courts of law.

2. The entry of the defendant was patented in 1845.

It is a familiar principle that nothing gives title to the public lands but the patent, and that a patent cannot be attacked except when it was issued through fraud or error.

Bagnell v. Broderick, 13 Pet. 455.

The United States, having parted with their title to the land embraced within the patent, could not give a second valid title to it.

2 Laws, Opinions, etc., Relating to Public Land, 213.

Mr. A. Grailhe, for the defendant in error:

By the Act of March 3, 1811, the United States Surveyor was directed to lay off vacant land in so many portions as would equitably divide it among the front proprietors entitled to it.

This equitable division has always been construed by the United States officers to be a pro rata partition of the land.

In Conn. v. Penn. Pet. C. C. 496, the courts say: "When the mistakes of a surveyor are shown by satisfactory proof, courts of law as well as courts of equity look beyond the patent to correct them.

Phillips v. Wilson, 1 Wash. C. C. 470; Menard v. Massey, 8 How. 293; Marsh v. Brooks, 8 How. 233; Hoofnagle v. Anderson, 7 Wh. 212.

The first section of article 3d of the Federal Constitution says that the judiciary power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish; and the following article adds that some power shall extend to all cases arising under the Constitution and laws of the United States.

By the 3d section of article 4th, Congress is empowered to dispose of and make all needful regulations relative to the territory or other property of the United States.

The Act of March 3d, 1831, says, sec. (6) "that in relation to all confirmed claims as may conflict, the Register of the Land Office, and receiver of public moneys are hereby authorized to decide between the parties, and shall be in their decision governed by such lines or boundaries as may be agreed upon between the parties, either verbally or in writing; and in case no boundaries be agreed upon between the parties, either verbally or in writing; and in case no boundaries be agreed upon between the parties, said register and receiver are authorized to decide between the parties in such manner as may be consistent with the principles of justice, and it shall be the duty of the Surveyor General of said State to have these claims surveyed and platted in accordance with the decisions of the receiver and register. The case of Jourdan v. Barrett does not support the position of defendant, but upsets every principle by her invoked. This decision merely establishes that a survey made after the Act of May 1, 1831, providing for a surveyor-general of Louisiana, could not be binding if made by a surveyor of lands south of Tennessee, with whom was by former laws vested the right of survey in Louisiana and the adjacent States.

One more word on the subject of patents and the assertion that courts of justice cannot look behind them. In Marsh v. Brooks, 8 How 233, a patent was set aside by reason of an outstanding equity by the defendant in a writ of right. See, also, Menard v. Massey, 8 How 293.

But we cannot find a better argument than that of the late lamented Judge Isaac T. Preston, contained in the opinion he delivered in this case as published in the organ of the Supreme Court of our State.

Mr. Justice Catron delivered the opinion of the court:

The plaintiff and defendant are respectively owners of tracts of land forty arpents deep, situate in a concave bend of the Mississippi River in Louisiana; their tracts front on different sides of the deepest point of land, and when the side lines of each tract are extended perpendicular to the base line corresponding with the bank of the river, the two tracts interfere before the second depth of forty arpents is obtained.

By the 5th section of an Act approved the 15th of February, 1811, Congress provided "that every person who, either by virtue of a French or Spanish grant, recognized by the laws of the United States, or under a claim conferred by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the Territory of Orleans, owns a tract bordering *on any river, creek, bayou or [*21

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water-course in the said territory, and not exceeding in depth forty arpents, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to and back of his own tract, that the same price and on the same terms and conditions as is or may be provided by law for the public lands in said Territory. And the principal deputy-surveyor of each district, respectively, shall be, and he is hereby authorized under the superintendence of the surveyor of the public lands south of the State of Tennessee, to cause to be surveyed the tracts claimed by virtue of this section. And in all cases where by reason of bends in the river, lake, creek, bayou or water-course bordering on the tract, and of adjacent claims of a similar nature, each claimant cannot obtain a tract equal in quantity to the adjacent tract already owned by him, to divide the vacant land applicable to that object between the several claimants in such a manner as to him may appear most equitable."

Those under whom the plaintiff and defendant hold their lands, respectively, availed themselves of the pre-emption accorded by this law. The husband of the plaintiff, having 155 80/100 acres in his front tract, paid into the hands of the receiver of public moneys, $148.75, for a certificate of the entry of 119 acres of the lands in his rear. Nicholas Haydel, under whom the defendant holds, owned a front tract containing 249 54/100 acres, and paid into the hands of the receiver of public moneys the price of 248 acres, for his entry of the back lands, under the law.

The whole quantity of land in the rear, subject to their entries, was 322 48/100 acres, as to which there was no conflict between them and any other proprietors. Of this quantity the principal deputy-surveyor of the United States allotted to Haydel 243 20/100 acres and Dufresne 79 28/100. His survey dividing the land in dispute was part of a township survey, and was approved in March, 1831, by the surveyor of public lands south of the State of Tennessee, and a patent was issuel to Haydel for 243 20/100 acres of land, in 1845.

The petition charges error in the division, but nothing more, and asks a redivison of the land by the District Court, on the sole ground of a vested equity in the plaintiff to forty acres of the land granted to Haydel. It is not alleged that Haydel controlled the surveyor, or had any connection with, or even knowledge of, the alleged error when the survey was made.

On this state of pleading and fact, the District Court decided for the defendant, and dismissed the petition; and an appeal was prosecuted to the Supreme Court of Louisiana, which reversed the judgment of the District 29*] Court, and ordered that *court to cause the land in dispute to be divided by a resurvey, so as to give Dufresne forty acres of the land for which Haydel had obtained a patent. This judgment was given on the assumption that, by their respective entries in the District Land Office, each party took an equity in the back land in proportion to the quantity of his front tract, when compared with the contending tract; and that thus the respective equities stood before and at the time when the lands were officially surveyed; and that the principal deputy who laid off the lands, under the supervision of his principal, acted in a merely ministerial capacity, and had no discretion to divide them so as to give Dufresne less than a full proportion of the whole. If it be true, that irregular entries of unsurveyed back lands, which entries were allowed by courtesy of the General Land Office, vested an equity in the enterer, and devested the United States of title, as the state court held, then it must follow, that after the entries were generally made in this loose form, throughout the coast of the Mississippi River, in Louisiana, that the courts of justice might have decreed partitions among front proprietors, in all instances, and have had the lands surveyed by judicial authority, and superseded the action of the United States altogether, as required by the Act of 1811.

These anomalous entries were conditional, and made subject to a future public survey; to this effect the receipt for the money was given by the receiver, and the Register was instructed not to transmit the certificate of purchase until the survey was completed.

The Constitution vested Congress with power to dispose of the public lands, and to make all needful regulations for this purpose; and as respects the class of lands under consideration, the proper department ordered, as a rule having few exceptions, that they should be laid down as part of a general plan of township surveys, and in connection with the public lands and private claims adjoining; and that this general survey should settle the quantity and form of each tract of back land to which a front owner had a preference of entry.

In this instance the survey was made by the principal deputy of the proper district, under the superintendence of the surveyor of public lands south of the State of Tennessee, as required by law; by this survey, it was ascertained that neither of the claimants here litigating could obtain a tract equal in quantity to his front tract; and therefore it became necessary for the surveyor, assisted by his immediate superior, to divide the vacant land between these two front owners, "in such a manner as might seem to him most equitable." When the survey was approved, if the party here suing supposed himself aggrieved, *he [*30 was authorized to appeal from the decision of the principal deputy, and the surveyor-general south of Tennessee, to the Commissioner of the General Land Office; and from his decision, if unfavorable, to the Secretary of the Treasury.

Congress contemplated that these lands should be divided among front proprietors, by a surveyor on the ground, aided by his principal; these officers were bound to act according to their best judgment, and decide as judges on the equities of these claimants; nor could the courts of justice interfere to control their acts, if they were honestly performed; the contrary of which is not alleged in this case.

This construction of the law is altogether necessary, as great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably

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made, than the Department of Public Lands could do.

It is ordered that the judgment of the Supreme Court of Louisiana be reversed.

Judgment reversed and cause remanded.

426*] *THE CITY OF BOSTON, Plaintiff in Error,

v.

DAVID R. LECRAW.

(See S. C. 17 How. 426-437.)

Littoral rights—between high and low water mark—sewers in city thereon—damages.

By the common law of Massachusetts, the grantee of land bounding on navigable waters, where the tide ebbs and flows, acquires a legal right in the soil of the shore between high and low water mark, and not a mere gratuitous license.

But, until he shall build upon his flats, or inclose them, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation.

This property is also subject to the restriction that the State, to prevent encroachments in the harbors, may establish lines and limit this power of the owner over his own property.

The territory occupied by the City of Boston was originally granted to and held by the town, and the City of Boston, as successor to the town, continues to own such portions of the original territory as have not been disposed of.

Such City has the right to extend sewers for drainage on its lands between high and low water mark, discharging them into the sea, at low water mark. Such erections are not a public nuisance, specially injurious to plaintiff's public right of navigation over the City's land, although such land, by lying between two wharves, is used as a dock for his wharf.

The City, by not exercising its power of reclamation, has not dedicated such land to the public.

The principles on which a presumption of the dedication of private property to public use arises, stated.

Such presumption is one of fact and not an inference of law to be made by the court, yet it is an inference which the court advise the jury to make, upon proof of certain facts.

It is the duty of the court to state what facts, if proved, will justify such a presumption.

To instruct the jury that certain facts are not sufficient evidence on which to presume a dedication, without informing them what facts, would constitute sufficient evidence for that purpose, is devolving on them the decision of both law and fact.

The plaintiff claimed no other rights of highway over the lands of defendant, save the public right of navigation. The title of defendants to the land was not disputed.

The court ought, therefore, to have instructed the jury that the public right of navigation over the land of defendant was defeasible; that the owners had a right to reclaim their land by wharfing out or making erections thereon beneficial to themselves; that there was no evidence that the City or people of Boston had dedicated their land to the use of some other public, besides themselves; that it was, consequently, not only the right, but the duty, of the authorities of the City to extend their sewers to low water mark, for the purpose of removing a nuisance injurious to the health of the citizens, and having done so on their own land, the damage to the plaintiff, if any, was damnum absque injuria, and he was not entitled to recover.

(Mr. Justice Curtis, having been of counsel, did not sit in this cause.)

Argued Jan. 22, 1855. Decided Feb. 12, 1855.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

This action was originally brought in the Circuit Court of the United States for the District of Mass., by Lecraw, the present defendant in error.

The Circuit Judge having been of council, and the District Judge being interested in the result, it was removed to the District of Rhode Island.

The plaintiff's declaration contained seven counts, upon the 6th and 7th of which he recovered. The 6th count sets out that the plaintiff was in possession of a certain wharf, bounded southerly by a dock which was, and for a long time had been, a public dock; and that the plaintiff had and ought to have a right of passage over this, with boats and vessels of every description. And that the defendant had wrongfully and injuriously erected large quantities of wood and timber across said dock by driving piles therein, and placed a drain along the same, by means of which the dock was obstructed.

The wharf estate of the plaintiff is situated in the southerly side of Boston. It extends to the sea, and is entirely unobstructed at the end seaward. Along the southerly side of the wharf there is a dock, extending from the end of Summer Street to the sea. This dock is about 30 feet wide; on one side of it is the wharf of which the plaintiff is lessee, and on the other side is another wharf which is also owned by the plaintiff. It is for the obstruction of this dock that the suit was brought. The alleged obstruction consisted of a drain connecting with a public sewer at the head of the dock, and extending through the dock to the sea.

The court instructed the jury that the defendant in error was entitled to their verdict if he proved that the dock in question was a public dock; that it was destroyed by a public nuisance, which cut off all access to the sea, and caused peculiar and special damage to the parties seeking for compensation.

The case is further stated by the court.

Messrs. Samuel Ames and P. W. Chandler, for the plaintiff in error:

1. It was error in the court below to rule that the plaintiff was entitled to recover of the City of Boston damages for the act of the Board of Health of said city.

2. The structure was erected by the Board of Health in the performance of a duty. The act was performed in good faith for the preservation of the public health, and was lawful. Such proceeding affords no ground of action, but is damnum absque injuria, and the judgment and decree of the Board of Health are conclusive of the necessity of the structure.

Baker v. Boston, 12 Pick. 184; Shaw v. Cummiskey, 7 Pick. 76.

Such proceedings, if prejudicial to the interest or use which any individual may have before enjoyed in the said dock, affords no ground of action. They are damnum absque injuria.

No compensation is provided by any statute, and no method of enforcing such a claim is intended by the Act which enumerates the duties of the Board of Health.

The action cannot be maintained at common law.

Dore v. Gray, 2 T. R. 358; Boulton v.

NOTE.—Title to land between high and low water marks—see note, 45 L.R.A. 227.

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Crowther, 2 Barn. & C. 703; Sutton v. Clark, 6 Taunt. 34; The King v. Bristol Dock Co. 6 Barn. & C. 181; Harman v. Tappenden, 1 East, 555; Baker v. Boston, 12 Pick. 189; Presbyterian Church v. New York, 5 Cow. 539; Stuyvesant v. New York, 7 Cow. 596; Callender v. Marsh, 1 Pick. 418; Rounds v. Mumford, 2 R. I. 154.

Goezler v. Georgetown, 6 Wh. 593; Bailey v. City of N. Y. 3 Hill, 531; Mayor v. Bailey, 2 Den. 450; Mayor v. Furze, 3 Hill, 612; Wilson v. Mayor of N. Y. 1 Den. 595; Lebanon v. Olcott, 1 N. H. 339; Stone v. Mayor of N. Y. 25 Wend. 179; Thurston v. Hancock, 12 Mass. 220; Mower v. Leicester, 9 Mass. 248; Holman v. Townsend, 13 Met. 297.

The removal or abatement of a nuisance by the Board of Health is not a "taking of property," within the meaning of the Constitution of Massachusetts, although it destroys the easement.

Baker v. Boston, 12 Pick. 184; Callender v. Marsh, 1 Pick. 418; 2 Kent's Com. 240.

3. If the locus was a public dock, slip or way, this fact did not vest in the owners of the adjoining wharves or flats any right to use it for any other purpose than as a passageway in common with other citizens, and the plaintiff, having no peculiar privilege therein, has no claim for damages for any obstruction thereof.

Gray v. Bartlett, 20 Pick. 186; Cooper v. Smith, 9 Serg. & R. 32; 3 Watts, 219; 20 Wend. 111; 1 Yeates, 167; 19 Cow. 128.

4. Inasmuch as the plaintiff below set up a dedication of the locus as a public dock, the nature of the dedication, if any, and the character of the dock thence derived, were questions of fact for the jury, and they should have been cautioned that "there must be some plain and explicit declaration by the owner of the flats that he doth dedicate the same to public use, and that the use of the same for passage or laying of vessels is no evidence of claim of such flats as a public dock, quay or way, by the public, and is no evidence of their acceptance of such dedication."

Considering the nature of the property in flats under the peculiar law of Mass., the strongest evidence of intention to dedicate them to public uses should be required.

Commonwealth v. Alger, 7 Cush. 53; Storer v. Freeman, 6 Mass. 435; Gray v. Bartlett, 20 Pick. 186.

Especially is this the case, where such flats are owned by a public corporation.

The question of this dedication, if any, was peculiarly a question for the jury.

Irwin v. Dixion, 9 How. 10.

5. The selectmen of Boston, acting under the authority of law as early as 1710, authorized the construction of a common sewer in Summer Street. In 1728 they authorized Vassall and the Deacons of the Old Church to lay a drain through this street "down to the sea." In 1804, the sewer was relaid "through Summer Street, to the sea," and the expense was apportioned upon the inhabitants benefited, by the selectmen, according to law, and in 1840 it was relaid by the city authorities.

These acts on the part of the town and city authorities amount to an express grant to the inhabitants of a right to drain to the sea, and *a reservation of the locus for this purpose;* any dedication of the locus to other purposes must be subordinate to this vested right and to that of making new structures, if necessary, to secure drainage to the sea.

Underwood v. Carney, 1 Cush. 285.

Messrs. H. F. Durant and W. Tilton, for the defendant in error:

1. The first point made by the plaintiffs in error, viz., that the City is not liable for the acts complained of, is not open to them upon this record. No such point was raised or exception taken before the Circuit Court.

There is nothing in this record which shows that the court took the question of fact from the jury, or instructed them that the City was liable for acts not done by their authority. The City is liable as a municipal corporation for wrongs done by its officers under the orders of the City authorities, and in the usual course of their duties, and in this case the acts complained of were ordered by vote of the City authorities and executed by its officers.

First Baptist Church, etc. v. The S. & T. R. R. 5 Barb. 79-90; Yarborough v. Bank of England, 16 East. 6; Brower v. Mayor, etc. of N. Y. 3 Barb. 258.

The acts complained of were ordered by the Mayor and Aldermen at a meeting of that Board, and not by any Board assuming to be a Board of Health. They were executed under orders from the Mayor and City Marshal.

The drain so made was the sole property of the City.

Mass. Laws, 1841, ch. 115, sec. 1.

II. The case of the defendant in error rests upon this foundation; the dock was a public dock which he had a right to use; the City destroyed that right by a public nuisance.

The City now sets up the justification that its own common sewer, which was exclusively under its own control, created a nuisance in this dock, and that, by way of abating the nuisance, it built a drain in the dock which destroyed it.

For this act it says there is no redress. To this justification the following objections are made:

First. It was not in the power of the State to authorize any city to do the acts complained of without making compensation.

3 Sto. Com. 661; 1 Black. Com. 139; 2 Kent's Com. 339, 340; Fletcher v. Peck, 6 Cr. 135; Fletcher v. A. & S. R. R. Co. 25 Wend. 462-464.

Second. The powers given to the City (Rev. Stats. ch. 21, sec. 9) are "to destroy, remove or prevent nuisances." Under this delegated authority, the City seeks to exercise another sovereign right of the State, viz.: the power to authorize erections within navigable waters.

Commonwealth v. Coombs, 2 Mass. 489, 492; Kean v. Stetson, 5 Pick. 492-495.

From the nature of this power, it is evident that it could not be granted and was not granted by the Statute referred to.

The navigable waters of the country are protected with jealous care.

Rex v. Ward, 4 Ad. & El. 384; Carey v. Brooks, 1 Hill, S. C. 365; Ang. on Tide Waters, 2d ed. 115.

Any erections within navigable water, unless in aid of navigation, is a nuisance and can be abated.

Atty.-Gen. v. Richards, 2 Anst. 603; Rex v.

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Grosvenor, 2 Stark, 511; Gold v. Carter, 9 Humph. 369.

No erection can be made in or over navigable waters to interfere with navigation, except under a special and explicit grant from the Legislature.

U. S. v. New Bedford Bridge, 1 Woodb. & M. 401, 413; Ill. v. St. Louis, 5 Gil. 351; Commonwealth v. Charlestown, 1 Pick. 180, 184; Ang. on Tide Waters, 106, 111.

In Massachusetts the navigable waters are in no manner within the control of towns, cities or counties.

Hood v. Dighton Bridge, 3 Mass. 263; Commonwealth v. Coombs, 2 Mass. 489; Arundel v. McCulloch, 10 Mass. 70; Kean v. Stetson, 5 Pick. 492; Henshaw v. Hunting, 1 Gray, 203.

Third. No such power as is claimed was ever intended to be given to the Board of Health. The power was given to "remove, abate and prevent nuisances." Under this power the right is claimed to destroy property and erect and maintain a public nuisance in the harbor of Boston.

No reasonable construction of the Statute can enlarge the power to prevent nuisances, into the power to erect and maintain a permanent structure in the harbor, or to destroy a public dock.

People v. Albany, 11 Wend. 539; Welch v. Stowell, 2 Doug. (Mich.) 332; Boom v. City of Utica, 2 Barb. 104; Mayor of Hudson v. Thorne, 7 Paige, ch. 261; Collins v. Hatch, 18 Ohio, 523; Hayden v. Noyes, 5 Conn. 391; Inhabitants of Springfield v. C. R. R. Co. 4 Cush. 63, 72; Commonwealth v. Downs, 24 Pick. 227, 229; Munson v. Chester, 22 Pick. 385, 387.

Fourth. The extraordinary powers claimed for the Board of Health would be contrary to the provisions of the Constitution of Massachusetts.

Const. of Mass. Declaration of Rights, art. 10; Perry v. Wilson, 7 Mass. 393; Stevens v. Middlesex Canal, 12 Mass. 466; Baker v. Boston, 12 Pick. 184; Thacher v. Dartmouth Bridge, 18 Pick. 501; Stetson v. Faxon, 19 Pick. 147; Gardner v. Newburgh, 2 Johns. Ch. 162.

Fifth. But if the act of laying the drain were not unlawful or the subject of indictment, still the City must make compensation, because the damages were not consequential merely, but were directly occasioned by the destruction of a legal right.

Baker v. Boston, 12 Pick. 184, 194; Bradley v. N. Y. & N. H. R. R. 21 Conn. 294, 309, 310; Hooker v. N. & N. H. Co. 14 Conn. 146, 153, 158; Fletcher v. A. & S. R. R. 25 Wend. 462; People v. Platt, 17 Johns. 195, 215; Stevens v. Middlesex Canal, 12 Mass. 466; Stetson v. Faxon, 19 Pick. 147.

This compensation is not confined to cases where real or personal property is actually taken, but is to be given in cases of injury to, or destruction of, easements or privileges. See cases above cited.

III. The court properly ruled that the action could be sustained if the dock was a public dock, and the use of it was destroyed by public nuisance, which occasioned to the defendant in error peculiar and special damages, not common to, and much greater than the public in general suffered.

Year Book Cases Henry VIII. pl. 10, p. 27; William's case, 5 Coke, 73; Co. Lit. 56 a; Rose v. Mills, 4 Maule & S. 101; Stetson v. Faxon, 19 Pick. 147; Frink v. Lawrence, 20 Conn. 118; Abbott v. Mills, 3 Vt. 521; Lansing v. Wiswall, 5 Denio, 213; Pierce v. Dart, 7 Cow. 609.

IV. The fact of dedication may be proved in various ways; no particular declaration of the owner is requisite, and no particular form is necessary.

Godfrey v. Alton, 12 Ill. 29, 35; Kennedy's Ex'rs v. Jones, 11 Ala. 63, 82; Best Pres. sec. 101.

V. The plaintiff in error claims the right to create the nuisance in question upon two other distinct grounds.

1st. That they had the right to place a drain there, because the dock had been dedicated to the City as a place for drainage.

2d. That the dock had been laid out as a street, and the City therefore had the right to put a drain there, although they had never made the street.

Upon the question of the right to place a drain in the dock.

1. The right of drainage claimed by the City cannot be maintained, because if any right of drainage into the dock existed before 1834, it was a right of individuals, not of the town or city. Before 1834, the town or city had no rights in, or control over, the sewers or drains.

Boston v. Shaw, 1 Met. 130.

2. If the City had any right to use the dock for an ancient drain, they had no right to enlarge and change the character and structure of the drain.

Cotton v. Pocasset Manf'g Co. 13 Met. 429.

Upon the rights claimed to place a drain in the dock on the ground that it was a street:

1. The defense now set up by the City that the place in dispute is a street, cannot be sustained, because the jury have found it to be a public dock.

2. Nor could the City in the court below defend themselves upon this ground.

3. By the laws of Mass., a highway or street cannot be laid out over the flats between high water mark and low water mark.

Commonwealth v. Coombs, 2 Mass. 489; Hood v. Dighton Bridge, 3 Mass. 263; Arundel v. McCulloch, 10 Mass. 70; Kean v. Stetson, 5 Pick. 492; Commonwealth v. Charlestown, 1 Pick. 180; Charlestown v. Middlesex, 3 Met. 202; Henshaw v. Hunting, 1 Gray, 203.

This was conceded by the counsel for the plaintiff in error to be the law of Mass., and they even sought to extend it to the case of a dock.

4. As the structure was a public nuisance, such a use of the flats can in no view of the case be justified.

By Parker, C. J., Commonwealth v. Charlestown, 1 Pick. 180, 184; Brower v. Mayor, etc. of N. Y. 3 Barb. 254, 258.

5. As the structure cut off all access to the sea, it cannot be justified under a right to make a street, or any other.

Frink v. Lawrence, 20 Conn. 117; Shaw v. Crawford, 10 Johns. 236; Cox v. The State, 3 Blackf. 193.

6. If a street had been made to the water,

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that very act gave the public the right to use the water and the dock beyond the street.

Godfrey v. Alton, 12 Ill. 29, 36, 37; Rowan's Ex'rs v. Portland, 8 B. Monroe, 232, 242; Kennedy's Heirs v. Covington, 8 Dana. 50, 61; Louisville v. Bank of U. S. 3 B. Monroe, 138, 144, 157.

7. If the City had the right to build a street, it would be because the public convenience and necessity required a public street for travel.

The orders of the Mayor and Alderman to make a drain through the dock, cannot be justified on the ground of a right to make a different structure, viz.: a street.

The court gave instructions much more favorable to the City than the authorities above cited would require.

Mr. Justice Grier delivered the opinion of the court:

The defendant in error, a citizen of New Hampshire, instituted this suit against the City of Boston, charging it with the erection of a public nuisance which was specially injurious to the plaintiff. The declaration contains seven counts. As the jury, under the instructions given by the court, gave a verdict for the plaintiff below on the last two only, it will be unnecessary to notice the others, or the points of law applicable to them.

These counts set forth, in substance, that in the year 1849 the plaintiff and a partner, since deceased, carried on the business of buying and selling wood and coal in Boston, and were in possession of a wharf known as the Bull wharf; that the dock forming the southerly boundary of said wharf and extending from Summer Street wharf, was a part of the harbor 432*] of Boston, *and a public dock, slip or way navigable by vessels, and over which the waters of the sea ebbed and flowed, and by reason thereof the plaintiff ought to have been allowed to pass and repass, as over a navigable highway with boats and vessels, over and through said dock from the wharf by him possessed to the channel of the sea; that defendant had erected piles and a drain in the dock, to the destruction of the navigation therein, and the special injury of the plaintiff.

A congeries of points, of prayers, of instruction, exceeding thirty in number, and covering nearly as many folios, were submitted to the court, some of which were given as prayed for, some with "qualifications," and many refused.

If a judge, in answering such a mass of hypothetical and verbose propositions, should occasionally contradict himself, or fall into an error; or if the jury, instead of being instructed in law, should be confused and misled, it may be considered the legitimate result of such a practice. We do not think it necessary, therefore, to examine particularly each one of this labyrinth of propositions; but after a brief history of the title of the parties, and the admitted facts of the case bearing on its merits, we will state the law as applicable to them, and thus be enabled to test the correctness of the charge of the court in the instructions given or refused.

The original charters to the Plymouth Company of that part of the territory which afterwards constituted the Colony of Massachusetts, conferred on them not only the property in the land, but all the "franchises, loyalties, liberties, etc., and the requisite civil and political powers for the government of the Colony."

By the common law of England, the right of littoral proprietors, bounding on public navigable waters, extend to high water mark only. But by an ancient ordinance, usually denominated the Ordinance of 1641, sec. 3, it declared, "that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: Provided, that such proprietors shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks or coves, to other men's houses or lands."

This is the foundation of what may be called the common law of Massachusetts on this subject. By it the grantee of land bounding on navigable waters where the tide ebbs and flows, acquires a legal right and a vested interest in the soil of the shore between high and low water mark, and not a mere indulgence *or gratuitous license, given without [*433 consideration, and revocable at the pleasure of the grantor.

See Austin v. Carter, 1 Mass. 231, and Commonwealth v. Alger, 7 Cush. 71.

As a consequence of such ownership, it is ruled that the proprietor of the land bounding on tide waters has such a propriety in the flats to low water mark, that he may maintain trespass, quare clausum fregit, against one who shall enter and cut down piles placed there by the owner, with a view to build a wharf or otherwise inclose the flats. But the right of the littoral proprietor under the ordinance has always been subject to this rule; that until he shall build upon his flats or inclose them, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation; so long as the owner of the flats permits the sea to flow over them, the individual right of property in the soil beneath does not restrain or abridge the public right. 7 Cush. 75. This property is also subject to certain restrictions in its use, so that the State, in the exercise of its sovereign power of police for the protection of public harbors, and to prevent encroachments therein, may establish lines and restrain and limit this power of the owner over his own property.

The whole territory now occupied by the City of Boston was originally granted to, and held by, the town, which made grants thereof from time to time, to such persons and on such conditions as it deemed expedient; and the City of Boston, as successor to the town, continues to own such portions of the original territory as had not been sold or otherwise disposed of. But while it acknowledged the rights of its vendees of lands adjoining the shore to wharf out opposite their respective lots, by virtue of the police power exercised by it over the harbor, it superintended and defined the limits within which the owner should exercise his rights.

In 1683 " the selectmen of Boston staked out a highway for the town's use, on the southerly

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side of the land belonging to John Gill, deceased (under whom the plaintiff claims), being thirty feet in width from the town corner of said Gill's wharf, next the sea." This is the street since called Summer Street. They laid out also another street, "near the shore, on the proprietor's land, fifty feet towards the sea shore." But they ordered, at the same time, "that the flats and lands between the said highway and the sea be granted to the proprietors of the land, which are abutters on the way, in equal portion to their fronts."

Summer Street, as laid out, ended at high water mark, and has not yet been extended, nor have the City made any erections on their land between high and low water, previous to 1850; but the public right of navigation over 434*] it has been exercised up to *the foot of Summer Street. The drains and sewers from that street, and others connected with it, have hitherto been made to discharge their contents at that point. In course of time, however, as the City increased, this drainage increased also, to such an extent as to become pestilential, and a very great nuisance to the neighborhood. In consequence thereof, the City of Boston has been twice (in 1848 and 1849) indicted for the nuisance, and sentenced to pay a fine. Since that time, the Mayor and Aldermen, acting as the Board of Health, have directed the drains or sewers to be continued out, on the land of the City opposite Summer Street, to low water mark. This is the first attempt by the City to reclaim this land from the sea, and use it for their own benefit, and constitutes the erection which is now the subject of complaint. The sewers are not made to discharge their contents on the plaintiff's land, but into the sea. No property of the plaintiff has been taken for the public use; nor does he in these counts, on which the verdict was obtained, claim any private right of way over the land of defendants, but states his damage to have accrued by a public nuisance, specially injurious to his public right of navigable way over the lands of the defendant.

That the plaintiff had, in common with the rest of the world, a right to navigate over the land belonging to the City, on which the erections complained of were made, is not disputed. Nor is the title of the City to the land so used, unless they have granted it away, or otherwise disposed of it, a subject of dispute in the case. Those under whom the plaintiff claims, as owners of the property adjoining Summer Street, have exercised their right of dominion over the land to low water mark by covering it with a wharf, many years ago, which is called Bull's wharf. And those who adjoin the street on the other side, have, in the same manner, exercised their right by erecting a wharf called Price's wharf. The property of the City being but thirty feet wide, and lying between these two wharves, was thus, by the accidents of its form and position, converted into a dock or receptacle for vessels, without any act of the owners of the land. A dock is defined by philologists, according to the American use of the term, to be "the space between wharves." No dock or slip has been made by the City or people of Boston on their land, either for their own use or that of any other extraneous or indefinite public. So long as they did not elect to exercise their dominion over this part of the shore, the public right of navigation continued. It was a right defeasible at the will of the owner of the subjacent land. It was a natural right, not derived from any grant, real or presumed, originating with the owner of the soil. But the adjoiners, by the use of this right of navigation *in connection with their [*435 wharves, claim a right to enjoy the benefit of defendant's property as a dock for their wharves, and thus convert it to their private use, under color of a public right.

In order to effect this, it is contended that the people of Boston, by not exercising their right of reclamation, and by using their property according to their own pleasure, have dedicated it to the public, or world in general, as distinguished from the public, or people of Boston, and have abandoned the full dominion which they once might have exercised over it.

The people of Boston, who owned this land as their common and private property, acted through a corporation, whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit cannot be called a dedication of it to any other public of wider extent. Whether it was called "town dock" or "public dock" (which were used as synonymous terms), it would furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or City.

The principles of law on which a presumption of the dedication of private property to public use is founded, are correctly stated, 3 Stark. Ev. 1203, to be: "That the law will not presume any man's acts to be illegal, and will, therefore, attribute to long continued use and enjoyment by the public, of a right of way, or other privilege in or over the lands of another, to a legal rather than an illegal origin; and will ascribe long possession which cannot otherwise be accounted for, to a legal title; upon a reasonable principle and very forcible presumption, that the acquiescence in such enjoyment, for a long period, by those whose interest it was to interrupt it, arose from the knowledge and consciousness on their part that the enjoyment was rightful, and could not be disturbed; and also on consideration of the hardship which would accrue to parties, if, after long possession, and when time had robbed them of the means of proof, their titles were to be subjected to a rigorous examination."

It is evident that these principles can have no application to the present case. The exercise of the public right of navigation over the soil of defendant is fully accounted for without any presumption of grant or dedication by the owners. The public enjoyed this highway of nature by a title reaching far before the advent of the Pilgrims, and paramount to any grant to them or by them; but by the law, the enjoyment of this public right was made defeasible by the owner of the land. Till he reclaimed his land, the public needed no grant or dedication by him, in order to their enjoyment of the right of navigation over it. The *owner [*436 was not bound to exercise his right within a given time, or forfeit it. A man cannot lose the title to his lands by leaving them in their

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natural state without improvement, or forfeit them by non user.

See Butts v. Ihrie, 1 Rawle, 218.

So long as the City chose to leave their land unreclaimed from the sea, they could not hinder the public navigation over it when covered with water, and could not, therefore, be properly said to acquiesce in that which they could not hinder. Nor could a grant or dedication of a right of way over their land be presumed in favor of the public, who enjoyed it under a different and paramount tenure. The public right has existed and been exercised for thousands of years, but it is not hostile to the defendants, though defeasible at their will. It resembles the case of Rex v. Hudson, 2 Strange, 909, where a dedication of land as a public highway was claimed by proof of sixty years' use; but the defendant produced a lease of the way for fifty-six years, and the court decided that no presumption of a dedication could arise during the lease, for the owner could not deny their right to use it, and there could be no presumption from his acquiescence.

It is true that the presumption of a dedication is one of fact, and not an artificial inference of mere law, to be made by the court, yet it is an inference which the court advise the jury to make upon proof of certain facts. It is the duty of the court to state what facts, if proved, will justify such a presumption. To instruct the jury that certain facts are not "sufficient" evidence on which to presume a dedication, without informing them what facts would constitute sufficient evidence for that purpose, is devolving on them the decision of both law and fact, and permitting them to dispose of men's property at their discretion, by presuming grants without a particle of evidence to authorize such presumption.

The counts on which the jury have assessed the damages in this case claim no other right of highway over the lands of the defendant, save the public right of navigation, nor has the evidence shown that he is entitled to any other. The title of the defendants to the land was not disputed. The court ought, therefore, to have instructed the jury that the public right of navigation over the land of defendant was defeasible; that the owners had a right to reclaim their land by wharfing out or making erections thereon beneficial to themselves; that there was no evidence in the case whatever by which the jury could presume that the City or people of Boston had dedicated their land to the use of some other public besides themselves; that it was, consequently, not only the right but the duty of the authorities of the City to extend their sewers to low water mark, for the 437*] *purpose of removing a nuisance injurious to the health of the citizens; and having done so on their own land, the damage to the plaintiff, if any, was damnum absque injuria, and he was not entitled to recover. The record shows that these or equivalent instructions were prayed by the counsel of defendant, and refused by the court.

The judgment of the Circuit Court is therefore reversed, and a venire de novo awarded.

Dissenting, Mr. Justice Daniel.

Judgment of the Circuit Court reversed with costs, and cause remanded to the Circuit Court, with directions to award a venire facias de novo.

RICHARD H. HENDRICKSON, Complainant and Appt.,
v.
SAMUEL L. HINCKLEY.

(See S. C. 17 How. 443–447.)

Equity—when judgment at law will not be enjoined—defenses made or purposely omitted at law, surprise, inadmissible evidence, not ground of relief.

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of, by fraud or accident, unmixed with negligence of himself or his agents.

Fraud, pleaded in the former action at law, and known for six years, parol evidence such as is not admissible to alter written contracts; defenses set up in the action at law, surprise at the trial; set-offs purposely omitted at law, furnish no ground of equitable jurisdiction.

Submitted Jan. 30, 1855. Decided Feb. 12, 1855.

APPEAL from the Circuit Court of the United States for the District of Ohio.

Hendrickson filed his bill in said Circuit Court, alleging a former suit at law in said court, brought by Hinckley against Hendrickson and Campbell on notes made by them; that they alleged as defects in said suit, fraud, payment and want of consideration; that said suit was tried, and resulted in judgment against Hendrickson and Campbell; that Campbell died since the suit; that at the time of said suit he and Campbell had, and still have, a large set-off against said notes, which they omitted to set up in that suit, by advice of counsel; that they were surprised in the trial by certain evidence given therein; that Hinckley has no property in Ohio except said judgment, and is a non-resident; and as relief, that said judgment be enjoined and said set-off allowed against it on the ground of surprise, fraud, etc. Injunction was issued against the judgment. Hinckley answered, denying the equity in the bill and the allegations thereof, and asked the same relief as if he had demurred.

On hearing the cause, the Circuit Court dismissed the bill, and appeal was taken to this court.

The case is stated by the court.

Messrs. S. M. Hart, Brent and Probasco, for the appellants:

We insist that we are entitled to have a judgment, which the defendant holds against us, subjected by a decree in this cause, to the satisfaction of our claims, on the authority of the following cases:

Sweeney v. Ferguson, 2 Blackf. 129; Kipper v. Glancey, 2 Blackf. 356; O'Brien v. Coulter, 2

NOTE.—When a judgment at law will be enjoined by a bill in equity—see notes, 12 L. ed. U. S. 366; 30 L.R.A. 560; 30 L.R.A. 700; 30 L.R.A. 787; 31 L.R.A. 33; 31 L.R.A. 200; 31 L.R.A. 747; 32 L.R.A. 321.

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Blackf. 421; Scott v. McMillen, 1 Litt. (Ky.), 302; Anderson v. Bradford, 5 J. J. Marsh. 73.

It is enough to bring our case within these decisions that we show that we cannot get service of legal process on Hinckley, and that he has equitable property within the jurisdiction of the court where the bill was filed.

We have no common law writ which will reach this property, even if we have judgment at law. We have no statutory process upon which we can subject it, because we are the judgment debtors. If we were not, we could subject it by process of foreign attachment. Situated as we are, however, we cannot have the benefit of that writ.

Mr. Edward Mills, for the appellee:

Where a defendant at law having a legal title to a set-off, neglects to set it up at law, he cannot afterwards enforce it in chancery.

Green v. Darling, 5 Mas. 201; Barker v. Elkins, 1 Johns. Ch. 465; Allen v. Medill, 14 Ohio, 445; Gordon v. Lawes, 1 Sumn. 529: Collins v. Farquar, 4 Litt. Ky. 153; Kipper v. Glancey, 2 Blackf. 356.

Mr. Justice Curtis delivered the opinion of the court:

The complainant filed his bill in the Circuit 445*] Court of the *United States for the District of Ohio; and that court having ordered the bill to be dismissed, on a demurrer, for want of equity, the complainant appealed.

The object of the bill is to obtain relief against a judgment at law, founded on three promissory notes, signed by the complainant, and one Campbell, since deceased.

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.

Mar. Ins. Co. v. Hodgson, 7 Cr. 333; Creath v. Sims, 5 How. 192; Walker v. Robbins, 14 How. 584.

The application of this rule to the case stated in the bill, leaves the complainant no equity whatever.

The contract under which these notes were taken was made in December, 1841. One of the notes is dated in December, 1841, and the others in January, 1842. In April, 1848, suit was brought on the notes. In October, 1850, the trial was had and judgment recovered. The reasons assigned by the bill for enjoining the judgment are—

1. That the consideration of the notes was the sale of certain property, and the complainant and Campbell were defrauded in that sale. But this alleged fraud was pleaded in the action at law, as a defense to the notes, and the jury found against the defendants. Moreover, upwards of six years elapsed after the sale and before the suit was brought; and the vendees, who do not pretend to have been ignorant of the alleged fraud during any considerable part of that period of time, did not offer to rescind the contract, nor did they, at any time, either return or offer to return the property sold.

2. The bill alleges certain promises to have been made by an agent of the defendant, concerning the time and mode of payment of the notes when they were given. These promises could not be availed of in any court, as a defense to the notes; for to allow them such effect, would be to alter written contracts by parol evidence, which cannot be done in equity any more than at law, in the absence of fraud or mistake.

Sprigg v. The Bank of Mt. Pleasant, 14 Pet. 201.

But whatever substance there was in this defense, it was set up, at law, and upon this, also, the verdict was against the defendants; and the same is true of the alleged partial failure of consideration.

3. The next ground is, that on the trial at law, letters from the joint defendant, Campbell, containing admissions adverse *to [*446 the defense, were read in evidence to the jury; and the bill avers that Campbell was not truly informed concerning the subjects on which he wrote, and that, until the letters were produced at the trial, the complainant was not aware of their existence; and so was surprised.

To this there are two answers, either of which is sufficient. The first is, that the complainant and Campbell being jointly interested in the purchase and ownership of the property for which these notes were given, and joint defendants in the action at law, and there being no allegation of any collusion between Campbell and the plaintiff in that action, the complainant cannot be allowed to allege this surprise. If he did not know what admissions Campbell had made, he might, and with the use of due diligence would have known them; and he must be treated, in equity as well as at law, as if he had himself made the admissions.

Another answer is, that if there was surprise at the trial, a motion for delay, as is practiced in some circuits, or a motion for a new trial according to the practice in others, afforded a complete remedy at law.

4. The complainant asserts that he has claims against the defendant, and he prays that, inasmuch as the defendant resides out of the jurisdiction of the court, these claims may be set off against the judgment recovered at law by the decree of the court upon this bill. But upon this subject the bill states, speaking of the action at law: "Your orator frequently conferred with L. D. Campbell, one of his attorneys, in reference to the said cause, and frequently spoke to him of the claims which your orator and said Andrew Campbell had against the said Hinckley, as hereinafter set forth; but the said Campbell, attorney, regarded the defense pleaded as so amply sufficient as that neither he nor your orator ever thought it necessary to exhibit said demands against said Hinckley as matter of defense, could it even have been done consistently with the defense made as aforesaid."

He purposely omitted to set off these alleged claims in the action at law, and now asks a court of equity to try these unliquidated claims and ascertain their amount, and enable him to have the same advantage which he has once waived, when it was directly presented to him in the regular course of legal proceedings. Courts of equity do not assist those whose condition is attributable only to want of due dili-

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gence, nor lend their aid to parties, who, having had a plain, adequate and complete remedy at law, have purposely omitted to avail themselves of it.

It is suggested that courts of equity have an 447*] original jurisdiction *in cases of set-off, and that this jurisdiction is not taken away by the statutes of set-off, which have given the right at law. This may be admitted, though it has been found exceedingly difficult to determine what was the original jurisdiction in equity over this subject. 2 Sto. Eq. Jur. 656, 664. But whatever may have been its exact limits, there can be no doubt that a party sued at law has his election to set off his claim, or resort to his separate action. And if he deliberately elects the last, he cannot come into a court of equity and ask to be allowed to make a different determination, and to be restored to the right which he has once voluntarily waived.

Barker v. Elkins, 1 Johns. Ch. 465; Greene v. Darling, 5 Mas. 201.

Similar considerations are fatal to the plaintiff's claim for relief, on the ground that the defendant resides out of the State, and that therefore he should have the aid of a court of equity, to subject the judgment at law to the payment of the complainant's claim. When the complainant elected not to file these claims in set-off in the action at law, he knew that defendant, who was plaintiff in that action, resided out of the State. If that fact was deemed by the complainant insufficient to induce him to avail himself of his complete legal remedy, it can hardly be supposed that it can induce a court of equity to interpose to create one for him. The question is not merely whether he now has a legal remedy, but whether he has had one and waived it. And as this clearly appears, equity will not interfere.

The decree of the court below is affirmed.

580*] *JANE A. COY, in her own right, and as Guardian of Lucy, Benjamin, Mary, Amelia, and Mehitable Coy, her Minor Children, Complainants and Appellants,

v.

CHARLES MASON.

(See S. C. 17 How. 580–585.)

Jurisdiction—parties—evidence—admission restricted to words used.

On bill praying that a decree of partition be declared void, on the ground of fraud, where the parties interested are not before the court, the District Court has no jurisdiction.

This court, for same reason, cannot take jurisdiction on writ of error.

Where plaintiff alleges that defendant claim under a certain title, which the answer denies, as statement, in an agreed statement of facts, that defendant claims the lands, but not admitting that he claimed under said title, is not sufficient to sustain plaintiff's allegation.

The evidence does not identify and establish, as against defendant, the right claimed by plaintiff.

IN ERROR to the District Court of the United States for the District of Iowa.

The case is stated by the court.

Mr. Platt Smith for the plaintiff in error.

Messrs. Chase and Charles Mason, for defendant in error, contended that Julien Cardinell, under whose deed to Coy and Brace the plaintiff claims, never had any interest in the half-breed tract; that the charge of fraud is not supported by the slightest proof (2 Greene, 100), and that the court which rendered the decree in partition, had jurisdiction as determined by the Supreme Court of Iowa.

Wright v. Marsh, 2 Greene, 100.

Mr. Justice McLean delivered the opinion of the court:

This case is brought before us on a writ of error to the District Court for the District of Iowa.

In an Indian Treaty, made the 4th of August, 1824, between the United States and the Sac and Fox tribes of Indians, for a large cession of territory within the limits of the State of Missouri and elsewhere, there was reserved the small tract of land lying between the Rivers Des Moines and the Mississippi, and the section of the line of the Treaty between the Mississippi and the Des Moines, which is intended for the use of the half-breeds belonging to the Sac and Fox nations; they holding it, however, by the same title and in the same manner that other Indian titles are held.

On the 30th of June, 1834, Congress passed an Act relinquishing all the right and title of the United States to the above land, and vested the title in the half-breeds, who, at the passage of the Act, under the Indian title, had a right to the same.

*In 1840, Josiah Spalding and others [*581 commenced proceedings in the District Court of Lee County, Iowa, for a partition of the tract among the respective owners, against Euphrasine Antaga and others. Notice was given by publication in a newspaper, and after some delays, a partition was made by consent of parties.

The complainants in their bill represent that Elizabeth Cardinell, alias Elizabeth Antaga, was a half-breed of the Sac and Fox nation of Indians, and the sister of Euphrasine Antaga, and in her lifetime was entitled to one full original share in the above tract. That in the year 1833 the said Elizabeth Cardinell died, leaving St. Paul, Eustace, Eli, Pierre and Julien Cardinell, her children and only heirs. That these children were all half-breeds, born before the 4th of August, 1824, and were entitled, in their own right, each to a share in the land. That after the 30th of June, 1834, and before the 14th day of April, 1840, all of the said heirs died, except Julien Cardinell, who became the owner of the shares of his mother and brothers.

In 1841 the land was divided into one hundred and one shares, among persons claiming to be the owners. Samuel Marsh, William E. Lee and Edward C. Delevan were trustees for certain claimants, called the New York Company, and were made defendants to the petition for partition; and they claimed one share under Eustace Cardinell, and two thirds of a share under Elizabeth Antaga, by the heirs of Eli and Eustace Cardinell. But the trustees filed no title papers or exhibits, showing their right to the one and two third shares claimed by them, and to which Julien was entitled.

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The complainants further represent, that when the petition for partition was filed, Julien was a resident of Prairie du Chien, in the Territory of Wisconsin, a distance of more than two hundred miles from the half-breed tract, and that he had no notice, etc. That the consent of the decree was a fraudulent device by the parties, and is consequently void. That Marsh, Lee, and Delevan had no right to the one and two thirds shares claimed; they drew the said shares under the agreed plan of division, without right, etc.

The complainants allege that they claim under a deed of conveyance from Julien Cardinell, dated 25th of February, 1848, and by descent, the one and two thirds shares. These shares, it is alleged, were disposed of by Marsh, Lee and Delevan, to Mason, the defendant, in 1852, who now claims them; that he is now in possession of the land, enjoying the rents and profits, and refuses to account, etc. Other allegations of fraud are made, of which Mason had notice, etc., and the complainants pray that the decree of partition may be set aside and annulled, as fraudulent 582*] *and void, and that a repartition may be had, and that the complainants may be allowed their interest in the land, etc.

The defendant demurs to the bill, and also answers, not waiving his demurrer, etc.

He admits that Elizabeth Cardinell was a half-breed, but denies that the children, whose names are stated in the petition, were half-breeds of the Sac and Fox nations, their father being a white man. He admits the death of the persons stated by the complainants, in their petition, and that Marsh, Lee, and Delevan, as trustees, etc., claimed one share under Eustace Cardinell, and two thirds of a share under Elizabeth Cardinell, called Antaga, through Eli and Eustace Cardinell, heirs, etc. But he denies that the trustees ever drew or received the said one and two thirds of a share, or any portion thereof, as set forth in the petition, or in any other manner; and he denies the allegations of fraud, etc.

"The parties agreed to the following facts: That Elizabeth Cardinell was a half-breed of the Sac and Fox nations of Indians, and died in 1826, leaving Julien Cardinell and his four brothers, St. Paul, Eustace, Eli, and Pierre, her children, whose father was a white man. Julien was born in 1821, and his brothers prior to the year 1824. All the children of the said Elizabeth were living on the 30th of June, 1834, and all, except Julien, died unmarried before 1840, leaving no children. In 1848 Julien conveyed to Coy and Brace, by a deed which is to be produced in court. Coy died in 1849, leaving the present plaintiff as his widow, and a family of children. Brace died about the same time, leaving also a widow and children, who reside in Iowa."

"The title of the half-breeds of the Sac and Fox nations of Indians appears by the Treaty of August, 1824, and the Act of Congress of June 30, 1834. It is admitted that there were one hundred and one true, original half-breeds who were entitled to shares."

"The record of the partition suit is to be regarded as in evidence, and either party may use any portion of it in the Supreme Court, whether the same is used in the District Court or not; but the following facts are admitted to be true unless contradicted by the record. The suit for partition was commenced in the spring of 1840. Legal notice thereof was given by publication, and no other service was made on any of the defendants in that suit. The case would have regularly come up for hearing in October, 1840, but was postponed till April following, to give more abundant time for all persons interested to appear and present their claims. Marsh, Lee and Delevan were defendants in that suit; they claimed upwards of sixty shares, and among* them were [*583 the one and two thirds shares, as set forth in the petition in this suit. In the judgment of partition forty-one shares were allowed them. Elizabeth Cardinell is the same person as Elizabeth Antaga, and is a sister of Euphrasine Antaga."

"The defendant in this suit has become a purchaser of the interests owned by Marsh, Lee and Delevan, as will be more fully shown by their deed to him. More than $100,000 of the purchase money remains unpaid. Marsh, Lee and Delevan are not residents of the State of Iowa."

"At the time of the partition, Julien Cardinell was absent from the Territory of Iowa, residing in Prairie du Chien, more than two hundred miles distant. The country at the time was new. He was ignorant and illiterate. There was no guardian appointed for him, nor any person present in court to represent his rights. There is no exhibit on record tending to show that Marsh, Lee and Delevan, or either of them, had any right to the shares of the said Julien, or to any interest derived from either of his brothers, or from his mother. The half-breed tract contains about 120,000 acres of land. Keokuk is a large town situated on the tract."

"The claimants in the tract are very numerous, amounting to several hundreds. It would be impracticable to make them all parties. In the partition suit no one but Marsh, Lee and Delevan laid claim to any share under any of the Cardinells, with the exception of one half of one share, which was drawn by Ebenezer D. Ayres."

"The whole tract was divided, but no part was set off to the said Julien, and no mention is made of his rights in said record. He had no guardian and no notice, except the constructive notice by newspaper publication in Iowa."

The bill prays that the decree of the District Court, on the ground of fraud, may be declared void, so far as the rights of the complainants are affected, and that a repartition of the land may be ordered. But there is no evidence of fraud, unless it be inferred from the facts admitted. The facts in regard to the partition suit are admitted, unless contradicted by the record; but the record of that proceeding is not before us, and without it we are unable to determine the extent of the admissions. If there were evidence of fraud in the partition, we could not take jurisdiction of that proceeding, as the parties interested are not before us; and for the same reason the District Court had no jurisdiction of this part of the case.

The answer denies that the one and two thirds shares claimed were allowed to Marsh,

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Lee and Delevan, and there is nothing in the admission of facts which disproves the answer in this respect. The defendant admits that 584*] the trustees claimed these *shares, but it is not admitted that they were allowed to them in the partition. The evidence does not identify and establish, as against the defendant, the right claimed by the complainant.

The decree of the Circuit Court, which dismissed the bill, is affirmed.

456*] *SAMUEL H. CARPENTER, Acting Executor, and Charles Wilkins Short, and I. Cleves Short, Executors named, and Residuary Legatees in the will of William Short, Deceased, Plffs. in Er.,

v.

THE COMMONWEALTH OF PENNSYLVANIA.

(See S. C. 17 How. 456–464.)

Jurisdiction to revise state law—ex post facto laws.

In 1826 a law of Pennsylvania provided that all inheritances "being within this Commonwealth" should be taxed, which should devolve "upon any other than the father, mother, wife, children or lineal descendants" of any decedent.

In March, 1850, by an explanatory Act, it was declared that the words "being within this Commonwealth" shall be so construed as to relate to all persons who have been at the time of their decease, or now may be, domiciled within this Commonwealth, as well as to estates.

A citizen of that State died before the passage of the last Act, leaving property to friends and collateral relatives residing out of the State. The will was proved in 1849, and settlement of estate made June, 1850. Property left was securities, stocks, loans and other property not within the State at the settlement. The tax was assessed thereon, which was affirmed by the Supreme Court of that State.

Held, this court has no authority to revise the Act of Pennsylvania. It does not violate the Constitution, treaties or laws of the United States.

The personal estate belongs to the executor. If the State, during the period of its administration and control, tax it, there is nothing in the Constitution and laws of the United States to prevent it.

The Act is not an ex post facto law, within sec. 10, art. 1 of Constitution of U. S. The term ex post facto relates to criminal cases only.

Argued Jan. 31, 1855. Decided Feb. 13, 1855.

IN ERROR to the Supreme Court of Pennsylvania.

The case is stated by the court.

Messrs. T. Ewing and Samuel M. Hart, for plaintiffs in error:

1. The construction of the Act of 1826 and the situs of the personal estate of the decedent domiciled in Pennsylvania at the time of his death, are matters for the determination of the Pennsylvania courts.

As the situs of personal estate of decedent the law in that State is well settled.

Mothland v. Wireman, 3 Pa. 187.

In the case of The Commonwealth v. Smith, 5 Barr. 144, it was decided by the Supreme Court of Pennsylvania that personal property within the State was subject to taxation where the domicil of decedent was in another State—the direct reverse of the English doctrine—and it is the law as settled in Pennsylvania that governs in this case.

Ohio Life Ins. Co. v. Debolt, 16 How. 431, 432.

2. That the Act of 1850 professes to be explanatory of the Act of 1826 does not help it in the least. If a direct Act levying a tax or penalty on past cases of collateral inheritance would be ex post facto within the meaning of the Constitution of the United States, so is this; as if the Act of 1826 provided for the punishment of crimes, a declaratory law of 1850 could not extend its provisions to acts committed prior to the declaratory law, no more than an original law could punish a fact as a crime.

3. We have here, then, a retroactive law, which takes the property of an individual to the use of a state because of a fact which had occurred prior to the passage of the law. And we suppose it is quite immaterial whether it is seized to the use of the State by the name of tax, fine, penalty or forfeiture, so that it is seized by virtue of a lex post factum. This court has decided in cases which raised the question that the clause in the 10th section, 1st article of the Constitution of the United States, which provides that no state shall pass any "ex post facto law," does prohibit the States from making past acts penal, which, when performed, were attended with no punishment or penalty; and it equally prohibits them from increasing any punishment or penalty by laws after the fact.

The State cannot by law of to-day forfeit to itself the lands or goods of B because of some fact done or suffered by B yesterday, and which did not then by law work a forfeiture or make his land or goods the property of the State. This would be according to the construction of the court ex post facto.

The Constitution of the United States does not apply alone in cases where an act, innocent when done, is, by a subsequent law, declared to be a crime and punished as such, but also to cases where a past fact giving no right to the State, the property of the individual is, by an after law, made the occasion of burdening him with fine, forfeiture or assessment. This case, then, comes literally within the prohibitory clause of the Constitution. It is ex post factum.

The intent and the just effect of this constitutional provision is, to protect the individual in his person and property against punishment or confiscation by the State, under a law operating upon a past fact.

4. We contend also that this law in its retroactive effect impairs the obligation of a contract.

When Carpenter, the executor, took upon himself the execution of the will, he entered into a contract implied in law to pay over to the legatees what should remain in his hands after paying debts and such charges as the law attached to the estate and its administration. That sum was about $43,000. The Act of March 11th, 1850, intervened and requires the executor to pay $25.000 of that sum to the State, and but $18.000 to the legatees in discharge of his implied contract.

This law therefore greatly impairs the obligation of this contract, for if the law be obligatory it at once absolves the executor from the

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obligation of his contract with the legatees, just to the extent that it requires him to pay to the State, and it is because of a fact which occurred before the passage of the law.

Presbyterian Church v. Wallace, 3 Rawle, 132; Ogden v. Blackledge, 2 Cr. 276; N. J. v. Wilson, 7 Cr. 166; Sturges v. Crowninshield, 4 Wh. 122; Bronson v. Kinzie, 1 How. 311; see also, Dartmouth College v. Woodward, 4 Wh. 518; McCulloch v. Maryland, 4 Wh. 316; Providence Bank v. Billings, 4 Pet. 559; Charles River Bridge v. Warren Bridge, 11 Pet. 540, 611; Gordon v. Appeal Tax Court, 3 How. 133; Planters' Bank v. Sharp, 6 How. 316; West River Bridge Co. v. Dix, 6 How. 531; Paup v. Drew, 10 How. 218; Woodruff v. Trapnall, 10 How. 204; East Hartford v. Hartford Bridge Co. 10 How. 535.

Messrs. **R. K. Scott, Samuel Hood, and F. W. Hughes,** for defendant in error:

1. It does not appear that the Supreme Court of the United States has jurisdiction of the cause.

2. It does not appear that there was drawn in question in the Supreme Court of Pennsylvania any of the causes or grounds alleged in the said writ of error.

3. It does not appear that the validity of the Pennsylvania Act of Assembly of Mar. 11, 1850, was called in question in the Supreme Court of Pennsylvania on the ground of its repugnancy to the Constitution of the United States.

4. Nor that any such question was decided.

5. Because it appears thereby that Charles Wilkins Short and I. Cleves Short, two of the plaintiffs in error, were not parties to the cause in the Supreme Court of Pennsylvania, nor were any of the decrees of said court rendered against them, or either of them, therein.

6. Because no valid return appears to have been made to said writ of error.

7. Because it appears by the certificate of prothonotary of the Supreme Court of Pennsylvania, that the record in The Matter of the Estate of William Short, Deceased, was remitted by the State Court to the Register's Court for the City and County of Philadelphia on the 17th day of June, 1851, and has not since been, and is not now, in the custody or control of the State Supreme Court of Pennsylvania, or any officer thereof.

As to the first four points.

The Supreme Court of the United States has jurisdiction to review the questions by writ of error, only where the validity of the State law is questioned on the ground that it is repugnant to the Constitution, treaties or laws of the United States.

The Commonwealth Bank of Kentucky v. Griffith, 14 Pet. 56; Lawler v. Walker, 14 How. 149, 152; Crowell v. Randell, 10 Pet. 368, in which Mr. Justice Story reviews the previous cases, etc. See, also, Ohio Life Insurance v. DeBolt, 16 How. 416; Taney, C. J. 428, etc.; State Bank of Ohio v. Knoop, 16 How. 369; McLean, J. p. 384, etc.

To give jurisdiction to the Supreme Court of the United States under the 25th section of the Judiciary Act it must appear on the record itself to be one of the cases enumerated in that section; and nothing out of the record can be taken into consideration.

Armstrong v. The Treasurer of Athens County, 16 Pet. 281, 285; 1 Curtis, Com. sec. 279.

Retrospective laws are forbidden to the States, only when in civil cases they impair the obligation of contracts, or in criminal cases where they are ex post facto.

Calder v. Bull, 3 Dall. 386.

Where a retrospective law of a state affects vested rights, the Supreme Court of the United States has jurisdiction only where such rights are grounded on contract.

The Charles River Bridge v. The Warren Bridge, 11 Pet. 420, 535, 547; 1 Curt. Com. sec. 253, 244, note 1; The Providence Bank v. Billings, 4 Pet. 514, 558, 561.

As to the fifth point. Strangers to the judgment or decree in the court below cannot sue out a writ of error, though they may have an interest in the result or proceeds of such judgment or decree.

Bayard v. Lombard, 9 How. 530; Boyle v. Zacharie, 6 Pet. 655; 1 Curt. Com. sec. 3613.

Mr. Justice **Campbell** delivered the opinion of the court:

The Legislature of Pennsylvania, in 1826, adopted a law by which all inheritances, "being within this Commonwealth," which, by the intestacy of the will of any decedent, should devolve "upon any other than the father, mother, wife, children or lineal descendants" of such person, should he be subject to the payment of a tax, now fixed at five per cent.

Purd. Dig. 138, sec. 1.

The assessments under this Act were confined to the property which might be within the Commonwealth.

The Commonwealth v. Smith, 5 Barr. 142.

In March, 1850, by an explanatory Act, it was declared that the words "being within this Commonwealth, shall be so construed as to relate to all persons who have been at the time of their decease, or now may be, domiciled within this Commonwealth, as well as to estates; and this is declared to be the true intent and meaning of this Act."

William Short, a citizen of Pennsylvania, died within the State a few months previous to the passage of this Act, leaving his property to friends and collateral relations, the principal of whom, the residuary legatees, reside beyond the limits of the State. The will was proven by a resident executor, in December, 1849, before the Register's Court in Philadelphia, and a settlement was made with that court in June, of the following year. In that settlement the executor represented that a portion of the estate, consisting of securities, stocks, loans and evidences of debt and property, was not within the Commonwealth, and offered to pay the tax for the property within, under the Act of 1826, and denied the validity of the assessment under the Act of 1850. The tax was assessed upon the entire personal estate, without reference to its locality by the court, and its judgment upon this subject was affirmed by the Supreme Court, to which it was removed by certiorari. That *court says: "More [*462 pointed words to make the Act of 1850 retrospective could not be chosen; and it will scarce be said the Legislature had not power to make it so, at least while the assets remain in the

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hands of the executor as administrator. No clause of the Constitution forbids it to extend a tax already laid, or to tax assets not taxed before; and in establishing its peculiar interpretation it has only done indirectly what it was competent to do directly." The Supreme Court thus interprets the Act of 1850, as if it read: "That assets in the hands of an executor for distribution among the collateral relations of, or strangers to the decedent, shall be subject to a tax of five per cent."

This court has no authority to revise the Act of Pennsylvania, upon any grounds of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the State. The only inquiry for this court is, does the Act violate the Constitution of the United States or the treaties and laws made under it?

The validity of the Act, as affecting successions to open after its enactment, is not contested; nor is the authority of the State to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied. But the complaint is, that the application of the Act of 1826, by that of 1850, to a succession already in the course of settlement, and which had been appropriated by the last will of the decedent, involved an arbitrary change of the existing laws of inheritance to the extent of this tax, in the sequestration of that amount for the uses of the State. That the rights of the residuary legatees were vested at the death of the testator, and from that time those persons were non-residents, and the property taxed was also beyond the State; and that the State has employed its power over the executor and the property within its borders, to accomplish a measure of wrong and injustice. That the Act contains the imposition of a forfeiture or penalty, and is ex post facto. It is in some sense true, that the rights of donees under a will are vested at the death of the testator; and that the acts of administration which follow are conservatory means, directed by the State to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this, would justify criticism, and perhaps censure. But until the period for distribution arrives, the law of the decedent's domicil attaches to the property, and all other jurisdictions refer to the place of the domicil, as that where the distribution should be made. The will of the testator is proven there, and his executor re-463*] ceives his authority to collect *the property by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities, and administrative control, prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control, at the period of distribution. If the State, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it.

Ennis v. Smith, 14 How. 400; In re Ewin, 1 Cr. & Jer. 151; 1 Barb. Ch. 180; 6 W. H. & G. 217; 21 Conn. 577.

The Act of 1850, in enlarging the operation of the Act of 1826, and by extending the language of that Act beyond its legal import, is retrospective in its form; but its practical agency is, to subject to assessment, property liable to taxation, to answer an existing exigency of the State, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And as the Supreme Court has well said, "in establishing its peculiar interpretation, it (the Legislature) has only done indirectly what it was competent to do directly."

But if the Act of 1850 involved a change in the law of succession, and could be regarded as a civil regulation for the division of the estates of unmarried persons having no lineal heirs, and not as a fiscal imposition, this court could not pronounce it to be an ex post facto law within the 10th section of the 1st article of the Constitution. The debates in the federal convention upon the Constitution show that the terms "ex post facto laws" were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning.

3 Madison Pap. 1399, 1450, 1579.

This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time.

Calder v. Bull, 3 Dall. 386; Fletcher v. Peck, 6 Cr. 87; 8 Pet. 88; 11 Pet. 421.

The same words are used in the constitutions of many of the States, and in the opinions of their courts, and by writers upon public law, and are uniformly understood in this restricted sense.

3 N. H. 375; 5 Mon. 133; 9 Mass. 363; 6 Binn. 271; 4 Ga. 208.

The plaintiff's argument concedes that his case is not within the scope of this clause of the Constitution, unless its limits are *enlarged to embrace civil as well as [*464 criminal cases; and he insists that the court should depart from the adjudications heretofore made upon this subject. But this cannot be done. There is no error in the record, and the judgment of the Supreme Court is affirmed.

Decree of the Supreme Court affirmed with costs.

AMOS J. BRUCE and Franklin Steele, Pl'ffs in Er.,

v.

THE UNITED STATES.

(See S. C. 17 How. 437–443.)

Official bond—liability of sureties—what is evidence of appointment and of account.

In action upon official bond of Indian agent, against principal and sureties, a transcript from the books of the Treasury Department, stating the officer's account, is admissible in evidence, under the Acts of Congress.

NOTE.—Liability of sureties for second term—see note, 1 L.R.A. 118.

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The transcript is only prima facie evidence; if the party disputes any of the charges, he can obtain the original vouchers on which he was charged, and show the error.

Authenticated copies of his receipts or vouchers need not accompany the transcript.

If it appeared on the account that an item was charged, of which the accounting officers could have no official knowledge, the transcript would not be evidence to support that charge.

The sureties of a re-appointed officer are liable for any balance in his hands at the time of his reappointment, which he received in his preceding term.

The sureties in the second term of office are not liable for a default committed in his first.

But no default will be presumed because a balance appears to have been in his hands at the end of his first term.

The burden of proof is on defendants to show a default, if any had occurred.

It was not necessary to produce the officer's commission or a certified copy to prove his appointment.

The recital of his appointment in the bond on which the action is brought, estops the obligors in the bond from denying it.

Argued Jan. 30, 1855. Decided Feb. 14, 1855.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The case is stated by the court.

Mr. M. Leslie for the plaintiffs in error.

Mr. C. Cushing, Att'y-Gen., for defendant in error.

Mr. Chief Justice Taney delivered the opinion of the court:

438*] *The writ of error in this case is brought upon a judgment obtained by the United States in the Circuit Court for the District of Missouri.

It appears that Bruce, one of the plaintiffs in error, was appointed agent for the Sioux tribe of Indians in 1844, and gave the bond on which this suit is brought for the faithful performance of his official duty. Franklin Steele, the other plaintiff in error, and John Atchison, were sureties in the bond; and Atchison having died pending the suit in the Circuit Court, it abated as to him; and the judgment in favor of the United States was rendered against the plaintiffs in error. The breach assigned is, that there was a balance in Bruce's hands on the 1st of July, 1848, of $10,191.69, which he refused to turn over and pay to the United States when required to do so.

Bruce had held the same appointment for four years, before he received the one of which we are now speaking, and his account with government begins in May, 1840.

At the trial the United States offered in evidence a transcript from the books of the Treasury Department, stating the account of Bruce from the time of his first appointment. According to this account, the balance above mentioned was due to the United States, but Bruce claimed various additional credits, amounting altogether to $6,931.68, which had been disallowed or suspended by the accounting officers, as appears by the closing account, usually called the statement of differences.

The United States further offered the transcript of a letter from the second auditor, whose duty it was to settle this account, addressed to Bruce, stating the balance due from him, according to the settlement in the auditor's office, and inclosing to him the statement of differences above mentioned, and directing him to turn over to his successor in office the balance of public money in his hands; and also offered the deposition of his successor, stating that he had made the demand, but that Bruce had failed to comply with it.

The defendants, therefore, objected to the admissibility of this evidence, but the court overruled the objection, and this constitutes the first exception in the case.

The objection is stated in general terms, and applies to the whole evidence offered by the United States, without pointing out the particular ground of the objection. But we understand from the argument here, that the defendants in the court below supposed that the transcript from the books of the Treasury was not, of itself, evidence that he received the several sums of money charged against him, and that authenticated copies of his receipts ought to have accompanied the transcript.

But this objection cannot be maintained. The Act of 1797 *provides that a tran- [*439 script from the books and proceedings of the Treasury, certified by the register, and authenticated under the seal of the Department, shall be admitted in evidence. And the Act of March 3d, 1817, directs that all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Treasury Department. The Act makes the auditors and comptrollers, by whom the accounts in the War and Navy Departments are settled, officers of the Treasury Department. And the provision above mentioned in the Act of 1797, in relation to transcripts from the books and proceedings in the Treasury, is extended to the accounts of the War and Navy Departments; and the certificates of the auditors respectively charged with the settlement of these accounts are to have the same effect as that directed in the former Act of Congress to be signed by the Register.

The accounts in question belonged to the War Department during the period of Bruce's agency, and were adjusted and certified by the proper officers. There could therefore be no objection to the evidence on that score.

Nor do we see how any valid objection can be made to the items charged against Bruce in the transcript. The books of the accounting officer necessarily contain the charges against, as well as the credits of, the disbursing officer. The accounts could not be adjusted on the books in any other manner; and the transcript, or in other words the copy of the entire account as it stands on the books (which must include debits as well as credits), is made evidence by the law. Nor do we see any reason for restricting the words of the Acts of Congress within narrower limits than the words plainly imply. The accounts are adjusted by public sworn officers, bound to do equal justice to the government and the individual. They are records of the proper departments, and always open to the inspection of the party interested. And, after all, the transcript is only prima facie evidence; and if the party disputes any of the charges against him, it is in his power, by a proper application to the court, supported by sufficient evidence, to obtain the original vouchers on which he was charged, if necessary to his defense, and to show that the debit against him is erroneous.

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If, indeed, it appeared on the face of the account that an item was charged against him which had not come to his hands in the regular and ordinary operations of the government, and of which, therefore, the accounting officers could have no official knowledge, the transcript would not be evidence to support that charge. But no such debit is found in this transcript; for, according to the regular and ordinary practice of the government in cases of this 440*] description, the agent receives *from his predecessor in the office the money and property remaining in his hands; and other funds which it may be his duty to disburse, are sometimes sent through the General Superintendent at St. Louis, sometimes by a treasury draft, forwarded directly to himself, and sometimes through the agency of a military or other officer of the government. And these advances pass through the proper offices of the Treasury and War Departments (now through the Department of the Interior), and the agent is charged upon his own receipts and warrants, issued in his favor.

This appears to have been done in the case before us. Every payment or advance to him is separately charged, and the time when it came to his hands, as well as the name of the person from whom he received it. The copies of his receipts, or of the vouchers for the charge, would have given him no further information; and the Acts of Congress above referred to do not require them to be annexed to, or accompany the account, but in plain and unambiguous terms, makes the transcript itself evidence.

Cases analogous to this, have, on several occasions, come before the court, and have all been decided upon the construction of the Acts of Congress above stated. 5 Pet. 292, U. S. v. Smith; 6 Pet. 202, Coxe and Dick v. U. S. and 10 How. 109, Hoyt v. U. S. are all in point. And the cases of The U. S. v. Buford, 3 Pet. 29, and The U. S. v. Jones, 8 Pet. 276, which are sometimes supposed to maintain a contrary doctrine, are perfectly consistent with the other decisions and with the one now given.

For, in the case of The U. S. v. Buford (who was a deputy-commissary), money had been placed in his hands by Morrison, who was a deputy-quartermaster, without authority and contrary to his duty, and the accounting officers refused to credit it in Morrison's account. Upon application to Congress, however, a law was passed authorizing the accounting officers to allow the credit, upon receiving from Morrison an assignment to the United States of all his right to the money mentioned in the receipt, which he had taken from Buford when he advanced him the money. Morrison made the assignment accordingly; and thereupon an account was stated on the books of the Treasury, charging Buford as debtor to Morrison for the amount advanced to him. And a transcript from this account was offered in evidence. It is set out in the report of the case, and it is evident that this account was not within the letter or spirit of the Act of Congress. It certainly could not prove the receipt of Buford; for the whole transaction was outside of the regular operations of the government, and the 441*] *accounting officers could not be presumed to have any official knowledge of the unauthorized transactions between the parties.

And so, again, as to the case of The U. S. v. Jones, who was surety in the bond of an army contractor. The transcript contained charges against the contractor for bills of exchange, drawn by him and paid to other persons. The court regarded this operation as not within the ordinary mode of proceeding in the Department, and that the accounting officers could not be presumed to have any knowledge of the drawing of those bills, or of their indorsement to others, and thereupon rejected these items. It will be seen, therefore, that the cases of The U. S. v. Buford and U. S. v. Jones are distinguishable from the present case, as well as from the other cases above referred to, and stand on different ground.

Indeed, none of the debits in the transcript appear to have been disputed by the plaintiffs in error, and no exception was taken to any one of them. The statement of differences between the accounting officers and Bruce, shows that there was no difference as to the amount with which he was chargeable. The difference consisted in a variety of credits which he claimed, and which had been suspended or refused at the Treasury; and the testimony offered by him, after his objection to the transcript, had been overruled, and the document admitted in evidence, was altogether directed to support the credits he claimed, and not to impeach any one of the debits against him.

The Circuit Court were therefore right in overruling his objection to the testimony offered by the United States.

We proceed to the next exception.

After the testimony on both sides was closed, the plaintiffs in error asked for the following instructions to the jury, all of which were refused, and the direction which follows them given:

"1. That unless they believe from the evidence that Bruce was legally appointed and commissioned as such Indian agent, they will find for defendant Steele; and they are further instructed that the commission, or a legally certified copy thereof, is the highest and best evidence thereof.

2. If the jury find from the evidence that Bruce was a defaulter at the time of the execution of the bond sued on, they will find for defendant Steele, to the extent of such preexisting default.

3. Defendant Steele is not liable for any defalcation existing, on the part of Bruce, prior to the 29th of August, 1844.

4. Defendant Steele is not liable as the surety of Bruce *for any money received [*442 by Bruce before he was Sub-Indian agent.

5. The original receipts of Bruce, or certified copies of the originals on file, is the best evidence of any moneys received by him, and the jury will disregard the transcript of accounts from the books, unless they believe it was out of the power of plaintiff to produce the receipts, or certified copies thereof."

These instructions were all refused, and "the court directed the jury, that if, when Bruce was re-appointed agent in 1844, he had moneys in his hands of the United States which he re-

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ceived as agent under his previous commission, then he was bound to apply and account for such moneys under the second commission, and his sureties are bound under the bond which is sued on. But if Bruce had appropriated the moneys received under the previous commission, to his own use, when this bond was given, then the first set of sureties are responsible for the moneys thus illegally appropriated, and these defendants are not liable; and the burden of proof is on the defendants to show that Bruce had illegally appropriated the moneys before the bond sued on was given."

We think the court were right in refusing the prayers, and in giving this instruction. In relation to the first instruction asked for, it certainly was not necessary for the government to produce the commission of Bruce or a certified copy. The bond upon which the suit was brought recites that he was appointed Indian agent, and the obligors in the bond are therefore estopped from denying it.

And as to the 5th, it is but a repetition of the objection to the transcript, which we have already disposed of.

And as relates to the 2d, 3d and 4th, we think the court was right in refusing them and giving the instruction as above stated. When Bruce received his second commission, if any money or property which he received in his former term of office still remained in his hands, he was bound to apply and account for it, under the appointment he then received.

The terms of the bond clearly require it, and his sureties are bound for it. It was so much money in his hands to be disbursed and applied under his second appointment. Indeed, if it were otherwise, the government would have no security for it. For if it was not wasted or misapplied during his first official term, but still remained in his hands to be applied according to his official duty, the sureties in his first bond would not be liable. For there would in that case be no default or breach of duty in that term of office; and if afterwards wasted or misapplied, it would be a breach of duty in that official term for which Steele was one of his sureties.

443*] *Undoubtedly the sureties in the second term of office are not responsible for a default committed in his first. But if any part of the balance now claimed from him was misapplied during that period, it was incumbent on the plaintiffs in error to prove it. No officer, without proof, will be presumed to have violated his duty; and if Bruce had done so, Steele had a right, under the opinion of the Circuit Court, to show it and exonerate himself to that amount; but it could not be presumed, merely because there appears by the accounts to have been a balance in his hands at the expiration of his first term.

We see no error in the opinions of the Circuit Court, and the judgment must, therefore, be affirmed.

Judgment of the Circuit Court affirmed, with interest at the same rate per annum that similar judgments bear in the courts of the State of Missouri.

*CHARLES H. McBLAIR, Administrator of Lyde Goodwin, Deceased, App't., [*232

v.

ROBERT M. GIBBES and Charles Oliver, Executors of Robert Oliver, Deceased.

(See S. C. 17 How. 232-238.)

Assignment—illegal transaction—fund arising therefrom, when recoverable.

An assignment of all the right, title and interest of the assignor in a claim, carries the assignor's right to commissions as agent in soliciting the claim.

The assignment of a fund arising from an illegal contract or transaction, subsequent to and independent of the illegal transaction upon which the contract was founded, is not illegal, but is valid.

If the fund be paid for the other party to a third person, the latter cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself, or if paid to one of the parties, he cannot withhold the share going to his associate.

These principles applied to a claim against Mexico. Cases on this subject examined.

Argued Dec. 28, 1854. Decided Feb. 15, 1855.

APPEAL from the Circuit Court of the United States for the District of Maryland.

This was a bill in chancery, originally filed by the present appellant in the Superior Court of Baltimore City to recover from the executors of Robert Oliver, the proceeds of the share of Lyde Goodwin, awarded to him as a member of the Mexican Company of Baltimore, by the commissioners, under the Treaty with Mexico.

The case was removed, on motion of the appellant, to the Circuit Court of the United States.

After various proceedings, the court below dismissed the bill, and the case was brought to this court on appeal.

The case is further stated by the court.

See, also, the following cases of Williams v. The Executors of Oliver, 134 post, and Gooding v. The Executors of Oliver, 148.

Messrs. Robert N. Martin, G. L. Delaney, and Henry Winter Davis, for appellant.

It being admitted that Oliver's executors have received Goodwin's share, we are entitled to call on them for it. And they can resist our demand only by showing, 1. a valid title by way of transfer from Goodwin; or, 2, that although no transfer has been made, yet Goodwin has been barred, through some act or neglect, from calling upon them for the fund. Defendants rely on both classes of defense.

They insist on the assignment of 1825 and 1829, but if the fund were assignable, yet,

1. Brown, as provisional trustee, had no power to assign.

2. No other assignment from Goodwin appeared before that of 1829.

3. The assignment of 1829 conveys no title to the share.

If the award undertook to pass against

NOTE.—Illegal contracts, what are. How far fraud or illegal consideration will avoid contract. See note to Armstrong v. Toler, 6 L. ed. U. S. 468. What contracts are void as against public policy, or as illegal. Illegal consideration, when a defense. Agreement not to bid. Lobby services. For contingent fees. To prevent competition. See note to Bartle v. Nutt, 7 L. ed. U. S. 825.

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Goodwin's claim, it is settled law that the award decides nothing between different claimants, but merely establishes the claim.

De Valengin v. Duffy, 14 Pet. 290; Sheppard v. Taylor, 5 Pet. 708; Frevall v. Bache, 14 Pet. 97; Comegys v. Vasse, 1 Pet. 212; N. Y. Ins. Co. v. Roulet, 24 Wend. 505.

The decree of the Court of Appeals is not an estoppel, because Goodwin was not a party.

Hollingsworth v. Barbour, 4 Pet. 475; Aspden v. Nixon, 4 How. 467, 497.

Goodwin not being entitled, was not bound to petition in the suit; and if not bound, then failing to come in was no default.

The Mary, 9 Cr. 126; Good v. Blewett, 13 Ves. 397; 19 Ves. 336; Hayes v. Miles, 9 G. & J. 193.

The purposes and dealings of the Mexican Company were originally illegal.

Till some change was wrought the claim of the company was not assignable, but any assignment was void.

No such change as has made the claim either valid or assignable, was wrought by any act prior to the Treaty of 1839.

Neither the Treaty or the award operated retroactively to make valid prior acts.

Therefore the assignments are void and nothing passed by them.

Gill v. Oliver, 11 How. 529; Williams v. Oliver, 12 How. 111; Deacon v. Oliver, 14 How. 610; Kennet v. Chambers, 14 How. 38, 49, 51, 52.

The court had no right to dispose of the Mexican Company's interest under such a bill.

Chalmers v. Chambers, 6 H. & J. 29; Hayes v. Miles, 9 G. & J. 193.

In a suit by a few for the benefit of all claimants, a decree of distribution is not conclusive on the right of a party failing to come in.

It implies no judgment on a litigated title.

Gillespie v. Alexander, 3 Russ. 130; David v. Froud, 1 Myl. & K. 200; Greig v. Somerville, 1 Russ. & M. 338.

If the assignment be not void, they constitute a mortgage to secure a debt of less amount, and we are entitled to the surplus.

Hughes v. Edwards, 9 Wh. 489; Morris v. Nixon, 1 How. 118; Alexander v. Conway, 7 Cr. 218.

Equity has jurisdiction of the case, and the bill is properly framed.

Oliver v. Piatt, 3 How. 333; Mathews v. Clark, 6 How. 122; Milnor v. Metz, 16 Pet. 221; N. Y. Ins. Co. v. Roulet, 24 Wend. 505; 1 Dan. Ch. Pr. 407.

Messrs. Reverdy Johnson and J. Mason Campbell, for appellees:

The decree of the Maryland court allowing Goodwin's interest in the Mexican Company to Oliver's executors, is conclusive as to their title thereto, upon all persons in all jurisdictions. See 12 How. 122, where the opinion of this court shows in what light the distribution suit was viewed here. It was a suit for the distribution of a fund in the Maryland court possessed of jurisdiction and distributing the fund according to the laws of Maryland.

2 Md. 451; Tongue v. Morden, 6 H. & J. 23; 2 How. 338.

The action of such a court upon the fund must necessarily be conclusive, as this court has held it to be.

The original illegality of the claim by the immediate representatives of the criminal is the ground of present recovery, and is indispensable to its success. Ex turpi causa non oritur actio. Nemo auditur allegens suam turpitudinem.

Equity will not permit an assignor to defeat his own assignment by procuring a good title subsequently for his own benefit, but will hold each subsequent acquisition to inure to the assignees' benefit.

2 Smith's Lead. Cas. 464; 1 McLean, 384; 2 Story, 630; 11 How. 325; 3 Story, 175; 2 Serg. & R. 507; 2 Barr. 325.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Maryland.

The bill was filed by the administrator of Lyde Goodwin against the executors of Robert Oliver, to recover the proceeds of a share in an association called the Baltimore Company, *which had a claim against the Mexican [*234 government, that was allowed under the Convention of 1839, "for the adjustment of claims of citizens of the United States against the Mexican Republic." The claim of the company was founded on a contract with General Mina, in 1816, for advances and supplies in fitting out a military expedition against the dominions of the King of Spain. The bill also sought to recover a commission of five per centum, which the members of the company had agreed to give to Goodwin, for his services as agent in soliciting the claim against Mexico. The share and commissions, as charged, amount to $67,337.15.

The executors of Oliver set up a right to retain the fund for the benefit of the estate, under and by virtue of a purchase of Goodwin's share in this company, and also of his right to the commissions, by their testator, in 1829. The purchase and transfer took place the 30th May, in that year, for a good and valuable consideration.

A question was made on the argument, whether or not the assignment of Goodwin was sufficiently comprehensive to include a right to the commissions as well as to the proceeds of the share. We are satisfied that it is. The language is very broad: "All my undivided ninth part, right, title and interest, of every kind whatever, in the claim on the government of Mexico," etc. And again: "The object and intention of this agreement is to make a full and complete transfer to the said Robert Oliver, of all my right, title and interest aforesaid," etc. The commissions were dependent upon the allowance of the claims of the company against Mexico, and of course, an interest intimately connected with them; without the allowance of the one, the other would be valueless.

The understanding of Goodwin himself, of the intention and effect of the assignment, accords with this view, as derived from his deposition taken in behalf of the claims of the company, and used before the Board of Commis-

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sioners; and also from his testimony in the proceedings before the Baltimore County Court, for the distribution of the fund among the several claimants.

This share of Lyde Goodwin in the company, and his commissions, have heretofore been the subject of consideration in this court. The case is reported in 11 How. 529. George M. Gill, the permanent trustee of Goodwin, who had taken the benefit of the insolvent laws of Maryland in 1817, claimed this fund before the Baltimore County Court as part of the estate of the insolvent, against the right and title of the executors of Oliver, claiming under this assignment of 1829. The Baltimore County Court held that the fund passed by the insolvent assignment of 1817, to Gill, the permanent trus-
235*] tee. The case was *taken to the Court of Appeals of Maryland, where the decree was reversed, and the fund distributed to Oliver's executors, the appellate court holding that the contract of the company with General Mina was made in violation of the Neutrality Act of the United States of 1794, and being thus founded upon an illegal transaction, constituted no part of the property or estate of the insolvent within the meaning of the Maryland insolvent laws. Gill brought the case to this court under the 25th section of the Judiciary Act, for the purpose of revising that decision; but the court dismissed the case for want of jurisdiction, a majority of the judges holding that the only question involved in the decision below was the true construction of a statute of the State, and that it belonged to the Maryland court to interpret its own statutes. Whether that interpretation was right or wrong, was a matter with which this court had no concern.

Gill, the permanent trustee, having thus failed to establish a title to the fund under the Maryland insolvent laws, the litigation is again revived respecting the fund, in behalf and for the benefit of the personal representatives of Goodwin, on the ground that the moneys realized upon the contract with General Mina, from the Mexican government, is to be regarded as a subsequent acquisition of property by the insolvent, belonging to his estate, and to be dealt with accordingly.

Hence this bill filed against the executors of Oliver to recover possession of the fund. The defense set up to this demand of the administrator of Goodwin, and which it is insisted is conclusive against him, is the assignment of the contract of General Mina, by Goodwin himself, to Robert Oliver, in 1829, which has been already referred to; that having thus parted with all his right or claim to that contract, for a full and valuable consideration, the proceeds thereof derived from the recognition and fulfillment by the Mexican government belong to the estate of Oliver, and not to that of Goodwin; and vested his executors with the equitable right to receive the moneys, and which have been paid accordingly under the decree of the Court of Appeals of Maryland, in making a distribution of the fund.

It is urged, however, in answer to this view, that the contract with General Mina being illegal, the sale and assignment of it from Goodwin to Oliver must also be illegal, and consequently that no interest therein, equitable or legal, passed to Oliver's executors.

But this position is not maintainable. The transaction, out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The assignment was subsequent, collateral to, and wholly *independent of, the illegal transactions [*236 upon which the principal contract was founded. Oliver was not a party to these transactions, nor in any way connected with them.

It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making, or in the fulfillment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defense, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfillment depended altogether upon the voluntary act of Mina, or of those representing him.

No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself. In Faikney v. Renous, 4 Burr. 2069, where two persons were jointly concerned in an illegal stock jobbing business with a third, and a loss having arisen, one of them paid the whole, and took a security from the other for his share, the security was held to be valid as a new contract uninfected by the original transaction. And in Petrie v. Hannay, 3 T. R. 418, where one of the partners, under similar circumstances, paid the whole at the instance of the other, he was allowed to recover for the proportionate share. These cases are examined and approved in Armstrong v. Toler, 11 Wh. 258.

In Tenant v. Elliot, 1 B. & P. 3, the defendant, a broker, effected an insurance for the plaintiff which was illegal, being in violation of the navigation laws; but on a loss happening, the underwriters paid the money to the broker, who refused to pay it over to the insured, setting up the illegality, upon which an action for money had and received was brought. The plaintiff recovered, on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction. The same principle was applied and enforced in the case of Farmer v. Russell, 1 B. & P. 296.

*In Thompson v. Thompson, 7 Ves. [*237 470, there had been a sale of the command of an East India ship to the defendant, and as a

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consideration he stipulated to pay an annuity of £200 to the previous commander so long as he should continue in command of the ship.

This contract of sale was illegal. Subsequently the defendant relinquished the command, and another person was appointed in his place. But under the regulation adopted by the East India Company to prevent the sale of the commands of their ships, an allowance was made to the defendant, on his retiring of £3,540.

The bill in this case was filed for the purpose of procuring a decree for the investment of a portion of this fund to satisfy the annuity of £200, praying that the value of it might be ascertained and paid out of the money allowed by the company.

The objection made was, that the contract providing for the annuity was illegal, and a court of equity, therefore, would not interfere.

The Master of the Rolls, Sir William Grant, agreed that the contract was illegal; he admitted there was an equity against the fund, if it could be reached by a legal agreement; but observed, "you have no claim to this money, except through the medium of an illegal agreement, which, according to the determinations, you cannot support." "If the case," he further observed, "could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing the trust;" "but in this instance the money is paid to the party." "There is nothing collateral in respect to which, the agreement being out of the question, a collateral demand arises, as in the case of stock jobbing differences."

So, in Sharp v. Taylor, 2 Phil. Ch. 801, the bill was filed, among other things, to recover a moiety of the freight money, the whole of which had come into the hands of one of the joint owners. The defense set up was, that the trade in which the vessel had been engaged, and in which the freight had been earned, was in violation of the navigation laws, and illegal. But Lord Chancellor Cottenham answered, that the plaintiff was not asking for the enforcement of an agreement adverse to the provision of the Act of Parliament, nor seeking compensation and payment for an illegal voyage; that, he observed, was disposed of when Taylor (the defendant) received the money; the plaintiff was seeking only his share of the realized profit.

Again, he observed, can one of two partners possess himself of the property of the firm, and 238*] be permitted to retain it, if he *can show that, in realizing it, some provision in some Act of Parliament has been violated? The answer is, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do as between the parties. The difference, he observes, between enforcing illegal contracts, and asserting title to the money which has arisen from them, is distinctly taken in Tenant v. Elliot, and Farmer v. Russell, and recognized by Sir William Grant, in Thompson v. Thompson.

These cases show that the assignment of Lyde Goodwin to Robert Oliver, in 1829, being collateral to, and disconnected from the illegal transaction out of which the Mina contract arose, was valid and binding upon Goodwin, and vested in Oliver all the benefits and advantages, whatever they might be, derived from that contract.

The assignment from Goodwin to Oliver, though the assignment of an illegal contract—which contract, therefore, imposed no legal obligation, and rested simply upon the honor of the parties—was not within the condemnation of the Maryland insolvent laws, as expounded by her courts, as the right was not derived under but entirely independent of them. Those laws have no application to this assignment.

And further, that the money having been realized by his executors, according to the purpose and object of the assignment, becomes a part of the assets of the estate, which belong to the personal representatives.

Another ground may be briefly stated, which, in our judgment, is equally conclusive against the complainant. The assignment of 1829, of the Mina contract, not being tainted with illegality, and therefore obligatory upon Goodwin, if he were alive and claiming the fund against the representatives of Oliver, having parted with all his right in the subject to their testator, for a valuable consideration, would be estopped from setting up any such claim, and of course his personal representatives can be in no better situation.

We have not deemed it necessary to look into the case for the purpose of ascertaining whether Goodwin, at the time of the proceedings in the Baltimore County Court, had such notice of them as required that he should have appeared there and asserted his right; and hence, that the decree of that court, in the distribution of the fund, was conclusive upon such right. That question is unimportant, inasmuch as, in our opinion, the executors of Oliver have, independently of that ground, established a complete title to the fund in controversy.

We think the decree of the court below was right, and should be affirmed.

*Mr. Chief Justice Taney: [*239

I shall state my opinion in this case, in the cases of Williams' Administrator and Goodwin's Administrator, as the three cases are nearly connected, and depend on the same principles.

Decree affirmed with costs.

JOHN WILLIAMS, Administrator of James Williams, Deceased, Appellant,

v.

ROBERT M. GIBBS & Charles Oliver, Executors of Robert Oliver, Deceased.

(See S. C. 17 How. 239-274.)

Trustee—distribution of common fund—one not a party thereto, not bound by decree—Executor who has distributed, how far protected.

After the distribution, by a court, of a common fund, among the several parties interested, an ab-

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sent party who had no notice of the proceedings, and not guilty of willful laches or unreasonable neglect, will not be concluded by the decree of distribution, from the assertion of his right against the trustee, executor or administrator, who held the fund; or in case they have distributed the fund, in pursuance of an order of the court, against the distributees.

The decree of distribution among the apparent owners, however conclusive upon them, possesses no binding effect upon the rights of the absent party, whose interests are not represented.

The apparent title under the decree of distribution is defeasible, and a party claiming under it has no reason to complain that he is called upon to replace what he has received against his right.

If any portion of the fund had been paid over by executors in pursuance of an order in an administration suit, the executors would be protected to that extent, and the claimant be compelled to proceed agaist the distributees—otherwise, not.

These principles applied to the proceeds of a Mexican claim, paid over to the executors of a party.

Argued Jan. 3–5, 1855. Decided Feb. 15, 1855.

APPEAL from the Circuit Court of the United States for the District of Maryland.

This was a bill in chancery originally filed by the appellant in the State Court in Maryland, but removed thence on motion of the appellees to the U. S. Circuit Court for the District of Maryland.

The bill alleges that James Williams, on whose estate the appellant administered, did, in 1816, with certain other persons, form an association, under the name of The Mexican Company of Baltimore, which acquired large claims on the Mexican Republic, acknowledged by the decrees of its Congress of 1823–4; that the amount of the Company's claim was $160,563.-72, and Williams' share of it one ninth; and that under the convention with Mexico of April 11, 1839, John Glenn and D. M. Perine, claiming to act as trustees on behalf of said Company or some of its members, presented the Company's claim to the mixed commission, which passed an award in the Company's favor for the sum above mentioned with interest; and that a suit for the distribution thereof was instituted in the Baltimore County Court, in which, on the petition, and some pretended claim of Oliver's executors, the said Williams' share was adjudged and decreed to them, and that they have received the same, and that neither said Williams nor the appellant were parties to the said suit for distribution, and that they are not bound by it.

The bill further states that Oliver died in September, 1835, and that the appellees are his surviving executors, and prays a decree for the amount so received on account of said Williams' share.

The answer of the executors admits Williams to have been a member of the Mexican Company as charged, and states its object to have been the revolutionizing of Mexico, a province of Spain, which country was then at peace with the United States; but they do not know whether the decrees of the Mexican Congress mentioned in the bill were passed, or their purport.

The answer further admits the convention with Mexico, and the sitting of the mixed commission under it; and that Glenn and Perine, acting under a deed, obtained an award from said commission, and received all Williams' share, which was a ninth, except $118.81; and that in a suit in Baltimore County Court, for the distribution of the moneys awarded, the Court of Appeals, to which the cause was carried from Baltimore County Court by appeal, and which is the highest court in Maryland, decreed the whole of Williams' share to Oliver's executors; and that Glenn and Perine, under process issued to enforce that decree, paid over, on the days mentioned in the answer the amounts there mentioned, to Oliver's executors, on account of Williams' share; and they in turn, in 1852, paid over the money to persons entitled thereto under Mr. Oliver's will.

The answer further states that notice was given in the public papers to all persons interested to present their claims to the mixed commission, and also in the same manner, by Baltimore County Court, to all persons interested in the fund there, to file their claims thereto, but that neither Williams nor his administrators ever made any such claim.

The answer further states that Oliver died in December, 1335, and that the appellees are his surviving executors, and that Williams, June 24, 1819, applied for the benefit of the Insolvent Laws of Maryland and executed a deed of all the property to George Winchester, as trustee; and that in 1825 the Baltimore County Court passed an order of sale in regard to Williams' estate; and that Winchester, as trustee, sold to Oliver, for $2,000, Williams' interest in the Mexican Company, and assigned the same in writing; and that said sum was the fair market value at the time of sale; and that said sale was fairly and bona fide made; and that the court had full jurisdiction to order it; and that the title to said share passed under said sale by virtue of the Act of Assembly of Maryland, 1841, chapter 309.

The answer further pleads limitations and adequate remedy at law, and the illegality of the original transaction.

It is admitted that James Williams died in 1838, and that the appellant administered on his estate in 1852; prior to the filing of the bill in this case, three eighths of the fund had been paid away and distributed by Oliver's executors.

The court below dismissed the appellant's bill with costs, and he now prosecutes his appeal from that dismissal.

The case is more fully stated by the court, and also by the Chief Justice in his dissenting opinion. See, also, the preceding case of McBlair v. Oliver's Executors, 17 How. 232.

Williams v. Oliver, 12 How. 111; Deacon v. Oliver, 14 How. 610; Gill v. Oliver, 11 How. 529.

NOTE.—Jurisdiction of U. S. Supreme Court to revise decrees of state courts as to construction of state laws. Power of states to construe their own statutes. See note to Jackson v. Lamphire, 7 L. ed. U. S. 679.

It is for state courts to construe their own statutes; Supreme Court will not review their decisions, except when specially authorized to by statute—see note to Commercial Bank v. Buckingham, 12 L. ed. U. S. 169.

Illegal contracts, what are. How far fraud or illegal consideration will avoid contract—see note to Armstrong v. Toler, 6 L. ed. U. S. 468.

What contracts are void as against public policy, or as illegal. Illegal consideration, when a defense. Agreement not to bid. Lobby services. For contingent fees. To prevent competition—see note to Bartle v. Nutt, 7 L. ed. U. S. 825.

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Messrs. Robert N. Martin, G. L. Delaney, and Henry Winter Davis, for appellant:

The appellant will contend that Williams, having been a member of the Mexican Company, they are entitled to his share under the award; and it being admitted that said Williams was a member, and that Oliver's executors have received his share, we are entitled to call on them for it.

Oliver's executors can resist this claim only by showing—

1. A valid transfer of the title of Williams; or,

2. Admitting the invalidity of their own title to show some bar to our recovery.

Their title is the assignment from Winchester as insolvent trustee, aided by the Act of 1841.

But it must be considered settled by this court, not less than by the Court of Appeals of Maryland.

(A) That the purposes and dealings of the Mexican Company were illegal as well under the laws of Maryland as under those of the United States.

(B) That being so illegal, "The entire contract is so fraught with illegality and turpitude as to be utterly void; in that it has no legal or moral obligations to support it, and that, therefore, under the Insolvent Laws of Maryland, such a claim does not pass to, or vest, in the trustee of an insolvent petitioner."

Gill v. Oliver, 11 How. 529; Williams v. Oliver, 12 How. 111; Deacon v. Oliver, 14 How. 610; Kennet v. Chambers, 14 How. 38, 39, 51, 52; Trumbo v. Blizzard, 6 G. & J. 23.

The claim, therefore, never vested in the trustee; and consequently his assignment of the 2d of April, 1825, could pass nothing.

It is not aided by the Act of Assembly, 1841, ch. 309.

This act professed to ratify only such Acts as would have been valid, but for the trustee's failure to give bond.

Here, the failure to give bond had nothing to do with the matter, the sale was void because the property had no existence and never vested in a trustee.

2. If the award had expressly excluded our title in favor of Oliver, it would not bar us. It affirms conclusively nothing but the validity of the claim against Mexico.

De Valengin v. Duffy, 14 Pet. 290; Sheppard v. Taylor, 5 Pet. 675; Frevall v. Bache, 14 Pet. 97; Comegys v. Vasse, 1 Pet. 212; N. Y. Ins. Co. v. Roulet, 24 Wend. 505.

The decree of the Court of Appeals is no estoppel as res adjudicata, for Gooding and Williams were not parties; and no notice, actual or constructive, of the pendency of the suit, is shown or averred.

Hollingsworth v. Barbour, 4 Pet. 475; Aspden v. Nixon, 4 How. 467–498.

Both Williams and Gooding were dead before the suit was instituted; and no administration existed until after final decree.

The title decided on was different. The title of Gooding and Williams was never in issue.

3. The decree does not bar the complainants as a final disposition of a fund in court for distribution.

Williams and Gooding were neither bound nor entitled to come in under the decree.

The Mary, 9 Cr. 126; Good v. Blewitt, 13 Ves. Jr. 397; 19 Ves. 336; Hays v. Miles, 9 G. & J. 193, 198, 199; Chalmers v. Chambers, 6 H. & J. 29, 30.

It is not a case where a few could sue for all. The decree in a suit by a few for distribution of a fund among all interested is not ever in itself a bar to one who did not come in.

Its only effect is to protect the trustee and shift the remedy from him or the fund against the party to whom it was awarded.

Gillespie v. Alexander, 3 Russ. 130; David v. Frowd, 1 Myl. & K. 200; Greig v. Somerville, 1 Russ. & M. 338.

It has never been held conclusive upon the right of the party unless the failure to intervene has been willful, after actual notice and without adequate reason; and even then the delay after the decree and distribution was the main ground of exclusion; the only case going so far was reversed on appeal.

2 Danl. C. P. 1453; Sawyer v. Birchmore, 1 Keen, 391, 825.

4. The decision of the Court of Appeals is not such an authority of a local tribunal on a local law as compels the Supreme Court, irrespective of its own opinion, to hold Oliver's title better than that of the complainants.

Williams v. Oliver, 12 How. 111.

It was only a decree by three out of a court of six; and they differed on the grounds of the decision.

Craig v. Missouri, 4 Pet. 427; Carroll v. Carroll, 16 How. 275.

It has never been held that the mere fact of a decision in a state court on the same papers binds the United States courts.

It is mere matter of authority; and that only when it relates to some state statute or usage or real estate title—or peculiar local law.

If, in fact, the court did affirm the validity of the assignment of Winchester, it is demonstrated that the decision was not on the local Insolvent Law, but one directly on the laws of the United States, and so peculiarly within the cognizance of this court.

For a decision affirming the validity of any assignment impeaches that operation of the United States laws which annuls every contract in violation of them.

Armstrong v. Toler, 11 Wh. 258; Craig v. Missouri, 4 Pet. 410; Greene v. Neal, 6 Pet. 297; Swift v. Tyson, 16 Pet. 1; Foxcroft v. Mallett, 4 How. 379; Neves v. Scott, 13 How. 268; Trumbo v. Blizzard, 6 G. & J. 23.

5. Williams' title is not as insolvent trustee, but as administrator, and since the contract of Winchester, and for property never vesting in him.

No question of estoppel can exist.

Fairtitle v. Gilbert, 2 T. R. 171; Penn. S. Nav. Co. v. Dandridge, 8 Gill & J. 248; 1 Atk. 354.

Neither does the original turpitude of the claim bar us; our title, and our only title, is the award.

The award gave the funds to the members of that Company or those legally representing them. To insist on the original turpitude is to annul the award and to impeach the right which it created.

6. The personal representative stands in the place of the deceased; the award is of a fund in augmentation of the estate.

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There is no question of relation; the administrator takes as of the date of the Treaty or award. It inures to deceased's estate.

On this principle the court proceeded when they resolved the abandonment of Stevenson's share and confined the division to the other nine.

Campbell v. Mullett, 2 Swanst. 551; Stevens v. Bagnell, 15 Ves. 140; Murray v. East Ind. Co. 5 Barn. & A. 204.

7. The bar of limitation does not apply in the absence of a personal representative.

Fishwick v. Sewell, 4 H. & J. 393; Ang. Lim. 173, 184, 185; Haslett v. Glenn, 7 H. & J. 17; Ruff v. Bull, 7 H. & J. 16; 2 Salk. 421; Murray v. East Ind. Co. 5 B. & A. 204.

8. The principle of negligence can have no application till the Treaty and award; for we could be guilty of no laches in prosecuting a void and illegal claim—and no notice of the pretended assignment of Winchester is brought home to either Gooding or Williams.

We are not barred by standing by and seeing Oliver prosecute the claim.

Gray v. Bartlett, 20 Pick. 186; 4 H. & McH. 43; 3 Atk. 134.

Messrs. **Reverdy Johnson** and **J. Mason Campbell**, for appellees:

1. The decree of the Maryland Court of Appeals in the distribution suit is conclusive upon all persons in all jurisdictions.

Of the character of this proceeding this court has already expressed its opinion in 12 How. 122, where it declined to take jurisdiction of it. It characterizes it as a suit for distribution dependent on the laws of Maryland which involved and decided the right and title to the shares claimed in it under those laws. It was a proceeding in rem, and the final action of the court upon the res must be conclusive on all the world, the court in which the proceeding took place having undoubted jurisdiction over the subject matter of it.

Tongue v. Moreton, 6 H. & J. 23; 2 Md. 451; 2 How. 338; 3 Wh. 246; 9 How. 348.

The title of Oliver's executors to Williams' share, which is now denied, is the same title which the Court of Appeals affirmed.

2. Even allowing the illegality of the transaction to be set up by the representatives of its author, they cannot validate their own title to the injury of his assignee. The assignor's new title will pass by way of estoppel, or in equity will be held to inure to the assignee's benefit, on the principle that every assignment which cannot operate as an executed conveyance will be held to be an executory contract for a conveyance.

2 Smith's Lead. Cas. 464; 1 McLean, 384; 11 How. 325; 2 Sto. 630; 3 Sto. 175; 2 Serg. & R. 507; 2 Barr. 325.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Maryland.

The bill was filed in the court below to recover of the defendants the proceeds of the share of James Williams in what is called the Baltimore Company, which had a claim against the Mexican government, that was allowed under the convention of 1839. The claim was similar to the one under consideration in the case of the administrator of Lyde Goodwin against these defendants, just disposed of. The proceeds of the share, as charged, amount to $41,306.41.

The main grounds of defense set up in this case are:

1. The sale of this share in the Company to Robert Oliver, for a valuable consideration, by George Winchester, permanent trustee of Williams, who had taken the benefit of the Insolvent Act of Maryland in 1819, which was made in pursuance of an order of the court having jurisdiction in cases of insolvency under that Act. The sale took place on the 2d of April, 1825.

2. A decree of the Court of Appeals in Maryland at the June Term, 1849, affirming a decree of the Baltimore County Court, which in the distribution of the fund arising from this claim of the Baltimore Company, assigned the proceeds of the share in question to the executors of Oliver.

If the appellees fail to maintain their title to this fund, upon one or other of these grounds, then the right to the share of Williams in the Baltimore Company, for aught that appears, still belonged to him at the time of his decease, in 1836, and passed to his legal representatives as a part of his estate; and although originally of no legal value, on account of the illegality of the transaction out of which the contract arose, yet, as the illegality has been waived and the money realized, we have seen, from the principles stated in the previous case of Lyde Goodwin, it belongs to Williams' administrator.

As it respects the first ground—the sale of the share of Williams, by the provisional trustee, to Robert Oliver, under the Insolvent Act—we have seen, in the case of Lyde Goodwin, the Court of Appeals of Maryland held that this contract of the Baltimore Company with General Mina, being in violation of *the [*250 Neutrality Act of the United States of 1794, was so tainted with turpitude and illegality, it could not be recognized under their Insolvent Laws as property; and that no right to or interest in the share passed to the trustee. And that this being the construction of the Statute by the highest court of the State, and which had a right to interpret its own laws, this court felt bound by it, without inquiring whether that interpretation was correct or not; and consequently, as Goodwin's interest in the share did not pass to the insolvent trustee, it remained in Goodwin himself, and passed to the executors of Oliver, by virtue of his assignment to their testator, in 1829.

In this case the executors of Oliver are obliged to make title to the share in question, under the insolvent trustee of Williams; the assignment to Oliver, their testator, having been made by the trustee, and not by Williams himself. And it is now insisted, on behalf of the executors, that the Court of Appeals of Maryland in this case reversed their opinion delivered in the case of Goodwin, and held that the interest in the share did pass under the Insolvent Laws to the trustee, and consequently that the proceeds of the share vested in them under his sale and assignment to their testator in 1825.

Had this been the decision of the Court of Appeals in the case of the share of Lyde Good-

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win, the interest and proceeds would have passed to Gill, the permanent trustee, instead of to the executors of Oliver.

These results, so contradictory and inconsistent, claimed, too, as flowing from the judgments of the highest court in the State, should not be admitted unless compelled, after the most careful and deliberate consideration.

The decision in both cases was made at the same term, June, 1849; the one in the present case subsequent to that in the case of Goodwin.

The court in their opinion state, that the grounds upon which they affirmed the judgment in this case were, first, for the reasons assigned by them for their decree in the previous case of Oliver's Executors against Gill, permanent trustee of Goodwin.

The grounds for that decree are stated in the record, and as far as material, are as follows: "They are of opinion that the entire contract (the Mina contract) upon which the claim of the appellee (Gill, the trustee) is founded, is so fraught with illegality and turpitude as to be utterly null and void; conferring no rights or obligations upon any of the contracting parties, which can be sustained or countenanced by any court of law or equity in this State; that it has no moral obligation to support it, and that, therefore, under the Insolvent Laws of Maryland, such claim does not pass to or vest 251*] in the trustee of an insolvent *petitioner. It forms no part of his property or estate, within the meaning of the legislative enactments constituting our Insolvent Laws."

Nothing can be more explicit or decisive against the title of the insolvent trustee, or of those setting up a claim under him, to a share in this Baltimore Company. The court say: "It has no legal or moral obligation to support it, and that, therefore, under the Insolvent Laws of Maryland, such a claim does not pass to or vest in the trustee of an insolvent petitioner. It forms no part of his property or estate, within the meaning of the legislative enactments constituting our insolvent system." And this opinion is re-affirmed, ipsisimis verbis, in giving the judgment against the trustee of Williams, then before the court, and with which we are now dealing; and yet it is gravely insisted that no such decision was made in this case as was made in the case of Goodwin; but, on the contrary, the court decided that the interest in the share of Williams did pass under the Insolvent Laws to the trustee; that he became thereby invested with the title, and was competent to transfer it to Robert Oliver, the testator of the defendants.

The supposed contradiction and inconsistency of the determination of the court is founded upon the second paragraph in the opinion delivered. It is as follows: 2d. "Because, under the proceedings based on, or originating from, the insolvent petitions of John Gooding and James Williams, and the Act of Assembly applicable thereto, Rober Oliver acquired a valid title to all the interest of said James Williams and John Gooding in the fund in controversy, for the reasons assigned by Judge Martin as the basis of his opinion in those cases."

Judge Martin had dissented from the opinion of the majority of the court, in the case of Lyde Goodwin, being of opinion that the interest in his share passed under the Insolvent Laws to the trustee; and had maintained the same opinion in respect to the share of Williams, in the case before the court. And it is supposed that this opinion was adopted by the other members, in the determination of the case.

We do not agree that this is a proper apprehension of the judgment given by the two members of the court; but, on the contrary, are satisfied that the opinion delivered may well warrant a more natural and consistent interpretation.

The true meaning will be apparent, we think, from the following explanation. Robert Oliver, as we have seen, had purchased the share of Williams of the insolvent trustee, in 1825, and consequently, if the interest in his share passed under the Insolvent Laws to the trustee, it had become vested in Oliver, and of course, on his death, in the executors.

*The question before the court was be- [*252 tween the insolvent trustee and the executors. The court, after re-affirming their opinion in the case of Lyde Goodwin, namely: that no interest in the share passed to the trustee under the Insolvent Laws, and therefore that he was disabled from making out a title to it, go on, in substance, to say, that if in error as to this, and the opinion of Judge Martin should be adopted, namely: that the interest did pass to the trustee, it could make no difference in the result, inasmuch as the executors of Oliver would then be entitled to the proceeds, under his purchase of the share from the trustee himself, in 1825. Therefore, viewing the case in their aspect, quacunque via data, the insolvent trustee had failed in establishing any interest in the fund.

It appears to us that this is obviously the meaning intended to be expressed, though we admit the terms used in the expression of it furnish some plausibility for the criticisms to which it has been subjected. The two opinions, the one in the case of Goodwin, and the other in the case of Williams, were given at the same term, and upon the same question; and if the interpretation of the defendants is right, are diametrically opposite to each other; and not only so, as the first opinion is incorporated in the second, the judgment rendered in the case of Williams is founded upon two opposite constructions of the same statute, in one and the same opinion.

We prefer the explanation we have given to this extraordinary and absurd conclusion, as it respects the proceedings of a respectable court, and one possessing the highest jurisdiction in the State.

The change of opinion upon a question of law, or in the construction of a statute, is no disparagement to a judge or a court, however eminent or experienced. The change is oftentimes a matter of commendation, rather than of reproach. But the case here presented, and upon which we are asked to turn the decision of the question is, that two opposite constructions of a statute have been given by the court in the same cause, leading necessarily to opposite results, and both relied on as grounds for the judgment rendered. We have already assigned our reasons for disbelief in any such conclusion, and shall not again refer to them.

It has been suggested that the Statute of Maryland, of 1841, confirming certain defective proceedings in insolvent cases, operated to confirm the sale of the trustee to Oliver, in

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1825, and that the opinion of the Court of Appeals in the case of Williams is founded upon this Statute. Winchester, the permanent trustee at the time of the sale, had not given a bond, with surety, for the faithful execution of his duty, as required by the law; and 253*] *under the decisions of the courts of Maryland, this omission disabled him from dealing with the estate of the insolvent.

The Act of 1841 was passed to remedy defects of this description. It provided that all sales and transfers of property and claims, theretofore made by any permanent trustee, etc., under the Insolvent Laws of the State, shall be valid and effectual, notwithstanding such trustee shall not have given a bond with security, etc.; and the 3d section provides that the Act shall not be so construed as to cure any other defect in the proceedings than the failure to give a bond, with security, or the want of any ratification by the court of any sale made by such trustee.

It is quite apparent from the provisions of the Act, that it was not designed to confirm all sales previously made by the trustee under the Insolvent Laws, and render them valid and effectual, but simply to confirm, so far as respected any defect arising out of the omission of the trustee to give proper security, and also as respected any omission on the part of the court to confirm the sale. These two defects in any previous proceedings were cured by the Statute; but in all other respects the proceedings were valid, or otherwise independent of it. It is impossible to maintain that the Statute looked to any such informality in the title of the trustee, as that held by the Court of Appeals in the case of Lyde Goodwin, as well as in the present one. And besides, it is inconceivable why the court should have re-affirmed their opinion in the case of Goodwin, as a ground for denying the title to the trustee, if they had intended to hold that it passed by force of the Act of 1841. We have no belief that such was the opinion intended to be expressed.

The decree of the court affirming the judgment of the court below has been referred to, as favoring the view of the decision contended for by the appellees. This decree adjudges and decrees, that the judgment below awarding the share of Williams to the executors of Oliver be affirmed, and that Glenn and Perine, the general trustees of the fund, pay the proceeds of the share to the said executors.

It will be remembered that the only question before the court respecting this share was between the executors on the one side, and the insolvent trustee of Williams on the other; and as the executors were the apparent owners of the fund, unless a title could be maintained by the trustee, so far as respected the parties before the court, the former exhibited the better title; at least, the better title to take the possession and charge of the fund in the distribution among the claimants. The form of the decree, therefore, was very much a matter of course, in the aspect of the case as then presented.

This view will be more fully appreciated 254*] when we refer to *another branch of this case, presently to be considered. We will simply add, in our conclusion upon this part of the case, that the opinion now expressed was the one entertained by us when the case, involving this share of Williams, was formerly before the court and which will be found in 12 How. pp. 111-123.

At p. 123 we observed that the counsel for the plaintiff in error sought to distinguish this case from the previous one (the case of Lyde Goodwin), and to maintain the jurisdiction of the court, upon the ground that the act of the Legislature of Maryland of 1841, confirming the authority of Winchester, the permanent trustee, was in contravention of a provision of the Constitution of the United States, as "a law impairing the obligation of contracts."

But we observed in answer "admitting this to be so (which we do not), still, the admission would not affect the result, for the decision (of the Court of Appeals) upon a previous branch of the case, denied to the plaintiff any right to or interest in, the fund in question, as claimed under the insolvent proceedings as permanent trustee, and hence he was deemed disabled from maintaining any action founded upon that claim.

It was of no importance, therefore, as it respected the plaintiff, in the distribution of the fund, whether it was rightfully or wrongfully awarded to Oliver's executors. He had no longer any interest in the question."

Our conclusion, therefore, upon this part of the case is, that according to the law of Maryland, as expounded by the highest court of the State, no title to or interest in the share of Williams in the contract of the Baltimore Company, under General Mina, passed under the Insolvent Laws of that State to the insolvent trustee; and consequently no interest in the same became vested in the executors of Robert Oliver, by force of the assignment from the trustee to him in 1825.

2. The next question is as to the conclusiveness of the decree of the Baltimore County Court, making a distribution of the fund among the several claimants, and which was affirmed by the Court of Appeals, upon the rights of the administrator of Williams to the proceeds of his share in his fund. The decree in the Baltimore County Court was rendered in December, 1846, and affirmed June Term, 1849.

Williams died in 1836, and no letters of administration were taken out upon the estate till 1852. It appears, therefore, that Williams had been dead ten years when the first decree was made, and thirteen at the date of the second; and no representative was in existence to whom notice of the proceedings could affect in any way, the interest of the estate in the fund.

Now, the principle is well settled in respect to these proceedings *in chancery for [*255 the distribution of a common fund among the several parties interested, either on the application of the trustee of the fund, the executor or administrator, legatee, or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of willful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or in case they have distributed the fund in pursuance of an order of the court, against the distributees.

David v. Froud, 1 Mil. & K. 200; Greig v. Somerville, 1 Russ. & M. 338; Gillespie v. Alexander, 3 Russ. 130; Sawyer v. Birchmore, 1

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Keen, 391; Shine v. Gough, 1 Ball. & B. 436; Finley v. Bank of the U. S. 11 Wh. 304; Story's Eq. Pl. sec. 106; Wiswall v. Sampson, 14 How. 52, 67.

The general principle governing courts of equity, in proceedings of this description, is more clearly stated by Sir John Leach, Master of the Rolls, in David v. Frond, above referred to, than in other case that has come under our notice.

That was a case where one of the next of kin, who had no notice of the administration suit, filed a bill against the administratrix and distributees to obtain her share of the estate. The bill was filed some two years after the decree for distribution had been made and carried into effect.

The Master of the Rolls observed that "the personal property of an intestate is first to be applied in payment of his debts, and then distributed among his next of kin. The person who takes out administration to his estate, in most cases, cannot know who are his creditors, and may not know who are his next of kin; and the administration of his estate may be exposed to great delay and embarrassment. A court of equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator. Upon the application of any person claiming to be interested, the court refers it to the master, to inquire who are creditors, and who are next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the master, within a reasonable time stated; and when that time is expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate among those who have before the master established an apparent title. Such proceedings having been taken, the court will protect the administrator against any future claim."

256*] *"But it is obvious," he remarks, "that the notice given by advertisements may, and must in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or from a multitude of circumstances they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owners to one who has no right to it."

The Master of the Rolls further observed, "that if a creditor does not happen to discover the proceedings in the court, until after the distribution has been actually made, by the order of the court, amongst the parties having, by the master's report, an apparent title, although the court will protect the administrator, who has acted under the orders of the court, yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no willful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties defendants to restore to the creditor that which of right belongs to him." The Master of the Rolls then applied this principle to the right of the next of kin, the complainant in the bill, and observed, that it had been argued that the case is extremely hard upon the party who is to refund, for that he has a full right to consider the money as his own, and may have spent it; and that it would be against the policy of the law to recall the money, which the party had obtained by the effect of a judgment upon a litigated title. "But," he observed, "there is here no judgment upon a litigated title; the party who now claims by a paramount title was absent from the court, and all that is adjudged is, that, upon an inquiry in its nature imperfect, parties are found to have a prima facie claim, subject to be defeated upon better information. The apparent title, under the master's report, is, in its nature, defeasible. A party claiming under such circumstances, has no great reason to complain that he is called upon to replace what he has received against his right."

In the case of Gillespie v. Alexander, also above referred to, Lord Eldon observed, that although the language of the decree, where an account of debts is directed, is, that those who do not come in, shall be excluded from the benefit of it; yet the course is to permit a creditor, he paying costs, to prove his debt, as long as there happens to be a residuary fund in court, or in the hands of the executor, and to pay him out of the residue. If the creditor does not come till after the executor *has [*257 paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so, but he cannot affect the legatees except by suit, and he cannot affect the executor at all.

These principles are decisive of this branch of the case, as they establish, beyond all controversy, the right of the administrator to assert the title of Williams, the intestate, to the proceeds of the share in question, notwithstanding the decree of distribution by the Baltimore County Court. There has been no laches on his part, or on the part of those whom he represents.

The cases above referred to relate to the rights of creditors, and next of kin, but the principle is equally applicable to all parties interested in a common fund brought into a court of equity for distribution amongst the several claimants.

It is worthy of observation in this connection, that the decree, however conclusive in its terms in the distribution of the fund amongst the apparent owners then before the court, possesses no binding effect upon the rights of the absent party whose interests have not been represented on the subject of litigation. The opinion of the court given, and decree in pursuance thereof, applies only to interests of those amongst whom the fund is distributed.

These observations furnish an answer to the argument on behalf of the appellees, drawn from a reference to the terms of the decree of the Court of Appeals of Maryland, in this case, by which the fund is adjudged to the executors of Oliver. As between all the parties then be-

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fore the court, this adjudication was doubtless proper and conclusive upon their rights.

It is agreed in the case that but five eighths of the fund in controversy is in the hands of the executors, the residue having been paid over in the administration of the assets of the estate.

If this portion had been paid over by the executors in pursuance of an order of the court in an administration suit, the defendants would be protected to that extent, and the complainant compelled to proceed against the distributees. But no such fact appears in the case.

Without saying, at this time, that an executor, in all cases, may be compelled to account to a party making title to a portion of the estate after distribution among the legatees and next of kin, unless first procuring an order of the court having charge of the administration, we perceive no reason, under the circumstances of this case, for exonerating them, or turning him round to a bill against the distributees.

Upon the whole, after the fullest considera- 258*] tion we have been *able to give to this case, we think the decree of the court below was erroneous, and should be reversed.

Dissenting, Mr. Chief Justice Taney, Messrs. Justices McLean and Daniel.

Mr. Chief Justice Taney, dissenting:

I dissent from the opinion in these two cases; but they are so intimately connected with the case against Lyde Goodwin's Administrator, just decided, that I shall be better understood by considering the three together.

When the case of Gill (who was trustee of Goodwin under the Insolvent Laws of Maryland) against Oliver's Executors was before the court, I did not concur in the judgment then given, as will be seen by the report of the case in 11 Howard's Reports. It appeared to me unnecessary at that time to do more than simply express my dissent; but the course which these cases have since taken, and the decisions now given, make it my duty to state more fully my own opinion, and the grounds upon which I passed the decrees that are now before the court.

The history of the controversy is this: Goodwin, Gooding and Williams were members of the Baltimore Mexican Company, which made the contract with Mina, in 1816. The character of that contract is fully stated in the 11th and 12th volumes of Howard's Reports, and also the manner in which it came before the commissioners under the Treaty with Mexico, and their award upon it.

The commissioners awarded the sum mentioned in their award to the Mexican Company of Baltimore, as due "for arms, vessels, munitions of war, goods and money, furnished by the Company to General Mina for the service of Mexico in the years 1816 and 1817," and gave interest to the Company according to 259*] *the stipulation in the contract with Mina. I have given the words of the award, because they show that the commissioners affirmed the validity of this contract, and directed the amount due by its terms to be paid to the trustees therein named, for the benefit of the parties interested in it.

Proceedings were soon after instituted in a Maryland court of equity against the trustees by persons claiming an interest in the fund; and the money by order of the court was brought into court to be distributed among the parties entitled. Many claimants appeared presenting conflicting claims for shares in the company.

Goodwin, Gooding and Williams all became insolvent—Goodwin in 1817, Gooding and Williams in 1819; and their respective trustees appeared in the Maryland court, and claimed the amount due to the insolvent.

On the other hand, the executors of Oliver claimed these three shares—Goodwin's under an assignment made to Oliver by Goodwin in 1829, and the other two under assignments made to him in 1825, by George Winchester, who was the trustee of each of them.

The controversies which arose upon the distribution of this fund were removed to the Maryland Court of Appeals, which is the highest court of the State. And in the trial there, it was objected that the contract with Mina was in violation of law, and therefore fraudulent and void, and vested no rights in the members of the Company which the law would recognize, and consequently that no right of property in it could vest in the trustee when the party became insolvent.

It may be proper to remark, that under the Maryland Insolvent Law, all the property, rights and credits belonging to the insolvent at the time of his petition, become vested in his trustee; and he, at the same time, executes a deed to the trustee, conveying and assigning to him all his property, rights and credits of every description for the benefit of his creditors. And if the persons above named, at the times of their petitions in 1817 and 1819, had any interest whatever, either legal or equitable, vested or contingent, under this Mexican contract, it passed to their trustees.

The Court of Appeals decided that the contract with Mina was fraudulent and void under our neutrality laws, and therefore vested no right in the parties which a court of justice in this country could recognize; and consequently that they had no interest or property under it which could be transferred to or vested in their trustees at the time of their insolvency. And upon this ground they decided against the claim of the trustees, and directed the whole amount of the three shares to be paid to Oliver's executors.

*The ground upon which they support- [*260 ed the claim of Oliver's executors to these shares is not stated fully in the opinion. It was, I presume, upon the ground that, by the terms of the award, the shares of these three persons were received by the trustees named in the award, in trust for these executors; and that the trustees, therefore, had no right to withhold it from them; as neither they nor their testator had any participation in the fraudulent contract out of which it had arisen. And if the court was right in deciding that neither the trustee of the insolvent, nor anyone else, could derive a title to this money under the contract with Mina, perhaps the language of the award, together with the documents referred to in it, might justify this decision. But I express no opinion on this point, and merely suggest it in justice to the Court of Appeals, in order to show that their opinions in these cases are not necessarily inconsistent with each

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other, although the court may have reasoned erroneously, and decided incorrectly.

These decisions were brought to this court by the trustees of the insolvents, by writs of error under the 25th section of the Act of 1789. Motions were made in each of them to dismiss for want of jurisdiction; and the motions were sustained by the majority of the court, and the cases dismissed, as will appear in the reports referred to.

I differed in opinion from the Court, but undoubtedly, when the cases came before me at circuit, upon bills filed by the administrators, it was my duty to conform in the inferior court to the decision of the superior, as far as that decision applied to the case presented by these complainants. It is true that in my own opinion, and according to the views of the subject I had always entertained, these bills, by the administrators of the insolvents, could not be maintained. But I dismissed them, not only upon that ground, but also under the impression that I was bound to do so upon the principles upon which this court had decided them in the suits by the trustees. It appears, however, by the opinion just delivered, that I was mistaken, and placed an erroneous construction on the opinions formerly delivered. It seems, therefore, to be due to myself to state not only my opinion in the former cases, but also the interpretation I placed upon the language of this court in deciding them. And I think it will be found that the language of the former decisions was fairly susceptible of the construction I put upon it, although that construction has turned out to be erroneous. I do not mean to say that the construction which the majority of the court puts upon its former decisions now, is not the true one, but that the language used in it might lead even a careful inquirer to a contrary conclusion.

261*] *I proceed, in the first place, to speak of the case of Gill, Trustee of Lyde Goodwin. As I have already said, when that case was before this court, I thought, and still think, we had jurisdiction; and proceed now to state the grounds of that opinion, and how it bore on the decision of the suit by his administrator, which is now before us.

The money in dispute was claimed under the contract with Mina. And the amount claimed was awarded to the Mexican Company, or their legal representatives or assigns, by the commissioners appointed under the Mexican Treaty, and the Act of Congress passed to carry it into execution. The commissioners were authorized to ascertain and determine upon the validity of the claims of American citizens upon the Mexican government, and for which this government had demanded reparation. Of course, it was their duty not to allow any claim for services rendered to Mexico, or money advanced for its use, by American citizens in violation of their duty to their own country, or in disobedience to its laws. For the government would have been unmindful of its own duty to the United States, if it had used its power and influence to enforce a claim of that description, or had sanctioned it by treaty. But the Board of Commissioners were necessarily the judges of the lawfulness of the contracts, and the validity of the claims presented. They were necessarily to determine whether they were of the description provided for in the treaty or not. They may have committed errors of judgment in this respect, and may have committed an error of judgment in sanctioning the contract with Mina. But the law under which they acted made them the exclusive judges on the subject. There was no appeal from their decision. And if there was no malpractice on the part of the commissioners, and the award was not obtained by fraud and misrepresentation, it was final and conclusive. It was like the judgment of any other tribunal having jurisdiction of the subject matter, and could not be re-examined and impeached for error of judgment in any other court which had no appellate power over it. And they decided that the contract of Mina was valid, and consequently it vested from its date a lawful right to the money in the members of the Mexican Company.

The objection, therefore, in the Maryland court, brought into question the validity of an authority exercised under the United States; and as the decision of the State Court was against its validity, it was my opinion that a writ of error did lie under the 25th section of the Act of 1789. And regarding the award as final and conclusive upon other tribunals, there was error in the judgment of the State Court which pronounced it invalid and fraudulent. It will be observed that this error was the foundation *of the judgment of the State [*262 Court. For if the court did not look behind the award, and had regarded the contract as valid, the right to Goodwin's interest undoubtedly passed to his trustee in 1817, long before his assignment to Oliver. I therefore thought this court had jurisdiction, and that the judgment of the Court of Appeals ought to be reversed, and this money paid to the trustee, and not to Oliver's executors.

The majority of the court, however, entertained a different opinion, and dismissed the cases, upon the ground, as I understand the opinion, that the construction of the Treaty, or of the Act of Congress, or the validity of the authority exercised under them, did not appear to have been drawn into question in the Court of Appeals; and that the case appeared to have been decided upon the effect and operation of their own Insolvent Law, and upon their own laws regulating contracts and transfers of property and credits within the State, over which we had no jurisdiction upon the writ of error; that these matters were exclusively for the decision of the state tribunals, and their decision final upon the subject.

Some remarks are made in the opinion in relation to grounds upon which the State Court might have decided without impeaching the award of the commissioners; and among others the fact that Goodwin had assigned his right to Oliver in 1829, and that the Mexican Congress had previously, in 1825, acknowledged its validity. There is an error in the date, but it is immaterial. The Acts of the Mexican Congress were in 1823 and 1824.

But I do not understand these remarks as intended to affirm that the share of Goodwin passed to Oliver by this assignment, but as suggesting grounds upon which the State Court might, whether erroneously or not, have decided in favor of the executors. Because, as the court held that it had no jurisdiction in the

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case, I supposed that it intended to give no opinion upon the merits. And I presumed that it did not intend to decide that the acknowledgment of Mexico, that Mina's contract was binding upon the Republic, could give any validity to it in the courts of the United States. For the contract of the Baltimore Company would have been liable to the same objections if it had been made originally, in 1816, with the Mexican government, instead of General Mina. And if it was void in 1817, and Goodwin then had no interest under it, it was equally void in 1829, when the assignment to Oliver was made; and it is due to the Court of Appeals to say, that they have not indicated, in any of their opinions, that the Acts of the Mexican Congress had any influence on their judgments.

Upon these considerations I dismissed the bill 263*] at circuit, upon *two grounds: 1st. My own opinion is, that the interest of Goodwin passed to his trustee, and consequently that the present complainant (his administrator) can have no title. 2d. This court decided upon a view of the whole case, that it had no appellate power over this judgment, and that it had been decided by the Maryland court upon its own construction of its own laws. And that point being adjudged by this court, I do not see upon what ground I could, in conformity to this opinion, revise the judgment of the State Court and reverse its decision. It would, in substance, have been the exercise of an appellate power at circuit over the decisions of the state courts, upon their own laws, which this court had refused to exercise on writ of error, and, for the reason first above stated, I now concur in affirming the judgment here in the case of Goodwin's Administrator.

I come now to the cases of The Administrators of Gooding and Williams, which are in many respects alike. These writs were also dismissed for want of jurisdiction, when formerly before the court; and in dismissing them, the court said that the title of the trustees to the shares of Gooding and Williams "involved only a question of state law, and therefore was not the subject of revision here, and was conclusive of his rights, and decisive of the case." I quote the language of the court. The want of jurisdiction was, therefore, the only point decided in these cases, and they were dismissed on that ground.

It is true that in these cases, as well as in that of Goodwin's Trustee, language is used, in the opinion of the court, which would seem to imply that the court was of opinion that the contract was void originally, but had afterwards become valid by the events referred to in the opinion. But I understood these observations, as I did those made in Goodwin's case, merely as suggesting considerations which might have led to the decision of the State Court, without impeaching the award of the commissioners, but not as approving or sanctioning them as sufficient grounds for their decree. For the court determined that it had no jurisdiction, and consequently the merits of the case were not before it, and I presumed it did not mean to express any opinion concerning the correctness or incorrectness of the judgment of the State Court. Such I have understood to be the established practice of this court, and I was not aware that this case was intended to be an exception. The only point decided was the conclusiveness of the judgment of the State Court upon the rights of the trustees.

The Court of Appeals assigned two reasons for their decision, and taking them literally, as they stand, they are inconsistent with each other. But the opinion appears to have been hastily *written, and not sufficiently guarded [*264 in its words; and it is evident they meant to say, that in the opinion of the court, no interest vested in the trustee, because there was no legal or equitable interest acquired by the contract that could vest anywhere, or in any person. But if there was a legal interest, it passed to his trustee, and by his assignment vested in Oliver. This mode of decision upon alternative grounds, is an ordinary and familiar one in courts of justice, and will often be found in the decisions of this court.

And however the reasoning of the State Court may be regarded, it is clear that with the interest of the intestate before them and under consideration, they decreed that the shares belonged to Oliver's executors. Now, it is perfectly immaterial whether the reasons assigned by the court were right or wrong. Here is their judgment, their decree—a decree founded altogether on state laws, as this court have said in their former decisions, and made by a court of competent jurisdiction. Upon what principle, then, can a court of the United States, either at circuit or here, undertake to revise it or reverse it for error? If we had no appellate power upon the writ of error, and no right to reverse the judgment for errors supposed to be committed by the State Court in interpreting and administering its own laws, how can this court or the Circuit Court exercise this revising power over the judgment in the form it now comes before us. It is doing in another way what it has admitted cannot be done in the prescribed mode of proceeding by writ of error. And I am not aware of any precedent for this exercise of power in a court of the United States administering state laws, when the judgment of the highest court of the State is before them upon the same case upon which the United States Court is called on to decide.

It will be remembered that the appellate and revising power of the courts of the United States over the judgments of state courts stands upon very different principles from those which, in England, govern the relation of superior and inferior tribunals, and they are not, therefore, always safe guides upon the revising and reversing power which the courts of the United States may constitutionally exercise over the judgments of the state courts.

I know it is said that the administrators of these insolvents who have filed these bills were not parties to the former proceedings, and are not therefore estopped by the decree of the Court of Appeals. And a good deal of argument has been offered to maintain that proposition; but that question cannot arise until other questions which stand before it and control it are first disposed of. For this court held, upon the former writs of error, that these cases were decided by the Court of Appeals exclusively upon Maryland law; and if that be the case, before we come *to the question of parties, oth- [*265

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er questions must be decided: 1st. Whether in this form of proceeding you can examine into the validity of the grounds upon which the State Court decided them, and reverse its judgment if you suppose it committed an error in interpreting and administering its own laws; and if you are authorized to do this, then, 2d. Did it commit an error in deciding that those shares belonged to Oliver's executors? The reasons they may have given for this opinion are altogether immaterial; and if these two questions are decided in the affirmative, and this court reverses the judgment, upon the ground that the shares belonged to the insolvents at the times of their death, and not to Oliver's executors, then the administrators would undoubtedly have an interest, and are not estopped by the former decree from claiming their rights. Nobody, I presume, disputes this. But before you come to this part of the case, you must take jurisdiction over the judgment of the State Court, and reverse it for error. Because, if that judgment stands, then the intestates had nothing at the times of their death that could pass to the administrators; and there would have been no more propriety in making them parties, than any other stranger who had no interest in the fund. The administrator of a vendor who has in his lifetime devested himself of all right to property, can hardly be supposed to be a necessary party in a controversy between purchasers under him when neither of the claimants has a right to fall back for indemnity on his estate. The administrators offer no new evidence of interest in them or their intestates, but present here the identical case, in all its parts, that was before the Court of Appeals when it passed its decree.

Indeed, I cannot comprehend how the State Court, or this court, can award the fund to the administrators, if the contract was fraudulent and void when the parties became insolvent. They both died before the award was made; but if, up to that time, the contract continued open to examination in a court of justice, and was decided to have been fraudulent and a nullity when made, nothing afterwards could have given it legal existence. Nihilum ex nihilo oriatur is as true in law as in philosophy. If void at first, it continued to be void and a nullity to the time of the deaths of the parties, and their administrators could derive no lawful title from them. To say that a legal or equitable interest in a fraudulent contract can exist in a party and be transmitted to his administrator, when used as legal language, is a solecism. And if from necessity, upon any principle of law or equity, the award related back, it would seem that those who purchased the interest in these shares, at their full market value at the time, and paid for it, should have the benefit of the relations.

266*] *It may be said, perhaps that although the Acts of Congress of Mexico, in 1823 and 1824, could not make valid a contract originally void and a nullity by our laws, yet these Acts of the Mexican Legislature constituted a new and original contract, which at that time might lawfully be made by our citizens, and that the rights of the parties take date from that contract. But this view of the case would not obviate the legal objections, but on the contrary *it would add to them. For it still assumes* the principle that the State Court had a right to examine into the testimony, not only to determine the rights of the parties under the award, but to impeach the award itself. And upon this theory, if they had not found these Acts of the Mexican Congress in the proceedings of the commissioners, the State Court might have held the whole award erroneous and a nullity vesting no rights in any one, because it sanctioned an illegal contract. As I have already said, a state court, in my judgment, has no such power.

The Commissioners do not refer to the Mexican Acts of Congress, nor allow the claims of the Company upon a contract made by these laws. They award expressly upon the contract with Mina, and give interest according to that contract. And unless their award may be impeached for error, and their decision upon the claim re-examined and reversed in the State Court, the rights of all the claimants depend upon this contract, and take date from it. According to the award of the Commissioners, it is this contract that gave the claimants rights, and which must consequently govern the court in distributing the fund.

It seems to be supposed that the decision of the Court of Appeals declaring this contract to be fraudulent and void was founded upon some local law of the State. But that is evidently a mistake. It was founded on the breach of the neutrality laws of the United States. They looked behind the award of the Commissioners, behind an authority exercised under the United States, and impeached its validity.

Besides, no other contract but this was under examination in the State Court. The court speak of no other in their opinion. The parties, as appear by the proceedings, all claimed under it, and the decisions of the court and the distribution of the fund were founded upon it. Can another and a subsequent contract be set up here, upon which the State Court has passed no judgment, and has not acted, and under which none of the parties before it claimed? I think not. And if their decision is to be set aside for error, it must, I presume, be for error in deciding upon the contract brought before them by the parties. And if this court now reverse these decrees upon the ground that the original contract with Mina was void, but became valid by subsequent *events, it [*267 reverses upon a new case, upon which the State Court has never decided. Moreover, it unsettles the whole proceedings in the State Court, for the interest of the claimants, in almost every instance, depended upon the time that a lawful right to this claim vested in the Company.

And if, notwithstanding these objections, this court may look into the judgment and reverse it for error, and they find it to have been decided upon two principles of law, consistent or inconsistent with each other, one of which is erroneous and the other sound, ought not the judgment to be affirmed?

Now, as I have already said, the State Court committed an error, in my opinion, in going behind the award, and receiving testimony to show that a contract was fraudulent and void which a tribunal of the United States having exclusive jurisdiction over the subject had decided to be lawful and valid. And if

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this court have the power to revise that judgment, I think it could not be supported on that ground.

But they put it upon another, and say, that if the original contract is regarded as valid, then the interest of the insolvents passed to their trustee, and by virtue of his assignment vested in Robert Oliver.

Now, in examining the judgment of an inferior tribunal in a case of this description, would the appellate court lay hold of the erroneous principle to reverse the judgment? Would they not affirm it upon the other alternative, which placed it upon lawful and tenable grounds? I think nobody would doubt that the judgment would be affirmed. Ought not the same rule to be applied to the Maryland judgment which this court is now revising? And is not this court bound, under the award of the Commissioners, to regard the original contract as valid, when it has been so decided by a lawful tribunal of the United States, having exclusive jurisdiction over the subject? If we are so bound, and not authorized to impeach the judgment of the Commissioners, then the judgment of the Maryland court, in the cases of Gooding and Williams, is right, and ought to be affirmed upon the second ground stated in the opinion, even if we were sitting here as an appellate tribunal.

It is true that the bill in the case of Williams' Trustee was filed in the State Chancery Court, which by a change of the law, represents the court where the fund was originally paid in and distributed among the claimants; and was removed to the Circuit Court of the United States by the appellees, who reside out of the State. And undoubtedly, the Circuit Court, in that state of the case, possessed the same power over it, and were bound to decide it upon the same principles that ought to have governed the State Court in which the bill 268*] was filed. But there *was no new evidence, no new fact, no new interest or equity presented. There is a new name, indeed, but no new interest or equity disclosed in the bill. And upon that case the Court of Appeals had passed its decree. That decree was the law of the case, in the inferior court, where this bill was filed. And the Court of Appeals itself could not reverse its decree, signed and enrolled at a former term, nor open it merely because a new name was before them, which, according to its former decree, had no interest in the fund, and consequently ought not to have been made a party in the former proceedings. And if we now reverse this judgment, we go further than the Maryland Court of Appeals could have gone, and exercise what is essentially an appellate power over it, correcting the errors of an inferior court.

But in Gooding's case this court go still farther. The bill in this case was filed originally in the Circuit Court of the United States. Yet the fund was never in that court, nor the money paid to the appellees by its order. If the decree is to be opened for error, after the fund is distributed by order of a court of competent jurisdiction, ought it not to be done in the court that passed the decree? And can a circuit court of the United States compel the appellees to repay money which they hold under the decree of a court of co-ordinate jurisdiction, made upon the same case, with the same evidence before them? I think not.

Besides, Gooding became insolvent again in 1829. All the property, rights and credits which he had at that time, vested in his trustees, who are still living. If Goodwin's interest in 1829 had become so far valid that it could pass by his assignment to Oliver, why is not Gooding's also lawful and vested in his trustees? Upon what principle can Goodwin's interest be capable of assignment in 1829, and Gooding's remain fraudulent until his death? Yet if it was capable of assignment in 1829, the complainant is not entitled. It passed to his trustees.

And if, as the court now say, Goodwin would be estopped from impeaching his assignment to Oliver on the ground that the original contract was illegal and fraudulent, why are not Gooding and Williams, and their administrators, equally estopped from impeaching their assignments to their respective trustee? The assignment to the trustee for the benefit of their creditors was equally meritorious with Goodwin's assignment to Oliver. And if they had appeared as parties in the Maryland court, would they have been permitted to impeach the title of the trustee, who was then claiming it, and set up a right to the money in themselves, upon the ground that the contract of their respective intestates was fraudulent? Certainly the principle *is well estab- [*269 lished in chancery, that a party cannot set aside a contract upon the ground that he himself was guilty of a fraud in making it. I do not cite cases to prove familiar doctrines. His administrator is in no better condition. And yet he is allowed, in this case, to defeat the operation of the intestate's deed to the trustee, upon the ground that the contract, of which the trustee claims the benefit, was a fraudulent one on the part of his intestate. And here, in a court of equity, these administrators support their title and recover this money against their trustees, as well as Oliver's executors, solely upon the ground that their intestate was guilty of a fraud in making the contract with Mina, and incapable, therefore, of assigning it. The party defeats the operation of his own deed, upon the ground that he himself committed a fraud. This doctrine cannot, I think, be maintained upon principle or authority, in a court of chancery.

We are not dealing with Mexican laws, or inquiring what a Mexican tribunal or the Mexican government would decide in relation to this contract, but we are inquiring how it stands in a Maryland court, and what are the legal rights under it by the laws of Maryland. And I understand this court to place its opinion solely upon the ground that this contract was fraudulent and void by the laws of Maryland, and that the parties acquired no rights under it.

It may have been good in Mexico—a valid, binding obligation. They may have been willing to reward our citizens for a breach of duty to their own country; but that could not cleanse it from the offense against our own law, nor give legal rights to the administrator, when there was no right in the intestate. The courts of the United States can hardly be authorized to sanction and enforce what are

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called honorary obligations of a foreign nation, when those obligations have arisen from temptations offered to our own citizens to violate the laws of their own country. Nor can I perceive how the opinion of the Maryland court, declaring this contract to be fraudulent and void, can be binding and conclusive upon this court, and yet every other decision of the same court, in the same case, explaining or qualifying this opinion, still be open to examination and reversed for error. I cannot, for myself, draw any line of distinction between the relative conclusiveness of the opinions of the State Court expressed, when all of them were equally within its jurisdiction and depended altogether upon the laws of the State; and all upon points necessarily arising in the case they are then deciding.

When these two cases were before the court, upon writs of error brought by the trustees, I entertained the opinions I now express. I then thought that the court had jurisdiction, 270*] upon *the ground that the validity of the Act of the Maryland Legislature of 1841, confirming a certain description of conveyances made before that time by the trustees of insolvent debtors, was drawn into question, as contrary to the Constitution of the United States, and their decision had been in favor of the validity of the state law. And I still think so. But at the same time I was of opinion that the law in question was valid, and that although we had jurisdiction, the judgment of the State Court in these two cases ought to be affirmed, and the writs of error not dismissed. For the trustee in whom the shares vested, according to the opinion I have expressed as to Goodwin's case, had transferred them to Oliver, and the State Court was therefore right in decreeing them to Oliver's executors. The majority of this court thought otherwise, and dismissed them for want of jurisdiction. And I did not state my dissent, because, as I then understood the opinion, the dismissal finally disposed of them.

It was upon the grounds above stated that I decided these cases at the circuit, and supposed, at the time I was deciding them, in conformity to the opinion of this court upon the conclusiveness of the judgment of the State Court. The judgment just pronounced, however, shows that so far as the shares of Gooding and Williams are concerned, I misunderstood the opinion of the majority of this court. But with all the habitual respect which I feel for the judgment of my brethren, the opinion I held at the circuit remains unchanged. And I have the more confidence in it, because this court now, as heretofore, have said that the questions in dispute depend altogether on Maryland law; and every judge in Maryland who has been called upon to hear and decide the cases of Gooding and Williams, of which I am now speaking, the judge of the court of original chancery jurisdiction, the judges of the Court of Appeals, all men of high legal attainments and eminence, have clearly and unanimously held, upon the same proofs now before us, that the executors of Oliver were entitled to these two shares in the Mexican Company, and decreed that the money should be paid to them. And no one of these judges deemed it necessary that the administrators should be parties, or called before the court, acting no doubt upon the established rules of chancery, that a person who has no interest in the fund need not and ought not to be made a party; and that the administrators could have no interest, as the intestates themselves had none at the times of their respective deaths. And that if they were before the court, they could not be allowed to impeach the deed to the trustees by alleging that their intestate had committed a fraud in making it.

I must, therefore, adhere to the opinions I entertained when the cases were before me at circuit, and dissent from the *opinion [*271 just pronounced, in the cases of Gooding's and Williams Administrators and concurring in that of Goodwin's Administrator, for the reasons hereinbefore stated.

Mr. Justice Daniel, dissenting:

When, at a former term, these cases were brought before this court, in the name of Nathaniel Williams, trustee for the creditors of James Williams, an insolvent debtor, and of the same Nathaniel Williams, as trustee for the creditors of John Gooding, an insolvent debtor, the court, after argument, and upon full consideration, dismissed them for want of jurisdiction. The decision of the court then pronounced, commanded my entire concurrence. I still concur in that decision, and hold the reasons on which it was founded as wholly impregnable. Those reasons were specifically these: That the questions involved in the cases were purely questions arising upon the construction of the Insolvent Laws of Maryland; questions properly determinable, and which had been determined by the highest tribunal of that State; and such, therefore, as vested no jurisdiction in this court.

Such, then, being directly and explicitly the decision of this court, as will be seen in the report of its decision in 12 How. 111 and 125, it becomes a matter for curious speculation to inquire by what view of the facts and the law of these cases, by what process of reasoning upon the same facts and the same law, this court have now arrived at a conclusion diametrically opposed to that which had been formerly reached by them. The parties in interest are essentially the same, varied only in name; it is the same Insolvent Law of Maryland which it is now, as it formerly was, undertaken to interpret; and it is the identical exposition of the identical court, formerly examined and sanctioned here, which this tribunal now assumes the right to reject and condemn.

*Indeed, the field for discussion and [*272 criticism is now much more narrow than was that which existed when these cases were formerly before this court. At that time there were strenuously urged grounds for contestation, founded upon an alleged construction of the Mexican Treaty, and of the acts of the Commissioners under that Treaty. At present, the claims of the appellants, and the impeachment by them of the decision of the State Court, and of that of the Circuit Court of the United States, have been rested chiefly, if not exclusively, upon the fact that the personal representatives of the insolvent assignors were not made parties to the suits brought for the distribution of the effects of the insolvents.

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It cannot be correctly insisted on as a universal or necessary rule, that in suits by assignees the assignors from whom they derive title must be made parties. Cases may occur in which there may be a propriety of joining the assignors in such suits; but without some apparent cause for such a proceeding, the rule and the practice are otherwise. Indeed, the calling into a controversy or litigation a person who can have no interest in such litigation, would be discountenanced by the courts, who would dismiss him from before them at the costs of the person who should have attempted such an irregularity. And it would seem that if there could be a case in which such an attempt would be irregular, it would be that in which the person so made a party had not, and could not have, any interest in the controversy; in other words, should be an insolvent, who had transferred upon record every possible interest he possessed in the matter in controversy. But suppose it be admitted as the general rule, that an assignee should, in the prosecution of an assigned interest, call in his assignor as a voucher, or for any other purpose, how will these cases be affected by such an admission?

The absence of the personal representatives of the insolvent assignors is the only circumstance imparting a shade or semblance of difference between the attitude of these cases as formerly brought before us, and that in which they are now presented. Of what importance, either now or formerly, could be the presence or absence of the personal representatives of these insolvents it might puzzle Œdipus himself to divine. The rights or interests of the representative can never be broader than are those of the person represented; and as the person represented in these cases are admitted on all sides, and are shown upon record, to have nothing, by reason of the transfer to their trustees of all that they had ever possessed, or to which they had any claim—and that, too, by a mode of transfer which declared the inade-
273*] quacy of their all for the *liquidation of their debts—it followed that those who came forward under these insolvents, jure representationis merely, could themselves be entitled to nothing by representation from their principals, nor claim anything in opposition to the universal and absolute assignments to the trustees of those debtors.

Had these personal representatives of the insolvents been made parties to the suits for distribution, it is probable that they would have been regarded by the court as mere men of straw, used for the purpose of depriving the purchasers, for valuable consideration, from the trustees or assignees of the insolvent's interests deemed at the time of the sale by the trustees, precarious and contingent, but which the progress of events had subsequently rendered available.

But whatever may be admitted as the general rule applicable to suits by an assignee, however that rule may be supposed to require that in such suits the assignor or his representative should be a party, still we are brought back to the true character of these cases, and of the rule of law peculiarly applicable to them, viz.: that they are controversies depending upon the construction of the Statutes of Maryland, which regulate the administration of the effects of insolvent debtors. That, in the construction of those statutes, it has been, by the Supreme Court of the State, decided, that in suits by the purchasers or assignees from the statutory trustees of insolvent debtors, the personal representatives of those insolvent debtors are not necessarily to be made parties, but that such suits may be prosecuted and decided without participation or interference on the part of such representatives; that in conformity with this construction of the Statute of Maryland by the Supreme Court of the State, the Circuit Court of the United States for the District of Maryland, and this court, in the cases herein mentioned, have concurrently ruled in direct opposition to the pretensions of the appellants now advanced.

Regarding the decision just pronounced as in conflict with all that has been heretofore ruled upon the subjects of this controversy, and as transcending the just authority of this court to reject the construction of the Statute of Maryland proclaimed by the Supreme Court of that State, I am constrained to declare my dissent from the decision of this court, and my opinion that the decrees of the Circuit Court in these cases, should be affirmed.

JOHN GOODING, Junior, Administrator de bonis non of John Gooding, Deceased, Appt.,

v.

ROBERT M. GIBBES & Charles Oliver, Executors of Robert Oliver, Deceased.

(See S. C. 17 How. 274.)

This case is in all respects the same, and involves the same questions, as the preceding case of Williams v. Gibbes. Decision is the same.

APPEAL from the Circuit Court of the United States for the District of Maryland.

This case is substantially the same as the preceding case of Williams v. The Executors of Oliver. For a full explanation of the questions involved, see ante.

Messrs. **Robert N. Morton, G. L. Delaney,** and **Henry Winter Davis,** for the appellants.

Messrs. **Reverdy Johnson** and **J. Mason Campbell** for the appellees.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States of the District of Maryland.

The case involves the same questions, and is in all respects the same as the case of The Administrator of Williams v. The Executors of Oliver, just decided.

The decree of the court below is therefore reversed, and the case remanded to the court below.

Mr. Chief Justice **Taney:**

I shall state my opinion in this case in the cases of Gooding's Administrator and Williams' Administrator, as the three cases are nearly connected, and depend on the same principles.

Mr. Chief Justice **Taney** and Mr. Justice **Daniel** dissented. See dissenting opinions in case of Williams v. Gibbs (ante, 147).

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417*] *JAMES ADAMS, Executor of Thomas Law, Deceased, et al., App'ts,
v.
JOSEPH LAW, by his next friend, Mary R. Robinson.

(See S. C. 17 How. 417–423.)

Marriage settlement—construction of.

A marriage settlement was executed to secure a jointure to the intended wife, in lieu of dower, conveying to a trustee, lands upon the trusts to permit the husband to receive the issues and profits during his life, and in case the wife should survive him, that she should receive the issues and profits during her life, "but in case the said wife shall die in the lifetime of her husband, leaving issue of said marriage one or more children, then living, then from and after the death of the husband, upon trust for the child or children of said intended marriage, to be equally divided between them if more than one, in fee simple," "and if only one child, then to his such child, his or her heirs and assigns, forever."

There was one child of the marriage who died before her mother, leaving two children, E. and E., the claimants. Then the said wife died, and afterwards the husband.

Held that the grandchildren, E. & E., the claimants, took nothing by the marriage settlement.

The description "issue of said marriage, one or more children" does not include grandchildren.

The parties having defined what they meant by "issue," the court have no right to extend its meaning. Cases on the subject examined.

The court refused upon motion, to amend its decree so as to exclude the grandchildren from claiming as distributees of the general estate, for the reason that they had elected to renounce all claim under the will and claimed under the marriage settlement.

Mr. Chief Justice TANEY, having been of counsel, did not sit in this cause.

Argued Jan. 26, 1855. Decided Feb. 15, 1855.

APPEAL from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

March 21, 1838, Joseph E. Law, a legatee of the testator, Thomas Law, who died August 5th, 1834, seised and possessed of a large and valuable real estate, filed his bill of complaint on the equity side of the Circuit Court for the District of Columbia, claiming payment from James Adams, the executor, of his legacy of $1,000, and praying an account of real and personal estate of the testator, and of the rents and profits thereof, and the sale of so much as may be necessary for the payment of said legacy. The amended bill set forth that William Blane, of Winkfield Park, in Great Britain, was, by a declaration of trust made by Thomas Law, entitled to an undivided sixth part of certain real estate belonging to said Thomas Law, and makes the representative of said Blane, defendant, as well as Thomas Law, Jr., and Edmond Law, son of John Law, and heirs and legatees of the said testator; and also Edmund, Eliza, and Eleanor Rogers, who are the representatives and descendants of Eliza Park Custis Law, and wife of Thomas Law, and who claim against his estate by virtue of certain antenuptial contracts.

In the course of the settlement of the estate, the executor had sold certain real estate, and with the proceeds and personal assets paid large claims, and being appointed trustee by the Circuit Court, has sold the residue of the said real estate, except a portion still unsold, estimated at some $12,000 or $13,000. The cause having been referred to the auditor to state the accounts, and reports having been made, the decree was passed and the general funds distributed among the supposed creditors. By this decree, claims were admitted to an amount much greater than the whole value of the estate, which was therefore made insufficient to pay more than 50 cents on the dollar, leaving nothing for the legatees. The contest relates chiefly to two claims which were disputed. What these were, appears in the opinion of the court.

The case is also stated by the court.

A further statement appears in the case of Rogers v. Law, 1 Black, 252, in which the rights of the parties hereto were more fully determined.

Messrs. Robert J. Brent and Henry May, for the appellants:

The motive and purpose of the deed of 1796 are disclosed in the recital to be "that a jointure should be made to the said Elizabeth, in lieu and bar of all claim on the estate, real or personal, of the said Thomas Law," and "for making and securing a full, sufficient and just provision for said Elizabeth by way of jointure." It will be observed by the latter part of the deed, that said Law releases the claim to her maiden property.

There is no intent in the recital to provide anything for the issue, and their names are not even mentioned in the statement of the inducements moving to the settlement.

In deeds, the preamble will, in court of law, control and qualify the terms of the grant in the body of the deed.

Budd v. Brooke, 3 Gill. 234; see, also, 1 Spence, Eq. 355, and cases there cited.

Courts of equity apply the rules of legal construction, to final deeds of marriage settlements the same as other deeds.

Neves v. Scott, 9 How. 211; 3 How. 271; 2 Spence, Eq. 131; 2 Story, Eq. 983.

This is a covenant to said Elizabeth for her maintenance in widowhood, for which she alone might have specific performance or even an action of law, after Mr. Law's death, her right to the convenant being only suspended by her subsequent intermarriage with the covenantor.

Atherley on Marriage Settlements, 27 Law Lib. 82, note 1.

As to the exposition of the law touching jointures, and the construction thereof, see Atherley on Marriage Settlements, 27 Law Lib. 501; 1 Bright on Husband and Wife, ch. 20, secs, 2, 3, 6.

"There is no instance," said Lord Alvanley, "of the court construing words contrary to their legal import, in so solemn an instrument as a marriage settlement."

Bayley v. Morris, 4 Ves. 794,

This deed, according to legal words, is but a limitation to the child or children of the marriage, living at Law's death, and if but one child had survived, he would have taken the whole, to the exclusion of more remote descendants, viz.: grandchildren by a deceased child.

For the leading cases in which the term "issue" was qualified, as here by the addition of the words "child or children," see Ellis v.

NOTE.—Settlement or conveyance for benefit of wife and child, when good or void as to creditors —see note to Sexton v. Wheaton, 5 L. ed. U. S. 604.

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Selby, 7 Sim. 352; Peel v. Catlow, 9 Sim. 372; 2 Jarman, 358-360.

Even the words "heirs at law" will mean "children" when subsequently explained in that sense.

2 Jarman, 14; 2 Fearne, 387; 9 Clark & Fin. App. Cas. 606.

Messrs. J. M. Carlisle and R. S. Coxe, for appellee:

It is submitted that grandchildren are within the intent and operation of the ante-nuptial deed, they being "issue of the said marriage."

The general intent would clearly embrace them, the language, "issue of the said marriage," clearly extends to them. It is apt, technical language, in a deed to that end.

Lord Mansfield, in Goodtitle v. Bailey, Cowp. 600, thus expresses a well-established principle: "The rules laid down in respect of the constructions of deeds are founded on law, reason and common sense; that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in but one form, they should operate in that which by law will effectuate the intention."

Upon this question the intention is decisive. The integrity and completeness of the instrument, likewise, depend upon the same construction; for if only "children" (in the narrow sense) were to take, then there is no limitation over, on the failure of such, at the death of Mr. and Mrs. Law, but only on the failure of "issue of said marriage" at that time.

In Wyth v. Blackman, 1 Ves. Sr., 196, the same question arises upon the construction of a volunteer settlement. Lord Hardwicke held that the word "issue" included children, grandchildren, and that the word "children" following it, had a co-extensive meaning, and this upon reasons applicable to the present case, and upon authority citing Wild's case, 6 Rep. 17; Bend. 30; 2 Vern. 106, etc.

This case of Wyth v. Blackman is quoted with approbation, and relied on by Lord Mansfield in the case of Doe, etc., v. Lord George Cavendish, 4 D. & E. 743. See, also, Griffith v. Harrison, 4 D. & E. 749, and the cases cited in those above referred to.

Mr. Justice Grier delivered the opinion of the court:

James Adams, the appellant, whose account, as executor of Thomas Law, deceased, was the subject matter of the decree below, excepts to it for the allowance of the two following items:

1. The claim of Lloyd N. Rogers, as administrator of Eliza P. Custis, the wife of the testator, amounting to the sum of $29,249.33.

2. A claim of Edmund and Eleanor Rogers, grandchildren of Thomas Law and Eliza, amounting to $66,154.84.

I. As the court is equally divided as to the legality of the first item, the decree must stand affirmed as to that amount, without further remark.

II. The claim of the grandchildren will require more extended notice.

This claim is founded on certain marriage articles, executed between Thomas Law, of the first part, Elizabeth Park Custis, of the second part, and James Barry, of the third part, on the 19th of March, 1796. They recite that a marriage is intended between said Thomas and Elizabeth, and that "it is the wish and design of the parties that a jointure should be made to the said Elizabeth, in lieu and bar of all claim on the estate" of said Thomas, etc., etc. In consideration of the marriage portion money, etc., the said Law conveys certain real estate "to the said James Barry, his heirs and assigns, forever, upon the trusts and to and for the uses, intents and purposes following; that is to say: for the use of the said Thomas Law, his heirs and assigns, until the solemnization of the said intended marriage, and afterwards to permit and suffer him, the said Thomas Law, to receive all the issues and profits of the said lands and premises, during the term of his natural life, for his own use; and immediately after the decease of the said Thomas Law, in case the said Elizabeth Park Custis shall *survive him, her intended husband, that she, the said Elizabeth Park Custis, shall have, accept and receive the issues and profits of the said lands and premises, for and during the term of her natural life, to and for her own use and benefit; but in case the said Elizabeth shall depart this life in the lifetime of the said Thomas Law, leaving issue of the said marriage, one or more children then living, then from and immediately after the decease of the said Thomas Law, upon trust for the child or children of the said intended marriage, to be equally divided between them, if more than one; to have and to hold the same lands and premises, as tenants in common in fee simple, share and share alike; and if only one child, then to such child, his or her heirs and assigns forever; but in case there shall be no issue of said marriage, then upon the death of the said Thomas Law and Elizabeth Park Custis, and the survivor or survivors of them, to revert back to the said Thomas Law, his heirs or assigns, or subject to be disposed of by him by last will and testament, or other deed, as he may judge proper." [*420

The marriage between the parties was solemnized in the same year. Afterwards (in 1800), Mr. and Mrs. Law joined in another deed, substituting Thomas Peters as trustee instead of Barry, and other property in place of that conveyed to Barry, but subject to the conditions and limitations of the marriage articles. And again, in 1802, another change was made in the property, subject to the same limitations. The daughter and only child of this marriage intermarried with Lloyd N. Rogers, and died before her mother, leaving children, the claimants, Edmund and Eleanor Rogers. Mrs. Law died in 1832, and the testator in 1834.

The only question for our decision is, whether the grandchildren, Edmund and Eleanor Rogers, took anything by the deed of settlement.

It is clear, from the face of this deed, that it is an executed marriage settlement, and that it must be expounded on legal principles applicable to other deeds. Limitations, either of legal or equitable estates, receive the same construction in a court of equity as in courts of law. "In executed trusts, whether by deed or will, the rule of law must prevail, and the apparent intention must give way to these fun-

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damental rules which for ages have served as landmarks in the disposition of property." 2 Spence's Eq. 131.

The trustee in this deed had no duty to perform; and as the estate is not limited to his own use, the trusts are but uses, and are executed as such by the statute. The object and purpose declared by the parties are, to secure a jointure to the intended wife in lieu and bar of dower and to release the marital rights 421*] *of the husband over the separate estate of the wife, in possession and expectancy. The settled property belonged entirely to the husband. The estate limited to the wife is contingent on her surviving her husband, in whom an estate for life is absolutely vested. If the life estate of the wife should vest by the contingency of her survivorship, there is no provision for the children or issue of the marriage, and the fee reverts to the right heirs of the husband. The estate limited to the children of Mrs. Law is a contingent remainder depending on the event that Mrs. Law shall "depart this life in the lifetime of said Thomas Law, leaving issue of said marriage, one or more children then living," etc.

Does this description include grandchildren? We think it does not.

The word "issue" is a general term, which, if not qualified or explained, may be construed to include grandchildren as well as children. But the legal construction of the word "children" accords with its popular signification, namely: as designating the immediate offspring. See Jarman on Wills, 51. It is true, in the construction of wills, where greater latitude is allowed, in order to effect the obvious intention of the testator, grandchildren have been allowed to take, under a devise "to my surviving children." But even in a will, this word will not be construed to mean grandchildren, unless a strong case of intention or necessary implication requires it. Hence it is decided that a power of appointment to children will not authorize an appointment to grandchildren. Robinson v. Hardcastle, 2 Bro. Ch. 344; 4 Kent's Com. 345.

In Reeves v. Brymer, it is said by Lord Alvanley that "children may mean grandchildren when there can be no other construction, but not otherwise." 4 Ves. 697.

The declared object of this deed is jointure, not a settlement for the issue of the intended marriage; for there is no provision made for them in case the wife should survive the husband. The contingency, also, on which this remainder depends, is not the leaving issue generally of the marriage; but the "issue" to whom the estate is limited are described and defined to be "one or more children living," to be equally divided between them if more than one, and "if only one child, to such child, his heirs," etc. There is no provision for the issue of deceased children, or for grandchildren, under any circumstances. The parties have carefully defined what they mean by "issue," and the court, in construction of their solemn deed, have no right to distort its plain meaning, to meet contingencies not provided for. It is an ancient and well-settled rule of construction, that "where a deed speaks by general words 422*] and afterwards descends *to special words, if the special words agree to the general words, the deed shall be intended according to the special words; for, if the general words should stand without any qualification, the special words would be altogether void, and of no effect." 8 Rep. 307.

Hence, in the construction both of wills and deeds, where the instrument has not, so carefully as in the present case, limited the word "issue" to children living, etc., but where the term is used without qualification, and is in another part of the same instrument supplied by the word "child," or "children," as a synonym, the courts have uniformly restrained its signification to children. Thus, in Carter v. Bentall, 2 Beav. 557, where the devise was a moiety to "issue" of his daughter, and if only one child, then to such one child, and the trustee was ordered to lay out the dividends in the maintenance of such "issue," Lord Langdale, M. R., held that the word "issue" was thus explained by the testator to mean "children."

In the case of Loveday v. Hopkins, Ambler, 273, it was held that grandchildren were not entitled under a bequest to "heirs," because the term appeared, by the context of the will, to be used in the sense of "children."

In Swift v. Swift, 8 Sim. 168, by marriage articles the jointure property was limited, after the death of the survivor, on the "issue" of the marriage living at the death, in equal share if more than one, and if but one, to go to such "child." The only child of the marriage died before the contingency, leaving a child. It was held that "issue" was to be construed "child," and the legacy did not vest in the grandchild.

It would lead to too great prolixity to examine particularly the very numerous cases in which similar language has received the same construction. A reference to a few more directly in point will suffice.

Fitzgerald v. Field, 1 Russ. 430; Needham v. Smith, 4 Russ. 318; Ridgeway v. Munkittrick, 1 Dru. & War. 84; Peel v. Catlow, 9 Sim. 373; Jennings v. Newman, 10 Sim. 223; Tawney v. Ward, 1 Beav. 563; Winn v. Fenwick, 11 Beav. 438; Campbell v. Sandys, 1 Sch. & Lef. 281.

Being of opinion, therefore, that the grandchildren took nothing under the limitations of the deed of marriage settlement, the decree of the court below is reversed as to the allowance of $66,154.84, made to Edmund and Eleanor Rogers, and affirmed as to the residue; and the record remitted with directions to make distribution accordingly.

Decreed accordingly, and that the costs in this court be paid out of the fund.

Subsequently, the appellants, having made a motion so to amend their decree, and the mandate thereon, as to declare that the grandchildren of the testator, Thomas Law, by reason of their election and renunciation as shown in the interlocutory decree of the Circuit Court, are not entitled as legatees of said testator to participate in the distribution of the fund in controversy.

Mr. Justice M'Lean announced the decision thereupon as follows:

"The court hold that the pleadings in the

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case do not embrace the point stated in the above motion. The heirs referred to, the children of Mrs. Rogers, having relinquished all claim under the will, and claimed under the deed of settlement the court held, they were not entitled to any part of the estate under the deed of settlement, on a construction of that instrument. Under these circumstances, whether they can claim as distributees of the general estate, is a question not considered by the court. The motion is therefore overruled."

THE STEAMBOAT NIAGARA, her Tackle, etc., The East River Steamboat Association, Claim'ts, App'ts,

v.

JOHN VAN PELT, Master of the Steamboat Cleopatra and The Norwich and Worcester Railroad Company, Owners, etc.

Appeal dismissed on settlement and stipulation.

Argued Feb. 15, 1855. Decided Feb. 15, 1855.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Mr. Hamilton for appellants. Mr. Marsh for appellees.

Mr. Chief Justice Taney made the following order in this cause: Feb. 15, 1855.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and it appearing to the court here, by stipulation on file signed by the counsel of the respective parties, that the matters in controversy had been agreed and settled between them, and that the case should be dismissed without costs to either party as against the other; it is thereupon now here ordered and decreed by the court, that this cause be, and the same is hereby dismissed, and that each party pay their own costs in this court.

JAMES RHODES, Comp't & App't,

v.

WILLIAM B. FARMER, William Fellows, and Cornelius Fellows.

(See S. C. 17 How. 464–468.)

Creditor's bill—what reached by—dismissal with costs, when.

Complainant, in creditor's bill, claimed that a judgment which he alleged was owned by one of the defendants should be assigned to him, and that his judgment was a lien thereon. The judgment was assigned to defendant upon the terms and consideration that he should pay to the assignor three fourths of the amount collected thereon, less costs, and to enable defendant to use it in a suit as a set-off.

Held that complainant's judgment was no lien on the assigned judgment, and he could reach only the equitable interest of his debtor, which was one fourth, therein.

And as one fourth of the assigned judgment was paid to complainant before the decree, the decree of the court below, dismissing the bill with costs, was correct.

Having received his debtor's equity in the assigned judgment, the complainant can claim nothing more.

Argued Feb. 6, 1855. Decided Feb. 15, 1855.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

The case is stated by the court.

Mr. P. Phillips, for appellants:

It is evident that there was an absolute assignment or sale, the purpose of the transfer being to enable Farmer to use the judgment as a set-off, for no one could so use it but an absolute owner.

1 Pothier on Obl. 415; Barb. on Set-off 37–58; 7 Cow. 469, 481; 1 Paige, 289.

The assignment being absolute on its face, evidence was inadmissible to show that such a transfer was not intended, more especially as it is confessed that the transfer was to enable the transferee to commit a fraud upon the law.

5 Ohio, 197.

On a bill for specific performance it is admitted that parol evidence may be offered to show that the writing does not express the real intent of the parties.

3 Greenl. Ev. 368, note.

Here there is no mistake, accident or fraud in the execution of the instrument. It is conceded that the design was to invest the party with a legal title.

1 Story Eq. secs. 113, 114, 115; 1 Pet. 16; 3 Greenl. Ev. 368.

This is not a bill for specific performance, but for condemning assets that cannot be made subject to an execution at law.

There was error in decreeing costs against the complainant. In the exercise of discretion upon this subject, the court is governed by "general rules and former precedents."

Goodall v. Whetmore, 2 Hagg, Ecc. 374.

Appeal will not lie for costs only, but when the question of costs is connected with a substantial ground of appeal, the party may succeed with the former question, though he fail with the latter.

Att'y-Gen. v. Butcher, 4 Russ. 180.

A court of equity would not entertain a bill by Fellows to rescind the assignment.

2 Story Eq. sec. 697.

The agreement set up is champertous.

5 Story Eq. sec. 1049.

Mr. George M. Bibb for appellees.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in chancery from the District Court of the United States for the Northern District of Mississippi.

Rhodes, the complainant, recovered two judgments in 1850 against Sneed, Wright, James E. Farmer, and William B. Farmer, in the District Court— one for the sum of $1,308.68, the other for $3,179.19—on which executions were issued and returned nulla bona. Prior to this, W. & C. Fellows, in the name of McKewen, King & Co., had recovered a judgment against James Strong and others, for $3,937.75, in the same court; and Strong, with the view of placing his property beyond the reach of the judgment, conveyed it to his wife. This conveyance, on an issue being made, under the practice of Mississippi, was set aside.

In the trial of the above issue, the complain-

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ant states it appeared in proof that William B. Farmer was the owner of the judgment against Strong and others, it having been assigned to him by W. & C. Fellows; and the complainant alleged that his judgment against Farmer, being unsatisfied, was a lien in equity upon the interest of William B. Farmer to the judgment assigned to him. And the complainant prayed that said judgment might be held by Farmer and W. & C. Fellows, subject to his judgments, and that they might be enjoined from praying it over, etc.

William B. Farmer, in his answer, admits that the judgments against him had been obtained, and that executions on them had been returned nulla bona. He denies that the judgment against Strong was ever sold to him; but he states that, in 1848, being sued for a large debt, which he supposed to belong to Strong, and wishing to procure a set-off, he applied 466*] to W. & *C. Fellows for the control of said judgment, offering to pay them three fourths of the amount that he might realize of the judgment should he be able to use it as a set-off, which was agreed to by them; and that he executed a penal bond, to pay to the said W. & C. Fellows three fourths of the amount so recovered on their judgment.

Defendant also states that the complainant received from James E. Farmer, a co-defendant, a sum of money, on the receipt of which he released the judgments; and the defendant submits, whether such release does not exonerate the other defendants.

He also states that he had made a verbal assignment of the judgment to William Cathron, as an attorney, for collection, and he submits whether the judgment can be made liable by the complainant to the satisfaction of his judgments. Other matters are set up in the answer, and he prays that the answer may be considered a cross-bill, etc.

The condition of the penal bond, given to W. & C. Fellows, stated that they had transferred to Farmer the judgment against Strong et al., for the sum of $3,937, subject to credits of about $763. Now, if the said obligors shall pay to W. & C. Fellows, or their assigns, in two equal installments, on the 27th of January, 1849, and on the 27th of January, 1850, three fourths of the amount which may be secured or realized by said Farmer out of said judgment, bearing interest at six per cent, deducting costs and attorney's fees which may be incurred, etc., then the obligation to be void.

In their answers, W. & C. Fellows deny that their co-defendant, William B. Farmer, is the owner of the whole of their judgment against Strong and others, but admit that he has an interest of one fourth part, etc.

During the pendency of this suit, the following receipt was given by John S. Topp, counsel for the complainant:

"June 9, 1852. Received of Messrs. Boston & Stearns, $1,052.59, being the one fourth part of the balance left in the marshal's hands, in the case of W. & C. Fellows v. Strong et ux., after deducting $700 for fees, as provided for in the within agreement."

The District Court, in its decree, says: "It appearing to the court that from the written admissions of Mr. Topp, solicitor for the complainant, since his filing the bill in this cause, recovered one fourth of the amount of the judgment of W. & C. Fellows v. James Strong and Mary A. Strong, his wife, which is enjoined in this cause, and that the complainant is entitled to no further relief in the premises, the injunction was dissolved, and the bill dismissed at the complainant's costs.

*The judgment of W. & C. Fellows v. [*467 Strong was assigned to Farmer without condition, and it is contended that parol evidence was not admissible to alter the terms of the assignment.

There is a good deal of testimony on the contract of assignment. Some of the statements are somewhat conflicting, but they are reconcilable; and the result of the whole is, that the assignment was made of the judgment to enable Farmer to use it by way of set-off to a demand against him which he supposed belonged to Strong. But it was understood that Farmer should have one fourth of the amount recovered from Strong, after deducting the costs for his labor and trouble in collecting the money, and for the payment of the residue of the judgment he gave bond and security.

The assignment of the judgment was good in equity, and though absolute on its face, the bond given expressed the conditions, and showed that Farmer's interest in the judgment against Strong extended only to one fourth part of it, after deducting costs.

The bill of the complainant is in the nature of a bill for a specific execution of the assignment of the judgment, and in such a case parol evidence is admissible to rebut or explain on equity. But the penal bond given to W. & C. Fellows, by Farmer, with Brown, as security, sufficiently explains the transaction.

The judgments obtained by the complainant against William B. Farmer and others constituted no lien, equitable or legal, on the judgment against Strong, after it was assigned to Farmer; and no relief could be given to the complainant against the assigned judgment, beyond the equitable interest of Farmer. He is represented to have been insolvent at the time the decree was entered. As one fourth of the judgment, after praying costs, was paid to the complainant before the decree, we think that the decree of the District Court, dismissing the bill at the complainant's costs, was correct.

The defendants were not liable to pay more than one fourth of the judgment, and as that amount was paid, about the time it was collected on the judgment against Strong, the defendants were not in default.

There is no evidence of a payment to the complainant by James E. Farmer, a co-defendant of William B. Farmer, on which a release of the judgments was executed by the complainant, as alleged in Farmer's answer. Nor is there any ground of defense, from the alleged verbal agreement with Cathron, who, as an attorney, was employed to collect the judgment against Strong.

The complainant, both in prosecuting the suit in the District *Court, and also by [*468 his appeal to this court, sought to recover the whole amount of the judgment against Strong, or at least so much of it as would satisfy his two judgments against Farmer and others. But

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he can in this mode of proceeding reach only the equity of his judgment debtor in the assigned judgment; and having received that, he can claim nothing more. The decree of the District Court is affirmed, at the costs of the complainant.

Decree affirmed, with costs.

471*] *ZACHARY PULLIAM, Executor of Amos Albriton, Plaintiff in Error,

v.

ALEXANDER OSBORNE, Administrator of Samuel Woodward.

(See S. C. 17 How. 471-476.)

Execution—priority of lien as between State and Federal executions.

Where property was seized and sold to plaintiff by a sheriff in Alabama, under executions issued from the state courts, upon valid judgments, after the teste and delivery to the marshal of executions from the United States District Court against the same defendant, but before the levy of the last executions on the same property; held that the purchaser under the executions on the state judgments, the plaintiff, could hold such property discharged of all claims by virtue of the levy of the executions from the District Court.

The lien of an execution under the laws of that State commences from the delivery of the writ to the sheriff, and the lien in the court of the United States depends on the delivery of the writ to their officer.

But no provision is made by the statutes of the state or United States for the determination of the priorities between the creditors of the respective courts, state and federal.

The liens were consequently co-ordinate or equal; and in such cases the tribunal which first acquired possession of the property, by the seizure of its officer, may dispose of it so as to vest title in the purchaser discharged of the claims of creditors of the same grade.

Argued Feb. 5, 1855. Decided Feb. 15, 1855.

TRANSFERRED from the Circuit Court of the United States for the Southern District of Alabama.

The defendant in error obtained a judgment in the District Court of the United States for the Middle District of Alabama against Pulliam, at the May term, 1842. On the 10th of June, 1842, he sued out an execution which was delivered to the marshal on the same day, and was by him levied Oct. 26, in the same year.

Previously to the rendition of this judgment, viz.: on April 19, 1842, two judgments were rendered in the District Court of Pickens County, against the said Pulliam, on which executions were issued on May 4, 1842, and on the same day delivered to the sheriff, who, on July 4, levied on certain slaves, bonds being given for the forthcoming of the slaves on the first Monday of Aug. 1842, which bonds were forfeited and so returned. Whereupon executions issued on Aug. 3, in the same year, on the same bonds against Pulliam and his sureties, were on the same day delivered to the sheriff, who, on, Sept. 2, levied on the said slaves as the property of Pulliam, and on Oct. 3 sold the same at public auction to the claimant, herein, and made him a bill of sale therefor. Upon these facts, the judge instructed the jury that Woodward, the plaintiff in execution, had a priority of satisfaction for his judgment in the court of the United States, over the said executions from the State Court, and the jury found against the complainant.

Mr. George E. Badger, for the plaintiff in error:

First. The lien upon the slaves created by the issue, delivery and levy of the first executions, from the State Court, continued, notwithstanding the giving of the forthcoming bonds. The slaves were still in custodia legis and not liable to seizure under another execution from another court.

Caperton v. Martin, 5 Ala. N. S. 217; Langdon v. Brumby, 7 Ala. 53; Doremus v. Walker, 8 Ala. 194; Hagan v. Lucas, 10 Pet. 400.

Second. If the lien of the first issued executions, upon the judgments in the State Court, was lost by the taking of the forthcoming bonds and surrender of the slaves to the defendane in execution, still the title of the claimants was valid.

Where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, they (the goods) shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed.

Payne v. Drewe, 4 East, 523; Hagan v. Lucas, above cited.

"When several executions, issuing from different competent courts, are in the hands of different officers, then, to prevent conflicts, if the officer holding the junior execution seizes property by virtue of it, the property so seized is not subject to the execution in the hands of the other officer, although first tested."

Jones v. Judkins, 4 Dev. & At. 454.

Where the same officer is charged with two or more executions, it is his duty so to arrange the processes in his hands, as to apply to the property to the satisfaction of that which has legal priority.

But if an actual sale has been made, whether with or without the fault of the officer holding the executions, the title of the purchaser is valid, and the goods sold are not liable to seizure under the senior execution.

Smallcomb v. Buckingham, 1 Ld. Raym. 251; Hutchinson v. Johnston, 1 T. R. 729; Ryebot v. Peckham, in note, 731.

Finally, there having been no seizure under the execution from the United States Court, on the 3d August, when the sheriff made his levy, nor when he made his sale, on the 3d of October; the sheriff had a right, and was bound to levy and sell, and if he had returned nulla bona, he would clearly have been liable for a false return, and consequently the purchaser obtained a good title.

Messrs. Ingle, Clements and Davidge for defendant in error.

Mr. Justice Campbell delivered the opinion of the court:

This was an issue in the District Court under a statute of Alabama (Clay's Dig. 213 secs. 62, 64), for the trial of the *right to proper- [*475
ty taken under an execution from that court, in favor of the appellee, and claimed by the testator of the appellant, as belonging to him, and not to the defendant in the execution.

It appeared on the trial that, at the delivery

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of the execution to the marshal, in favor of the appellee, the property belonged to the defendant, and that the levy was made before the return day of the writ; but that before this levy, the property had been seized and sold to the claimant, by a sheriff in Alabama, under executions issued from the state courts, upon valid judgments, after the teste and delivery of the executions from the District Court.

The District Court instructed the jury, that a sale under a junior execution from the State Court did not devest the lien of the execution from the District Court, and that the writ might be executed, notwithstanding the seizure and sale under the process from the State Court.

The lien of an execution, under the laws of that State, commences from the delivery of the writ to the sheriff, and the lien in the courts of the United States depends upon the delivery of the writ to their officer. But no provision is made by the statutes of the State or United States, for the determination of the priorities between the creditors of the respective courts, state and federal. They merely provide for the settlement of the priorities between creditors prosecuting their claims in the same jurisdiction.

The demands of the respective creditors, in the present instance, were reduced to judgments, and the officers of either court were vested with authority to seize the property.

The liens were consequently co-ordinate or equal, and in such cases, the tribunal which first acquires possession of the property, by seizure of its officer, may dispose of it so as to vest a title in the purchaser discharged of the claims of creditors of the same grade.

This court applied this principle (Williams v. Benedict, 8 How. 107) to determine between judgment creditors in a court of the United States, and an administrator holding under the orders of a probate court of a state; in Wiswall v. Simpson, 14 How. 52, in favor of a receiver holding under the appointment of a court of chancery of a state and a judgment creditor; in Peale v. Phipps, 14 How. 368, in favor of a trustee in possession under the order of a county court, against such a creditor; and in Hagan v. Lucas, 10 Pet. 400, between execution creditors issuing from state and federal jurisdiction. The same principle has been applied in several state courts in favor of the purchasers at judicial sales of steamboats and 476*] other *crafts subject to liens in the nature of admiralty liens; Steamboat Rover v. Stiles, 5 Black, 483; Steamboat Raritan v. Smith, 10 Mo. 527; 19 Ala. 738; and is recognized in the courts of common law and admiralty in Great Britain. 4 East, 523; 2 Wms. Ex'rs 888; The Saracen, 2 W. Rob.

In Alabama the bona fide purchaser at a judicial sale, made to enforce a statutory lien, takes the property discharged of liens of the same description, whether the subject of the sale be land or personal property.

Wood v. Gary, 5 Ala. 43; 12 Ala. 838, 11 Ala. 426.

The propriety of the rule is fully vindicated by the statement in Hagan v. Lucas, 10 Pet. 400, where this court says: "A most injurious conflict of jurisdiction would be likely often to arise between the federal and state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, acquires by a levy, a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution at the same time, by the marshal and the sheriff, does this special property vest in one or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and it is not liable to be taken by any other execution in the hands of a different officer, and especially an officer acting under a different jurisdiction."

The instruction of the District Court is erroneous, and its judgment is therefore reversed, and cause remanded.

JAMES STEVENS, App't,

v.

ROYAL GLADDING and Isaac T. Proud.

(See S. C. 17 How. 447–455.)

Copyright—sale of plate does not carry right to print from it—forfeitures not decreed in equitable actions—account of profits decreed.

There would be great difficulty in assenting to the proposition that patents and copyrights, held under the laws of the United States, are subject to seizure and sale on execution, but no opinion is expressed by the court on this point.

The right to print and publish a map which has been copyrighted, does not pass to the purchaser on execution sale of the copper plate on which it is printed.

The right to print and publish is not annexed to the plate, nor parcel of it, and does not pass by sale of it. If the purchaser has not also acquired the right to print the map, he cannot use the plate for that purpose.

In an equitable action complainant cannot have a decree for the penalties imposed by sec. 7 of the Act of February 3, 1831, to wit: the forfeiture of the printed copies, and one dollar for each sheet unlawfully printed.

There is nothing in the Act of 1819 which extends the equity powers of the courts to the adjudication of forfeitures.

But defendant is entitled to a decree for an account of the profits received by defendant from sales of the map. This is incident to the right to an injunction in copyright and patent right cases.

Argued and sub. Jan. 30, 1855. Decided Feb. 19, 1855.

APPEAL from a decree of the Circuit Court of the United States for the District of Rhode Island, dismissing the bill of the complainant with costs.

The bill in this case was filed in the Circuit Court of the United States for the District of Rhode Island, by the plaintiff in error, to restrain the defendants from printing and publishing a map of that State.

The bill was dismissed by the court below under circumstances recited in the decree, a portion of which is here given: "The court differ in opinion as to the effect of the sale of the copper plate, but agree that injunction cannot issue without a return of the money paid for the plate."

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This cause having been heard on the bill, answer, and other pleadings therein, and the complainant having refused to return the price of the plate of the map in question as required by the court.

"It is now, on motion of the respondents, and by consideration of the court, ordered, adjudged and decreed, that the said bill be, and the same is hereby dismissed, with costs."

A further statement of the case appears in the opinion of the court. See, also, Stevens v. Cady, 14 How. 528, a case involving the same title now asserted by the defendants in this case.

Mr. James Stevens, in personam:

It is immaterial how, or where, or from whom these respondents obtained these maps for sale; it is the publishing, the exposing to sale, the selling of these maps without the author's consent, which constitutes the violation of the copyright.

The allegations of these respondents in their answer to the complainant's bill is that "they received and sold these maps under the right of Isaac H. Cady, to make and print and sell the same," which right the highest judicial tribunal of the country, the Supreme Court of the United States, has recently decided had not been legally acquired. 14 How. 528.

Mr. Samuel Ames, for appellees:

1st. The 7th section of the Act of Congress, approved February 3, 1831, entitled "An Act to amend the several Acts respecting copyrights." (4 U. S. Stat. at L. 438), inflicting forfeiture and penalties upon those who sell any map, etc., "without the consent of the proprietor or the proprietors of the copyright thereof, first obtained in writing, signed in the presence of two credible witnesses," applies only to persons claiming the right of sale by act of parties, and not to those claiming and proving such right by act or operation of law.

4 U. S. Stat. at L. sec. 1, p. 435; Hesse v. Stevenson, 3 Bos. & P. 565, 578; Bloxam v. Elsee, 1 C. & P. 558; S. C. 11 Eng. C. L. R. 468; S. C. in error, 6 B. & C. 169; S. C. 13 Eng. C. L. R. 133; Cartwright v. Amatt, 2 Bos. & P. 43; Sawin et al. v. Guild, 1 Gall. 485; Wilson v. Rousseau, 4 How. 646; Webster on Pat. 21, 22, 23, 82, N. N.; Godson on Pat. and Copyright, 2d ed. 219, 221, 377, 430; 2 Renouard traite des droits d'auteurs, ch. 3, sec. 4, arts. 204, 205, p. 348, et seq.

Second. Copyrights and patents, both in England and France, may be seized and sold on execution or decrees of seizure against him.

Hesse v. Stevenson, Sup.; Bloxam v. Elsee, Sup. Cartwright v. Amatt, Sup.; Mary York v. Twine, Cro. Jac. 78; Sewall, office of Sheriff, 225; 46 Law Lib.; Webster on Pat. 21, 22, 23; Godson on Pat. and Copyright, 219, 221; Incl. 430; Renouard traite des droits d'auteurs, 348, 349, etc., ch. 3 sec. 4, arts. 204, 205.

Third. After an author has printed his book or map, he thereby has made the right to use and sell the same appurtenant thereto; and public policy and every legal analogy require that the two should not be dissevered for the purpose of enabling him to defeat the rights of his creditors sought through the remedies provided.

Wilson v. Rousseau, 4 How. 682, 684; Bloomer v. McQuewan et al. 14 How. 549, 550, 553, 554; 2 Renouard traite des droits d'auteurs, p. 348, et seq. ch. 3, sec. 4, arts. 204, 205.

Fifth. That the condition of relief annexed by the court below was a perfectly equitable one, and upon non-compliance therewith by the complainant, the bill ought to have been, as it was, dismissed without costs. Origin of rule, imposing the terms of relief on complainant, 1 Spence, Equitable Jurisdiction of Chancery, 216, 422, 423, and notes. Though equity cannot relieve against common law or statute penalties (Peachy v. Duke of Somerset, 1 Str. 447; Keating v. Sparrow, 1 Ball & B. 372, 373, 374), yet it does, in the case of usurious bonds and instruments, grant relief against them only on condition of payment of the principal and legal interest of the amount borrowed; in other words, only upon the waiver of the Statute on Forfeitures.

1 Story Eq. Jur. 64, C. and cases cited; Rogers v. Rathbun, 1 Johns. ch. 365; Tupper v. Powell, Ib. 439; Morgan v. Schermerhorn, 1 Paige, 544; Livingston v. Harris, 3 Paige, 528; Campbell v. Morrison, 7 Paige, 158; Judd v. Seaver, 8 Paige, 548; Cole v. Savage, 10 Paige, 583.

Mr. Justice Curtis delivered the opinion of the court:

The appellant filed his bill in the Circuit Court of the United States for the District of Rhode Island, to restrain the defendants from printing and publishing a map of that State, whereof he claimed to be the exclusive proprietor, under the Act of Congress of February 3, 1831, concerning copyrights of maps, etc. The defendants admit that they have sold such maps, but allege that a copper plate, owned by the plaintiff, was duly sold on an execution which issued on a judgment recovered against the plaintiff, in the Court of Common Pleas for the County of Bristol, in the State of Massachusetts, and that one Isaac H. Cady was the purchaser of the plate under that sale; that Cady has used the plate to print the said maps, and the defendants have sold them; and they insist that, by the purchase of the copper plate Cady acquired the right to print maps therewith, and to publish and sell them; and that, therefore, the defendants have not infringed on any exclusive right of the complainant.

By reference to the case of Stevens v. Cady, reported in 14 How. 528, it will be seen that the same title, now asserted by *these [*451 defendants, was tried on that case, between the complainant and Cady. But as is stated in the report of that case, no counsel then appeared or was heard in support of Cady's title; and Mr. Justice Woodbury, who sat in the cause in the Circuit Court, having deceased, this court was not apprised of the grounds and reasons on which the decree of that court dismissing the bill rested; and when this cause was called, counsel having appeared and desired to be heard, though he frankly avowed that the question passed on in the former case, was the only one which could be raised, the court readily assented, and having now considered the argument of the respondent's counsel, the court directs me to state its opinion in the cause.

The positions assumed by the respondent's

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counsel are, that copy and patent rights are subject to seizure and sale on execution; and that whenever the owner of a copyright of a map causes a plate to be made which is capable of no beneficial use except to print his map, he thereby annexes to the plate the right to use it for printing that map, and also the right to publish and sell the copies when printed; and that when the plate is sold on execution, these rights pass with the plate, and as incidents or accessories thereto, though no mention is made of them in the sale.

There would certainly be great difficulty in assenting to the proposition that patent and copyrights, held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject, in 14 How. 531, it may be added that these incorporeal rights do not exist in any particular state or district; they are co-extensive with the United States. There is nothing in any Act of Congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of states and districts. That on execution out of the Court of Common Pleas for the County of Bristol, in the State of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island, or New York, will hardly be pretended. That by the levy of such an execution, the entire right could be divided, and so much of it as might be exercised within the County of Bristol, sold, would be a position subject to much difficulty.

These are important questions, on which we do not find it necessary to express an opinion, because, in this case, neither the copyright, as such, nor any part of it, was attempted to be sold. The return of the officer on the execution is, that he seized and sold "one copper plate for the map of the State of Rhode Island." The defendants must, therefore, stand upon the second position assumed by their 452*] counsel, that the right to *print and publish the map passed by the execution sale with the plate.

There are no special facts in this case to distinguish it from any case of a sale on execution of copper or stereotype plates. It appears that the plaintiff owned the plate; whether he made it, or caused it to be made, or purchased it after it had been made, does not appear.

Nor should the case be confounded with one where the owner of copper or stereotype plates sells them. What rights would pass by such a sale would depend on the intention of parties, to be gathered from their contract and its attendant circumstances. In this case, the owner of the copyright made no contract of sale, and necessarily had no intention respecting its subject matter.

The sole question is, whether the mere fact that the plaintiff owned the plate, attached to it the right to print and publish the map, so that this right passed with the plate by a sale on execution.

And upon this question of the annexation of the copyright to the plate, it is to be observed first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other. It was lawful for anyone to make, own and sell this copper plate. The manufacture of stereotype plates is an established business, and the ownership of the plates of a book under copyright may be and doubtless in practice is, separated from the ownership of the copyright. If an execution against a stereotype founder were levied on such plates, which he had made for an author and not delivered, the title to those plates would be passed by the execution sale, and the purchaser might sell them, but clearly he could not print and publish the book for which they were made. The right to print and publish is therefore not necessarily annexed to the plate, nor parcel of it.

Neither is the plate the principal thing, and the right to print and publish an incident or accessory thereof. It might be more plausibly said that the plate is an incident or accessory to the right; because the sole object of the existence of the plate is as a means to exercise and enjoy the right to print and publish.

Nor does the rule, that he who grants a thing, grants impliedly what is essential to the beneficial use of that thing, apply to this case. A press, and paper and ink, are essential to the beneficial use of a copper plate. But it would hardly be contended that the sale of a copper plate, passed a press and paper and ink, as incidents of the plate, because necessary to its enjoyment.

The sale of a copper plate, passes the right to such lawful use *thereof as the pur- [*453 chaser can make, by reason of the ownership of the thing he has bought; but not the right to a use thereof, by reason of the ownership of something else which he has not bought, and which belongs to a third person. If he has not acquired a press, or paper or ink, he cannot use his plate for printing, because each of these kinds of property is necessary to enable him to use it for that purpose. So, if he has not acquired the right to print the map, he cannot use his plate for that purpose, because he has not made himself the owner of something as necessary to printing as paper or ink, or as clearly a distinct species of property as either of those articles. He may make any other use of the plate of which it is susceptible. He may keep it till the limited time, during which the exclusive right exists, shall have expired, and then use it to print maps. He may sell it to another, who has the right to print and publish, but he can no more use the right of property than he can use a press or paper which belongs to a third person.

The cases mentioned at the bar, in which incorporeal rights have been held to pass with corporeal property, do not apply.

By the levy of an execution on a mill, the incorporeal rights actually annexed to the mill, and necessary to its use, pass with the mill. So does what is parcel of the mill, though temporarily removed from it—as a millstone, which has been taken from its place to be picked. These, and many other such cases, are collected in Broome's Legal Maxims, 198, 205.

But the right in question is not parcel of the plate levied on, nor a right merely appendant

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or appurtenant thereto; but a distinct and independent property, subsisting in grant from the government of the United States, not annexed to any other thing, either by the act of its owner or by operation of law.

For these reasons, as well as those stated in 14th How., our conclusion is, that the mere ownership of a copper plate of a map, by the owner of the copyright, does not attach to the plate the exclusive right of printing and publishing the map, held under the Act of Congress, or any part thereof; but the incorporeal right subsists wholly separate from and independent of the plate, and does not pass with it by a sale thereof on execution.

The next question is, whether the complainant can have a decree in accordance with the prayer of his bill, for the penalties imposed by the 7th section of the Act of February 3, 1831. The bill prays specifically for a decree for these penalties. We speak of the forfeiture of the printed copies as well as of the sum of one dollar for each sheet unlawfully printed, as penalties; for, under the laws of the United States, it is clear that the complainant can have no title to either of them, except by way of penalty.

454*] *There being no common law of copyright in this country, whatever rights are possessed by the proprietor of the copyright must be derived from some grant thereof, in some Act of Congress, either nominatim or by a satisfactory implication; and looking to the Act of Congress applicable to this subject matter, it appears that the rights claimed by this bill are expressly conferred by way of forfeiture. Its language is: "Then such offender shall forfeit the plate or plates on which such map, etc., shall be copied, and also all and every sheet thereof so copied or printed as aforesaid, to the proprietor or proprietors of the copyright thereof; and shall further forfeit one dollar for every sheet of such may, etc., which may be found in his or their possession, printed, etc., contrary to the true intent and meaning of this Act; the one moiety thereof to the proprietor or proprietors, and the other moiety to the use of the United States, to be recovered in any court having competent jurisdiction thereof."

In the case of Colburn v. Simms, 2 Hare, 554, Mr. Vice-Chancellor Wigram came to the conclusion that since the decision of the House of Lords in the case of Millar v. Taylor, the right to a decree for the delivery up of copies must be rested by the complainant upon some statute provision; and that inasmuch as courts of equity do not enforce forfeitures by an exercise of their ordinary jurisdiction, such a jurisdiction also must be derived from an Act of Parliament. And though the 8th section of the Act of 1 & 2 Vict. ch. 59, as well as the preceding Act of 54 Geo. III. ch. 156, sec, 4, allows the forfeited copies to be recovered in "any court of record in which an action at law, or a suit in equity, shall be commenced by such author or authors, or other proprietor or proprietors," etc.; yet it was admitted in Colburn v. Simms, that no such order had ever been made, in invitum, in a court of equity. It is a significant fact that Congress, in legislating on this subject, though manifestly acquainted with the phraseology of the Act of Geo. III., and though in some particulars it adopted that phraseology, yet omitted to confer upon courts of equity power to enforce either of the forfeitures provided for, but left them to be recovered "in any court having competent jurisdiction thereof." And the only equitable jurisdiction, as to copyright, conferred upon the courts of the United States, is by the Act of February 15, 1819, which gives original cognizance to the courts of the United States, as well in equity as at law, of cases arising under any law of the United States granting to authors or inventors the exclusive right to their respective writings, inventions and discoveries; and upon any bill in equity filed by any party aggrieved in any such case, shall have authority to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the *rights of any authors or inventors se- [*455 cured to them by any laws of the United States, on such terms as the said courts may deem fit and reasonable. Though the substance of this enactment is incorporated into the 17th section of the Patent Act of July 4, 1836, so far as it related to inventors, and so far as it related to the subject of patent rights, is no longer in force, proprio vigore, yet so far as it gave cognizance to the courts of the United States, of cases of copyright, it still remains in force, and is the only law conferring equitable jurisdiction on those courts in such cases, for the 9th section of the Act of February 3, 1831, protects manuscripts only.

There is nothing in this Act of 1819 which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended, that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. The prayer of this bill for the penalties must therefore be rejected.

The remaining question is, whether there ought to be a decree for an account of the profits. The complainant has not prayed for such an account, nor have the defendants stated one in their answer; but the bill does pray for the general relief.

The right to an account for profits is incident to the right to an injunction, in copy and patent right cases.

Colburn v. Simms, 2 Hare, 554; 3 Dan. Ch. Pr. 1797.

And this court has held, in Watts v. Waddle, 6 Pet. 389, that where the bill states a case proper for an account, one may be ordered under the prayer for general relief.

See, also, 2 Pet. 612; 14 Pet. 156; 16 Pet. 195; 9 How. 405.

The decree of the Circuit Court must be reversed, and the cause remanded to the Circuit Court, with directions to award a perpetual injunction as prayed for in the bill, and to take an account of the profits received by the defendants from the sales of the map.

Decree reversed.

WILLIAM B. SHIELDS et al., App'ts,
v.
ROBERT R. BARROW.

(See S. C. 7 How. 130-146.)

Equity—parties—all interested should be present—double aspect of bill—amendment—cross-bill—relief.

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A court of equity cannot make a final decree until all parties essential to the merits of the question are brought in.

Persons having rights which must be affected by the decree cannot be dispensed with.

Those whose interests are separable from those before the court are not indispensable parties.

On bill to rescind a contract all those substantially interested in the contract should be parties unless the interests are separable.

If the case can be completely decided as between the parties, the fact that an interest exists in another whom the court cannot reach by process, will not prevent a decree.

A bill may be filed with a double aspect, but the alternative case stated must be the foundation for the same relief—a bill for rescission of a contract cannot be joined with one for specific performance.

Under the privilege of amending, a party cannot make an entirely new bill.

Indispensable new parties cannot be introduced into a cause by a cross-bill.

Where parties indispensable to a decree for specific performance are not before the court, the bill must be dismissed.

A court of equity cannot give relief for which there is a plain, adequate and complete remedy at law.

Submitted Jan. 29, 1855. Decided, Feb. 30, 1855.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

Mr. J. P. Benjamin, for the appellants:

The original bill could not possibly be sustained for want of proper parties. A bill to set aside an agreement for canceling the sale of property could not be entertained without the presence of the two parties to the sale and agreement to cancel. But the court was without jurisdiction between these two parties, who were both citizens of Louisiana, and the bill should have been dismissed on its face.

This court has repeatedly had occasion to determine that, where necessary parties to a bill could not be brought into the federal court, by reason of the constitutional limitation on their jurisdiction, the suit must be dismissed. Where parties are merely formal, the court will dispense with their presence, but will never assume jurisdiction over them.

Russell v. Clark's Ex'rs, 7 Cr. 69; Greenleaf v. Queen, 1 Pet. 148; Wormley v. Wormley, 8 Wh. 421; Carneal v. Banks, 10 Wh. 181; Harding v. Handy, 11 Wh. 126; Mallow v. Hinde, 12 Wh. 193; Vattier v. Hinde, 7 Pet. 252; Dunn v. Clarke, 8 Pet. 3.

The Act of Congress of 28th Feb. 1839, so far from authorizing such proceedings as were had in this suit, expressly contemplates the case where parties in interest cannot properly be brought before the court, and provides that "the judgment or decree shall not conclude or prejudice such parties."

The plea to the jurisdiction ought, therefore, to have been sustained as filed by those defendants who were citizens of Louisiana.

Complainant, although willing to abandon his claim for a rescission of the contract, instead of discontinuing his suit, engrafted in it an inconsistent demand, by what he calls an amendment. This is contrary to all the rules of pleading in chancery.

Sto. Eq. Pl. 332, et seq.; Mitford's Ch. Pl. 385.

So where the original bill prayed that a bond might be delivered up to be canceled, an amendment not allowed, praying an account of what was not due on the bond.

Cresy v. Beavan, 13 Sim. 354.

Mr. Louis Janin, for appellee:

A party to an indivisible contract must fulfill his contract if he claim specific performance. 16 Pet. 169. The original and the cross-bill are one cause. 3 Daniel's Ch. Pr. 1743.

In The Merchants' Bank of Alexandria v. Louisa and Maria Seaton, 1 Pet. 303, this court held that "The general rule as to parties undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree among all the parties interested. But this is a rule established for the convenient administration of justice, subject to many exceptions, and more or less subject to the discretion of the court, and ought to be restricted to parties whose interest is involved in the issue and to be affected by the decree."

Field v. Schieffelin, 7 Johns. Ch. 250; Sto. Eq. Pl. sec. 393.

Mr. Justice Curtis delivered the opinion of the court:

To make intelligible the questions decided in this case, an outline of some part of its complicated proceedings must be given. They were begun by a bill in equity, filed in the Circuit Court of the United States for the Eastern District of Louisiana, on the 19th of December, 1842, by Robert R. Barrow, a citizen of the State of Louisiana, against Mrs. Victoire Shields, and by amendment against William Bisland, citizens of the State of Mississippi. The bill stated, that in July, 1836, the complainant sold certain plantations and slaves in Louisiana, to one Thomas R. Shields, who was a citizen of Louisiana, for the sum *of $227,000, payable by installments, [*138 the last of which would fall due in March, 1844.

That negotiable paper was given for the consideration money, and from time to time $107,000 was paid. That the residue of the notes being unpaid, and some of them protested for non-payment, a judgment was obtained against Thomas R. Shields, the purchaser, for a part of the purchase money, and proceedings instituted by attachment against Thomas R. Shields and William Bisland, one of his indorsers, for other parts of the purchase money then due and unpaid. In this condition of things, an agreement of compromise and settlement was made, on the 9th day of November, 1842, between the complainant of the first part, Thomas R. Shields, the purchaser, of the second part, and the six indorsers on the notes given by Thomas R. Shields, of the third part. Of these six indorsers, Mrs. Shields and Bisland, the defendants, were two. By this new contract the complainant was to receive back the property sold, retain the $107,000 already paid, and the six indorsers executed their notes, payable to the

NOTE.—Jurisdiction of U. S. Circuit Court depending on parties and residence—see note to Emery v. Greenough, 1 L. ed. U. S. 369.

Necessary parties in equity—see note to Marshall v. Beverly, 5 L. ed. U. S. 97.

Necessary parties in equity, when objection to be made—see note to Morgan v. Morgan, 4 L. ed. U. S. 242.

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complainant; amounting to $32,000, in the manner and proportions following, as stated in the bill:

"The said William Bisland pays $10,000, in two equal installments, the first in March next, and the other in March following, for which sum the said William Bisland made his two promissory notes, indorsed by John P. Watson, and payable at the office of the Louisiana Bank in New Orleans. The said R. G. Ellis, $6,966.66, on two notes indorsed by William Bisland. The said Geo. S. Guion, $2,750, on two notes indorsed by Van P. Winder. The said Van P. Winder, $5,750, on two notes indorsed by Geo. S. Guion. The said William R. Shields, $4,766.66, on two notes indorsed by Mrs. Victoire Shields; and finally, Mrs. Victoire Shields the same amount on two notes payable as aforesaid at the office of the Louisiana Bank in New Orleans."

The complainant was to release the purchaser Thomas R. Shields, and his indorsers, from all their liabilities then outstanding, and was to dismiss the attachment suit then pending against Thomas R. Shields and Bisland.

The bill further alleges, that, though the notes were given, and the complainant went into possession under the agreement of compromise, the agreement ought to be rescinded, and the complainant restored to his original rights under the contract of sale; and it alleges various reasons therefor, which it is not necessary in this connection to state. It concludes with a prayer that the act of compromise may be declared to have been improperly procured, 139*] and may be annulled and set aside, *and that the defendants may be decreed to pay such of the notes, bearing their indorsement, as may fall due during the progress of the suit, and for general relief.

Such being the scope of this bill and its parties, it is perfectly clear that the Circuit Court of the United States for Louisiana could not make any decree thereon. The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others. Thomas R. Shields, the principal, and four out of six of his indorsers, being citizens of Louisiana, could not be made defendants in this suit; yet each of them was an indispensable party to a bill for rescission of the contract. Neither the Act of Congress of February 28, 1839, 5 Stat. at L. 321, sec. 1, nor the 47th rule for the equity practice of the circuit courts of the United States, enables a circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such a decree.

In Russell v. Clarke's Executors, 7 Cranch, 98, this court said: "The incapacity imposed on the Circuit Court to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interests of absent persons, it may be the duty of the court to decree, as between the parties before them. But, in this case, the assignees of Robert Murray & Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court cannot proceed to a final decision of the cause till they are parties."

The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

*A bill to rescind a contract affords [*140 an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties.

Now, it will be perceived that in Russell v. Clarke's Executors, this court, after considering the embarrassments which attend the exercise of the equity jurisdiction of the circuit courts of the United States, advanced as far as this: They declared that formal parties may be dispensed with when they cannot be reached; that persons having rights which must be affected by a decree, cannot be dispensed with; and they express a doubt concerning the other class of parties. This doubt is solved in favor of the jurisdiction in subsequent cases, but without infringing upon what was held in Russell v. Clarke's Executors concerning the incapacity of the court to give relief, when that relief necessarily involves the rights of absent persons. As to formal or unnecessary parties, see Wormley v. Wormley, 8 Wh. 451; Carneal v. Banks, 10 Wh. 188; Vattier v. Hinde, 7 Pet. 266. As to parties having a substantial interest, but not so connected with the controversy that their joinder is indispensable, see Cameron v. M'Roberts, 3 Wh. 591; Osborn v. Bank of U. S. 9 Wh. 738; Harding v. Handy, 11 Wh. 132. As to parties having an interest which is inseparable from the interests of those before the court, and who are, therefore, indispensable parties, see Cameron v. M'Roberts, 2 Wh. 571; Mallow v. Hinde, 12 Wh. 197.

In Cameron v. M'Roberts, where the citizenship of the other defendants than Cameron did not appear on the record, this court certified: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction

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over the cause. If a distinct interest vested in Cameron so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." And the grounds of this distinction are explained in Mallow v. Hinde, 12 Wh. 196, 198.

Such was the state of the laws on this subject when the Act of Congress of February 28th, 1839, 5 Stat. at L. 321, was passed, and the 47th rule, for the equity practice of the Circuit Court of the United States, was made by this court.

The first section of that Statute enacts: 141*] "That when, in any *suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

This Act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of Cameron v. M'Roberts, 3 Wh. 591; Osborn v. Bank of U. S. 9 Wh. 738, and Harding v. Handy, 11 Wh. 132. For this court had already there decided, that the nonjoinder of a party, who could not be served with process, would not defeat the jurisdiction. The Act says it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court, in Mallow v. Hinde, 12 Wh. 198, when speaking of a case where indispensable parties were not before the court, "we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

So that, while this Act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this Act of Congress, and of the previous decisions of the court, on the subject of that rule. Hagan v. Walker, 14 How. 36. It remains true, notwithstanding the Act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without *affecting those [*142 rights. To use the language of this court in Elmendorf v. Taylor, 10 Wh. 167: "If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach—as if such party be a resident of another state—ought not to prevent a decree upon its merits." But if the case cannot be thus completely decided, the court should make no decree.

We have thought it proper to make these observations upon the effect of the Act of Congress and of the 47th rule of this court, because they seem to have been misunderstood, and misapplied in this case; it being clear that the Circuit Court could make no decree, as between the parties originally before it, so as to do complete and final justice between them, without affecting the rights of absent persons, and that the original bill ought to have been dismissed.

But, unfortunately, this course was not taken. The two defendants, Mrs. Shields and Bisland, answered, denied the allegations of fraud, and insisted that, so far as they were concerned, the compromise was made in good faith, and they were ready to perform their parts of it, according to their respective stipulations.

On the same day that Bisland filed his answer, he filed also a cross bill against Barrow, praying for a specific performance of the contract of compromise.

But this bill also was fatally defective, as respects parties. Thomas R. Shields, and his other five indorsers, had such a direct and immediate interest in the contract of compromise, and that interest was so entire and undivisible, that without their presence, no decree on the subject could be made. In Morgan's Heirs v. Morgan, 2 Wh. 290, a bill was brought by the heirs of a deceased vendor, to compel the specific performance of a contract to purchase lands. It was objected that the deceased had a child who was not made a party. Chief Justice Marshall said: "It is unquestionable that all the co-heirs of the deceased ought to be parties to this suit, either plaintiff or defendant, and a specific performance ought not to be decreed until they shall be all before the court."

The next step in the pleadings was, that Barrow filed what he calls a petition, in which he recites summarily what had previously been done in the cause, and declares himself willing to have the agreement of compromise specifically performed; and prays for leave to amend his bill, by making Thomas R. Shields a party, alleging he had become a citizen of Mississippi, and by inserting the following words:

"But if this honorable court should be of opinion that the *said agreement of No- [*143 vember 9, 1842, is valid, and should not be set aside; and if the said defendant shall acknowledge its validity and binding force

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then the orator prays that its specific performance may be decreed, according to its true purport and tenor, as hereinabove explained; and he offers to do and perform on his part all the acts which, by said agreement, he is bound to perform; and he prays that said defendants may be decreed to pay to him the value of the mule, negro, clothing and flat boats, which were taken away from the said plantation as aforesaid; that they be decreed to relieve the said Liza, and the other above mentioned property, from the judicial mortgages mentioned in this bill, and from the tacit mortgage of the minor children of the said Thomas R. Shields; that the said Thomas R. Shields, when made a party to this suit, both in his individual capacity and as tutor of his aforesaid minor children, may be ordered to execute a proper and legal re-conveyance to your orator, of the above-described property, or that any other order may be made which, to this honorable court, may appear meet and fit for the purpose of again vesting in the orator a good and valid title to the aforesaid property; that the notes described in said Act of November 9, 1842, and amounting to $32,000, may be surrendered to your orator; that the defendants may be decreed to pay to your orator the amount of such of the said last mentioned notes as may have been drawn by them, and also such of said notes as may be indorsed by them, and which may have been protested, and of the protest of which they may have been duly notified before the final decree of this honorable court, the whole with interest from the day of protest; and that said defendants may furthermore be decreed to pay the current expenses of said plantation during the year anterior to said November 9th, 1842, and to refund to your orator any amount and expenses which he may have been, or may yet be, compelled to pay on account of privileged claims incumbering said plantation on the day of said Act."

The court allowed the above amendment. So that the bill thereafter presented not only two aspects, but two diametrically opposite prayers for relief, resting upon necessarily inconsistent cases; the one being that the court would declare the contract rescinded, for imposition and other causes, and the other, that the court would declare it so free from all exception as to be entitled to its aid by a decree for specific performance.

Whether this amendment be considered as leaving the bill in this condition, or as amounting to an abandonment of the original bill for a rescission of the contract, and the substitution of a new bill for a specific performance, it was equally objectionable.

144*] *A bill may be originally framed with a double aspect, or may be so amended as to be of that character. But the alternative case stated must be the foundation for precisely the same relief; and it would produce inextricable confusion if the plaintiff were allowed to do what was attempted here.

Story's Eq. Pl. 212, 213; Welford's Eq. Pl. 88; Edwards v. Edwards, Jacob, 335.

Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the Vice-Chancellor, in Verplank v. The Mercantile Ins. Co. 1 Edwards, Ch. 46. Under the privilege of amending, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. See, also, the authorities there referred to, and Story's Eq. Pl. 884.

We think sound reasons can be given for not allowing the rules for the practice of the circuit courts respecting amendments, to be extended beyond this; though doubtless much liberality should be shown in acting within it, taking care always to protect the rights of the opposite party.

See Mavor v. Dry, 2 Sim. & Stu. 113.

To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, leaves the record unnecessarily incumbered with the original proceedings, increases expenses, and complicates the suit; it is far better to require the complainant to begin anew.

To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject.

After this change had been made in the original bill, and Barrow had answered the cross-bill of Bisland, the next step taken in the cause, respecting the pleadings and parties, was the entry of the following order:

"The motion of the complainant for the delivery of the notes of George S. Guion and Van P. Winder, which have been, by order of the court, delivered into the court, to abide its further order, came on to be heard; and having been fully argued, and it appearing to the court that all the parties to the second contract set up in the complainant's bill and in the cross-bill of the defendant, Bisland, are not before the court; and it also appearing to the court that the said defendants, Shields and Bisland, are citizens of the State of Mississippi, and that all the *other parties interest- [*145 ed in the execution of the said second contract are citizens of the State of Louisiana, it is therefore ordered, that unless the said Shield and Bisland do, on or before the first Monday in August next, file their cross-bill, setting up and praying a specific execution of said contract, and make all the parties to the second contract, set up in the complainant's bill and residing in Louisiana, defendants, that the complainant, Barrow, shall be at liberty to proceed upon his bill of complaint for a specific execution of the original contract between the parties, and for the rescission of the said second contract against such of the parties residing in the State of Mississippi as may fail to comply with this order."

The validity of this order cannot be maintained, and nothing done in consequence of it can be allowed any effect in this court.

It is apparent that if it were in the power of a circuit court of the United States to make and enforce orders like this, both the Article of the Constitution respecting the judicial power, and the Act of Congress conferring jurisdiction on the circuit courts, would be practical-

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ly disregarded in a most important particular. For in all suits in equity it would only be necessary that a citizen of one State should be found on one side, and a citizen of another state on the other, to enable the court to force into the cause all other persons, either citizens or aliens. No such power exists; and it is only necessary to consider the nature of a cross-bill, to see that it cannot be made an instrument for any such end. "A cross-bill, ex vi terminorum, implies a bill brought by a defendant against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill."

Story's Eq. Pl. sec. 389; 3 Dan. Ch. Pr. 1742.

New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties, he amends his bill, and makes them. If the interest of the defendant requires their presence, he takes the objection of non-joinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject, and a cross-bill to make new parties is not only improper and irregular, but wholly unnecessary.

When the defendants, Mrs. Shields and Bisland, had complied with this order of the court, and filed their cross-bill, as it was called, against the other indorsers and Thomas R. Shields, and they had come in, as they did, what was their relation to the cause? They surely were not plaintiffs in it. If they were defendants the court had not jurisdiction, for 146*] they, as well as *the complainant, were citizens of Louisiana. In truth, they were not parties to the original bill; they were merely defendants to the cross-bill. They had no right to answer the original bill, or make defense against it, and of course no decree could be made against them, upon that bill.

We do not find it necessary to pursue further an examination in detail, of the complicated maze of pleas, demurrers, answers, amendments and interlocutory orders, which followed the filing of this, so called, cross-bill. It is enough to say that the defendants to it were never lawfully before the court; that the court never obtained jurisdiction over those of the parties who were citizens of the State of Louisiana, and amongst them was Thomas R. Shields, who, though made a party to the original bill by amendment, as a citizen of Mississippi, pleaded that he was a citizen of Louisiana, and was thereupon stricken out of the original bill, and was only a defendant to the cross-bill; that it never had lawfully before it such parties as were indispensable to a decree for the specific performance of the contract of compromise, or for the rescission thereof; and lastly, that when it proceeded finally to make a decree condemning certain of the defendants, who were indorsers for Thomas R. Shields, to pay the notes given on the compromise, it gave relief, for which there was a plain, adequate and complete remedy at law, and which was wholly aside from the prayer of the bill for a specific execution of the contract of compromise, which was fully executed in this particular when the notes were given and deposited in the hands of the notary.

This court regrets that a litigation, which has now lasted upwards of thirteen years, should have proved wholly fruitless; but it is under the necessity of reversing the decree of the Circuit Court, ordering the cause to be remanded, and the original and cross-bills dismissed.

Decree reversed and cause remanded.

ROBERT WICKLIFFE, Administrator, with the will annexed, of Luke Tiernan, Deceased, Complainant and Appellant,

v.

BENJAMIN EVE, Deceased; Richardson Adams, Executor of Randolph Adams, Deceased; Robert P. Letcher, James Ballinger, and Franklin Ballinger.

(See S. C. 17 How. 468–470.)

Jurisdiction as to parties—Rights of administrator of deceased partner.

Where all the parties to a suit, both plaintiff and defendants, are citizens of the same State (Kentucky), the Circuit Court has no jurisdiction of the parties, and the bill is rightly dismissed.

Administrator of deceased partner has a right to come into a court of equity by bill, to coerce the surviving partner to settle, and pay the debts of the firm with the joint property.

After the creditors of the partnership are satisfied, such administrator may come in, on a bill properly framed, for his intestate's share of the surplus.

Argued Feb. 6, 1855. Decided Feb. 20, 1855.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The case is stated by the court.

Mr. E. Preston, for the appellant, contended that the bill was not an original bill, but merely a supplementary remedy, to enable the court to regulate equitably the judgments at law which no state or other courts could do, and that it was a continuation of the suit between the plaintiffs and defendants.

Simms v. Guthrie, 9 Cr. 25; Dunn v. Clarke, 8 Pet. 1; Clarke v. Mathewson, 12 Pet. 170.

Mr. M. Blair, for appellees:

This is an original bill to set aside the original bill complained of, for fraud in obtaining it, and although it prays for an examination and review of said decree, the ground on which it proceeds is the alleged fraud in obtaining it, and not for errors apparent on the face of the decree, or for new matter discovered since the decree; nor is it against those who were parties to the original bill only, or by one against whom that decree was rendered, or by one in privity with the parties or aggrieved by the decree. These are the requisites of the bill of review as laid down in the text books of chancery practice.

Maddock, Tit. Bill of Review; see, also, the opinion of Judge Baldwin, 9 Pet. 770, and cases there cited.

The court had no jurisdiction. The courts of the United States being courts of limited jurisdiction, the facts which confer it must be stated in the bill.

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8 Pet. 436, 112; 10 Wh. 192; Piquignot v. Pa. R. R. Co. 16 How. 104.

The parties are not alleged to be citizens of different states so as to give jurisdiction on that ground.

3 Dow, 382; Bingham v. Cabot, 3 Dall. 382.

469*] *Mr. Justice Catron delivered the opinion of the court:

In 1822 some of the defendants made two notes, one for $1,308.44, and one for $1,383.95, to Luke Tiernan & Sons; one payable the 1st of December of that year, and the other December 1, 1823.

In 1833, suits were brought by the plaintiff, as attorney of the payees, in the United States Circuit Court for the Kentucky District, and judgments were obtained by default.

No executions to enforce the judgments were put into the marshal's hands till December 15, 1845; and shortly after they were stayed by injunction, at the suit of some of the defendants against Charles Tiernan, the surviving partner, on the ground of payment, and the bar of the Statute of Kentucky, for failing to sue out executions within twelve months after judgment; and on the 6th day of May, 1847, the injunction was, by decree of the United States Circuit Court, made perpetual.

Wickliffe had in the meantime brought suit against Luke Tiernan, claiming an indebtedness against him to the amount of about three thousand dollars, but never obtained judgment. He had attached the debt he alleged to be due by the defendants to Tiernan & Sons, and when the injunction suit was pending against the surviving partner, Wickliffe, having obtained letters of administration on the 13th of November, 1846, petitioned to be made a defendant, but the court overruled the motion.

On the 6th of December, 1847, he moved for leave to file a bill of review on the same ground, but the court also refused; and the present suit was brought to set aside the decree enjoining execution of the two judgments, on the ground that the decree in favor of Eve and others was obtained by fraud through the connivance of Charles Tiernan, the defendant. The bill alleges, among other things, that Charles Tiernan was largely indebted to his father, and had assigned his interest in the judgments to him, and had become bankrupt. There is no averment in the bill that the partnership debts of Luke Tiernan & Sons had been paid; nor is there any averment that the complainant and defendants were citizens of different states.

Wickliffe attempted to have himself made a defendant to the suit of John G. Eve and others against Charles Tiernan, on the assumption that Luke Tiernan was indebted to him, Wickliffe; and he claimed a right to have part of the amount due to him from Luke Tiernan satisfied out of the moneys he alleged were due to Luke Tiernan & Sons from Eve and others. Charles Tiernan, being the surviving partner of the firm, had the sole right to defend the suit, as he represented the partnership property; in regard to which, the administrator of Luke Tiernan had a right to come into a court of equity by bill to coerce the 470*] *surviving partner to settle, and pay the debts of the firm with the joint property; and after the creditors of the partnership were satisfied, then Luke Tiernan's administrator might have come in on a bill, properly framed, for one third of the surplus, or as much more as L. Tiernan was in advance to the firm. This familiar doctrine is well stated by Mr. Justice Story, in his work on Partnership, secs. 97, 347.

But the bill before us claims no relief in this form; the complainant asks that the decree releasing Eve and others may be set aside as fraudulent, and the balance due on Eve's debt may be decreed to him, as administrator of Luke Tiernan; and in this capacity he seeks to retain for himself, and subject the property of the firm to pay the debts of an individual partner. Charles Tiernan is no party to this proceeding, and as he was not brought before the court, there could be no jurisdiction taken of the subject matter, he being legal owner of the chose in action claimed, if the claim had any existence.

The bill was dismissed in the Circuit Court, because the complainant and the defendants were citizens of Kentucky, and therefore the court declared it had no jurisdiction, for want of proper parties. To obviate this objection, it is insisted here, on the part of the appellant, that this is a bill of review of the proceedings in the cause of John G. Eve et al. v. Charles Tiernan. The appellant having been refused the privilege to file a bill of review, he then filed this original bill impeaching the decree for fraud, and to this bill none but citizens of Kentucky were parties.

It is manifestly an original bill within the description given by Mr. Justice Story's Eq. Plead. sec. 404, and being so, the Circuit Court had no jurisdiction of the parties.

It is ordered that the decree, dismissing the bill, be affirmed.

WILLIAM A. BOOTH, Appellant,
v.
FERDINAND CLARK.

(See S. C. 17 How. 322-340.)

Receiver of state court—power to sue in another jurisdiction—right of same and of assignee in bankruptcy to debtor's property considered.

A receiver appointed in a creditor's bill, in the State of New York, cannot sue out of the State in which he was appointed, to wit: in the United States Circuit Court for the District of Columbia.

As between such receiver, although first appointed, and the assignee in bankruptcy, the latter has the official right to a fund arising from a Mexican claim which had been awarded to the bankrupt by United States Commissioners under Treaty with Mexico.

Power of receivers appointed by the state courts in this respect considered, and cases on the subject reviewed.

There was a want of vigilance in omitting to proceed in this matter by the receiver, which did not make any equity which he might have in New York upon the debtor's property superior to that of other creditors pursuing the funds in this court.

The receiver had nothing in this case in the nature of a lien to bind the debtor's property not within the State of New York.

Argued Jan. 29, 1855. Decided Mar. 1, 1855.

NOTE.—Effect of bankrupt law on receiverships—see note, 45 L.R.A. 190.

Right of receiver as to property outside of the jurisdiction in which he is appointed—see note, 23 L.R.A. 52.

Power of receiver to sue outside of jurisdiction of appointment—see note, 4 L.R.A.(N.S.) 824.

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APPEAL from the Circuit Court of the United States for the District of Columbia.

This was another claim to the fund in the Treasury of the United States, involved in the case of Clark v. Clark. Booth brought his action in the Circuit Court of the United States for the District of Columbia, in the character of Receiver, appointed in the year 1842 by the Court of Chancery of the State of New York, in a proceeding upon a bill of a judgment creditor, one Juan de la Camara, to compel a discovery of property and choses in action of Ferdinand Clark.

After various proceedings, the Circuit Court dismissed the bill, and the complainant appealed to this court.

The case is further stated by the court.

Mr. Jos. H. Bradley, for appellant, after stating the facts, made the following points:

I. By the proceedings in the court of Chancery of New York, the property of Clark was vested in the receiver, Booth, before Clark petitioned for the benefit of the Bankrupt Act, and the right of Booth was not affected by the voluntary bankruptcy and discharge of the defendant.

2 Rev. Stat. 173, secs. 38, 39, in margin; Storms v. Waddell, 2 Sand. Ch. 494, 510, 512, and cases cited.

The order of the court works the transfer of the title.

Mann v. Pentz, 2 Sandf. Ch. 257, 271, 272.

The subsequent discharge did not devest the title thus created. Marcy v. Jordan, 2 Den. 570. It is like an execution in the hands of the sheriff, not levied, which, by the "settled law of the State," binds the property.

Waller v. Best, 3 How. 111.

Or the attachment in a New Hampshire suit.

Peck v. Jenness, 7 How. 612, 619, 622.

It is the settled law of the State of N. Y.

2 Sand. Ch. 519.

II. The receiver could maintain any action in relation to the property and rights of property which the debtor himself could have had.

6 Barb. 542, 544; 3 Sand. 311, 316, 317.

III. The matter in controversy was a chose in action at the time of the appointment of the receiver, was personal property, followed the person of the owner, and passed to the receiver.

Nathan v. Whitlock, 9 Paige, 159; North v. Turner, 9 Serg. & R. 244, and the authorities there cited; 19 Wend. 75; Gillet v. Fairchild, 4 Den. 80, 82, and cases cited.

A claim upon a foreign government would be embraced in such an assignment.

4 Den. 80, 82, and cases cited; Couch v. Delaplaine, 2 N. Y. 397, 402, 403; Milnor v. Metz, 16 Pet. 221; Comegys v. Vasse, 1 Pet. 193; 2 Sto. Eq. secs. 829, 1040.

The fund not being the subject of manual possession, an appropriation of it is all that is required.

5 Binn. 392, 398.

Having no locality, the validity of its transfer depends on the law of the place where the transfer was made.

2 Kent's Com. 570, 7th ed. Sto. Con. secs. 362, 383, 399; VanBuskirk v. Hart. Fire Ins. Co. 14 Conn. 583, 586-590.

"According to the law of the place where made."

Black v. Zacharie, 3 How. 482; Oakey v. Bennett, 11 How. 44.

The Court of Chancery in New York had jurisdiction of the subject matter and of the person. It carried with it jurisdiction over his personal effects.

Holmes v. Remsen, 4 Johns. Ch. 485; S. C. 20 Johns. 262; Hooper v. Tuckerman, 3 Sand. 311, 317; Hoyt v. Thompson, 5 N. Y. 320; Sto. Confl. 420; Life and Letters of Jos. Story, Vol. I. p. 380, Letter to Chan. Kent.

IV. The Circuit Court of the District of Columbia had jurisdiction of the cause, if the right of the receiver was complete under the laws of the State of New York.

Holmes v. Remsen; Hooper v. Tuckerman; Hoyt v. Thompson; Sto. Confl. 419-421, already cited; Thomas v. Merchants' Bank, 9 Paige, 216; McLaren v. Pennington, 1 Paige, 102; Bank of Augusta v. Earle, 13 Pet. 520-591; Milnor v. Metz, 16 Pet. 221.

Executors and administrators by statute (Act 24th June, 1812, sec. 11, 2 Stat. at L. 758), and assignees of insolvents in the several States have always been allowed by the court to sue here. The receiver in this case was not a common law receiver, but a receiver by statute as in case of insolvency.

The court had jurisdiction under the Act 3d March, 1849.

"There is a known distinction between circumstances which are of the essence of the claim required to be done by an Act of Parliament, and clauses merely directory. The precise time, in many cases, is not of the essence."

Rex v. Loxdale, 1 Burr. 447.

The provisions of a law which are merely directory, are not to be construed into conditions precedent. Laws are construed strictly to save a right or avoid a penalty; but liberally to give a remedy, or effect an object declared in the law.

Whitney v. Emmett, 1 Bald. C. C. 316.

The intention of the Legislature should be followed whenever it can be discovered, although the construction seems contrary to the letter of the statute.

Dwarris on Stat. 718; The People v. The Utica Ins. Co. 15 Johns. 380; see, also, 6 Cr. 307; 3 How. 565.

By the court: "Courts are not to construe an Act so liberally as to work injustice, but so liberally as to prevent the mischief and advance the remedy.

Jackson v. Fish, 10 Johns. 466.

Negative words will make a statute imperative; words in the affirmative are directory only.

Rex v. Leicester, 9 Dowl. & Ry. 772; 7 Barn. & Cress. 12.

Where a statute directs a person to do a thing in a given time, without any negative words restraining him from doing it afterwards, the naming of the time will be considered as directory to him, and not as a limitation of his authority.

Pond v. Negus, 3 Mass. 230; Smith's Com. sec. 670, et seq.; Stimson v. Huggins, 16 Barb. 658.

When an act is to be done within a given time, it may be done afterwards if nothing has occurred to prevent it.

Griffith v. Miner, 7 La. 350; Proseus v. Mason, 12 La. 16.

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Under a directory statute, a duty not performed at the time specified, may be valid if performed afterwards.

Webster v. French, 12 Ill. 302.

Remedial statutes have been made to extend by an equitable construction, to other persons, to other things, to other places, and to other times than those expressly mentioned in the statute.

Dwarris, 721 to 726.

Finally, the Circuit Court has jurisdiction by reason of the general powers conferred upon it by statute. It has all the powers given to the circuit courts of the United States by the Act 13th February, 1801. "Cognizance of all cases in equity between parties, both or either of which shall be resident or be found within said district, Act 27th February, 1801, sec. 5; 2 Stat. at L. 106, to proceed against non-residents in the same way as they are proceeded against in the general court, or in the Supreme Court of Chancery in the State of Maryland.

Act 3d May, 1802, sec. 1 Stat. at L. 193; and see Kendall v. The U. S. 12 Pet. 524.

Mr. A. H. Lawrence, for appellee, after stating the facts, made the following points:

1st. That the bill was properly dismissed, because the complainant had not filed his bill of complaint, given notice to the Secretary of the Treasury, or filed his bond, as required by the 8th section of the Act of 3d March, 1849. 9 Stat. 394.

2d. The proceedings in the Chancery Court of New York being proceedings in rem, could only affect property within the territorial jurisdiction of the State. Story Confl. sec. 543.

Indeed, the authorities in N. Y. seem to go to the extent that a decree operates only on property discovered by the proceedings, even within the jurisdiction of the court.

Storm v. Waddell, 2 Sand. Ch. 495; 4 Ed. Ch. Rep. 658; 1 Paige, 637; 2 Paige, 657; 4 Paige, 47, 513; 8 Paige, 569, 475.

Clark's native domicil was Massachusetts. He resided for a while in Havana, and afterwards returned to his native State, and then took up his abode in New Hampshire. See Sto. Confl. secs. 591, 592.

3d. The Bankrupt Court having taken jurisdiction of the claim in controversy, and it having been disposed of under its decree, the property has effectually passed.

Houston v. City Bank of New Orleans, 6 How. 486.

4th. There was not, by the decisions in New York, a specific lien on the property in question by virtue of the appointment of a receiver; and if there had been, it would have been presented to the District Court, and would have been there recognized.

Ex parte Christy, 3 How. 316; Savage v. Best, 3 How. 119; Nugent v. Boyd, 3 How. 436; Waller v. Best, 3 How. 111; Peck v. Jenness, 7 How. 612.

Mr. Justice Wayne delivered the opinion of the court:

We learn from the record of this case that Juan de la Camara recovered a judgment in the Supreme Court of New York against Ferdinand Clark for $4,688.49, with interest at *seven per cent; that* a fieri facias was issued *upon the judgment, and that* there was a return upon it of "no goods, chattels, or real estate of the defendant *to be levied upon." [*328 Upon this return, Camara filed a creditor's bill before the Chancellor of the First Circuit in the State of New York, setting out his judgment and the return upon the fieri facias, in which he seeks, under the laws of that State, to subject the equitable assets and choses in action of Clark to his judgment; and he asks for a discovery of them from Clark, for an injunction, and the appointment of a receiver. Notices of this proceeding and of the action upon it were served upon the solicitor of Clark, and the bill of complaint was taken as confessed, upon the defendant's default in not answering. Booth, the present complainant, was appointed receiver on the 3d August, 1842. Clark had been previously enjoined under the proceeding from making any disposition of any part of his estate, legal or equitable. Thus matters stood from the time of the receiver's appointment, in 1842, until June, 1851. Then Booth, as receiver, reports that no effects of Clark had come to his knowledge, except a claim upon Mexico, which had been adjudged to Clark by the United States Commissioners under the Treaty with Mexico; and that as receiver he was contesting it; and he asks from the court authority to proceed for that purpose, which was granted. Such is an outline of the case in New York, containing every substantial part of it.

We will now state the proceedings of this suit at the instance of the receiver, in the Circuit Court of the United States for the District of Columbia, from the decision of which, dismissing the receiver's bill, it has been brought to this court for revision.

On the 29th May, 1851, Booth, the receiver, filed his bill in the Circuit Court for the District of Columbia, reciting so much of the proceedings of the New York courts as was deemed necessary to support his suit. He declares that Clark, when the original suit was instituted against him by Camara, and from that time until after he had been appointed receiver, had resided in New York. That his effects consisted principally, if not wholly, of the claim upon Mexico, and that he claimed that fund as receiver for the purposes of that appointment. Clark answered the bill. He denies that the proceedings against him in the courts of the State of New York created any lien in behalf of Camara, or the receiver, upon the fund in controversy. He admits that no part of his property ever came into receiver's hands under those proceedings, and that he had the claim upon Mexico whilst the suits were pending against him, and when the receiver was appointed under Camara's creditor's bill; but that all the evidences and papers in support of his Mexican claim were then in the public archives at Washington. He also states that the Board of Commissioners, under the Act of Congress of March 3, 1849, entitled "An Act to carry into effect certain *stipulations [*329 of the Treaty between the United States and the Republic of Mexico, of the 2d February, 1848," had made an award in his favor for the sum of $86,786.29, which sum was then in the hands of the Secretary of the Treasury of the United States. He alleges, that, being a resident of the State of New Hampshire, he filed in the clerk's office of that district, on the 28th

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January, 1843, his petition to be declared a bankrupt. That he had been declared a bankrupt on the 22d March following, pursuant to the "Act to establish an uniform system of bankruptcy throughout the United States," passed August 19, 1841. He then recites that there had been attached to his petition in the bankrupt's court a schedule of his property, rights and credits of every kind and description, in which his Mexican claim had been stated: and that it was upon that claim the commissioners had awarded to him the sum before mentioned. He declares that under the decree of the court in bankruptcy, one John Palmer had been appointed assignee; and that having given his bond in compliance with the order of the court, he was vested as assignee, in virtue of the operation of the Bankrupt Law, of all the defendant's property for the benefit of his creditors, including the Mexican claim. It is also stated in his answer, that notice of all the proceedings in his matter of bankruptcy had been published in the leading newspapers of New Hampshire, and that the name of Juan de la Camara, and his residence, was placed among the list of his creditors attached to his petition to be declared a bankrupt. And he avers that all of his creditors had had notice of the proceedings in bankruptcy. That neither Camara nor any other creditor had filed or made any objections to those proceedings, or to the action of the assignee, until after the award had been made upon the Mexican claim.

It is not necessary, for the purposes of this opinion, to state the defendant's recital of the sale of his effects by Palmer, the assignee; his purchase of them, including the Mexican claim, or the rights claimed by the defendant under his purchase, all relating to the same, having been fully acted upon by this court at this term, in the case of Ferdinand Clark v. Benjamin Clark and W. H. G. Hackett. We state, however, that Palmer, the original assignee in Clark's bankruptcy, having died, he had been succeeded by the appointment of Hackett as assignee. This suit, then, is substantially between Hackett, as the assignee of Clark in bankruptcy, and Booth, the receiver under Camara's creditor's bill; that it may be determined by this court which of them has the official right to the Mexican fund, for the distribution of it between the creditors of Clark, or whether Booth, as receiver, shall have from that 330*] fund a sufficient sum to pay *Camara's entire debt, leaving the residue of it for distribution between Clark's other creditors.

It appears also from the record that Booth, the receiver, took no steps to execute his official trust, from the time of his appointment in 1842 until 1851, after the award of the Mexican claim had been made in Clark's favor. And also that the Court of Chancery, acting upon the creditor's bill brought by Camara, had not been applied to, either by Camara or by the receiver, for any order upon Clark in personam, to coerce his compliance with its injunction and decree.

Upon this statement of the case we will now consider it. There is no dispute concerning the regularity or binding operation of the judgment obtained by Camara against Clark. None in respect to the proceedings under the creditor's bill. The leading point in the case is the effect of the proceedings under the last, to give a right to the receiver, in virtue of a lien which he claims upon the property of the debtor, to sue for and to recover any part of it, legal or equitable, without the jurisdiction of the State of New York. In other words, as an officer of a court of chancery, for a particular purpose, will he be recognized as such by a foreign judicial tribunal, and be allowed to take from the latter a fund belonging to a debtor, for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues, contesting his right to do so? Or can he as receiver claim, in virtue of a decree upon a creditor's bill given in one jurisdiction, a right to have the judgment upon which the credtor's bill was brought paid out of a fund of a bankrupt debtor in a foreign jurisdiction, because his appointment preceded the bankrupt's petition?

It is urged that the receiver in this case, by the decree of the court in New York, was entitled officially to the entire property of Clark, real, personal or equitable, both within and without the State of New York. That he could, as receiver, maintain any action for the property and rights of property of the debtor which the latter could have done. That the fund now in controversy was a chose in action belonging to the debtor when the receiver was appointed, and though not within the State of New York, that it followed the person of the owner and passed to the receiver, because the owner was domiciled in New York. And it was also said, that having such official rights or liens upon the property of the debtor, the comity of nations would aid him in the assertion of them in a foreign tribunal. The counsel for the receiver cited from the Reports of the State of New York several cases in support of the foregoing propositions. We have perused all of them carefully, without having been *able to view them altogether as [*331 the learned counsel does. Whatever may be the operation of the decree in respect to the receiver's powers over the property of the debtor within the State of New York, and his right to sue for them there, we do not find anything in the cases in the New York Reports showing the receiver's right to represent the creditor or creditors of the debtor in a foreign jurisdiction. It is true that the receiver in this case is appointed under a statute of the State of New York, but that only makes him an officer of the court for that State. He is a representative of the court, and may, by its direction, take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession. But it is not considered in every case that the right to the possession is transferred by his appointment, for where the property is real, and there are tenants, the court is virtually the landlord, though the tenants may be compelled to attorn to the receiver. Jeremy's Equity Jurisprudence, 249. When appointed, very little discretion is allowed to him, for he must apply to the court for liberty to bring or defend actions, to let the estate, and in most cases to lay out money on repairs, and he may without leave distrain only for rent in arrear, short of a year.

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6 Ves. 802; 15 Ves. 26; 3 Bro. C. C. 88; 9 Ves. 335; 1 Jac. & W. 178; Morris v. Elme, 1 Ves. Jr. 139, 165; Blunt v. Clithero, 6 Ves. 799; Hughes v. Hughes, 3 Bro. C. C. 87; 5 Madd. 473.

A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg. 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. Delany v. Mansfield, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court.

Verplanck v. Mercantile Insurance Company, 2 Paige, C. R. 452.

Unless where he is appointed under the statute of New York directing proceedings against corporations, 2 R. S. 438, and then he is a standing assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor.

Attorney-General v. Life and Fire Insurance Co. 4 Paige, C. R. 224.

In the case just cited, Chancellor Walworth 332*] says, that *the receiver has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. In the statement which has been made of the restraints upon a receiver, we are aware that they have been measurably qualified by rules, and by the practice of the courts in the State of New York, as may be seen in Hoffman's practice; but none of them alter his official relation to the court, and, so far as we have investigated the subject, we have not found another instance of an order in the courts of the State of New York, or in the courts of any other state, empowering a receiver to sue in his own name officially in another jurisdiction for the property or choses in action of a judgment debtor. Indeed, whatever may be the receiver's rights under a creditor's bill, to the possession of the property of the debtor in the State of New York, or the permissions which may be given to him to sue for such property, we understand the decisions of that State as confining his action to the State of New York.

Such an inference may be made from several decisions. It may be inferred from what was said by Chancellor Walworth in Mitchell v. Bunch, 2 Paige, C. R. 615. Speaking of the property which might be put into the possession of a receiver, and of the power of a court of chancery to reach property out of the State, he declares the manner in which it may be done, thus: "The original and primary jurisdiction of that court was in personam merely. The writ of assistance to deliver possession, and even the sequestration of property to compel the performance of a decree, are comparatively of recent origin. The jurisdiction of the court was exercised for several centuries by the simple proceeding of attachment against the bodies of the parties to compel obedience to its orders and decrees. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the defendant claims an equitable title, within the jurisdiction of the court, or to execute such a conveyance or transfer thereof as will be sufficient to vest the legal title, as well as the possession of the property, according to the lex loci rei sitæ." It is very obvious, from the foregoing extract, that up to the time when Mitchell v. Bunch was decided, in the year 1831, it had not been thought that a court of chancery in the State of New York could act upon the property of a judgment debtor in a creditor's bill which was not within the State of New York, but by the coercion of his person when he was within the jurisdiction of the State; *and that it had not been con- [*333 templated then to add the means used by chancery to enforce its sentences, in respect to property out of the State of New York, the power to a receiver to sue in a foreign jurisdiction for the same. It is true that the jurisdiction of a court of chancery in England and the United States to enforce equitable rights is not confined to cases where the property is claimed in either country, but the primary movement in the chancery courts of both countries to enforce the injunction, is the attachment of the person of the debtor, where he is amenable to the jurisdiction of the court.

We find in the second volume of Spence on the jurisdiction of the Court of Chancery in England (6, 7), this language: "When, therefore, a case is made out against a person resident within the jurisdiction of the court, in respect to property out of it, but within the empire, or its dependencies, which would call for the interference of the Court of Chancery if the property were situate in the country, the court, as it had the power, has assumed the jurisdiction, when such an interference is necessary to the ends of justice, of enforcing the equitable rights of the parties to or over property out of its jurisdiction, by the coercion of the person and sequestration of his property here, in the same manner as it would have done had the property been situate in this country." And Sir John Leach said: "When parties defendant are resident in England, and are brought upon subpœna here, the court has full authority to act upon them personally, with respect to the subject of the suit, as the ends of justice require, and with that view to order them to take or to omit to take any steps or proceedings in any other court of justice, whether in this or in a foreign country. This court does not pretend to any interference with the other courts." It acts upon the defendant by punishment for his contempt, for his disobedience of the court. The Court of Chancery has no power directly to affect property out of the bounds of its jurisdiction.

Roberdeau v. Rous, 1 Atk. 544; 2 Spence.

We believe such to be the proper course, in

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chancery, in cases of injunction, and that its jurisdiction, by injunction, rests entirely on the coercion of the person. Such, however, was not the course pursued in this case, though the debtor was then a resident of the State of New York, and amenable to the jurisdiction of the court. No motion was made to force Clark to comply with the injunction which Camara had obtained under the creditor's bill. The matter was allowed to rest for seven years, Camara being aware that Clark had a pecuniary claim upon the Republic of Mexico, at least as early as in the year 1843. The receiver during all that time took no action. His first movement is an application to be permitted to sue for the fund in the hands of the government, which had been awarded to Clark by the Commission-
334*] ers under the Treaty *with Mexico. Permission was given to sue. He has brought his bill accordingly, and it directly raises the question, whether he can, as an officer of the Court of Chancery in New York, and in his relation of receiver to Camara, be permitted to sue in another political jurisdiction.

We have already cited Chancellor Walworth's opinion as to the course which is to be pursued in New York upon an injunction in a creditor's bill. Mr. Edwards, in his excellent work on receivers in chancery, after citing the language used in Mitchell v. Bunch, says: "Still the difficulty remains as to a recognition of the powers or officers of the court, by persons holding a lease upon the property (especially realty), out of the jurisdiction. Then in Malcolm v. Montgomery, 1 Hogan, 93, the Master of the Rolls observed, that a receiver could not be effectually appointed over estates in Ireland, by the English Court of Chancery, in any direct proceeding for the purpose, and that attempts had often been made to do so by serving orders made by the Engish Court of Chancery, but that they had failed, because the English Court of Chancery has no direct means of enforcing payment of rent to its receiver by tenants who reside in Ireland. The Attorney-General and another counselor also said, that to their knowledge such attempts had been frequently made, but had been uniformly given up as impracticable. A conflict might also arise between the receiver out of the jurisdiction and creditors, and also other persons out of the jurisdiction. The comity of nations, and different tribunals would hardly help a receiver."

We also infer, from the case of Storm v. Waddell, in 2 Sandford, that the receiver's right to the possession of the property of a debtor in the State of New York, and his right to sue for property there, is limited to that jurisdiction. The Chancellor, in the last case mentioned, after having given an epitome of the cause of proceeding in a creditor's bill, and speaking of equitable interests and things in action belonging to the debtor, without regard to the injunction, says: "The property of the defendant is subjected to the suit, wherever it may be, if the receiver can lay hold of it, or the complainant can reach it by the decree. The injunction, when served, prevents the debtor from putting it away or squandering it." This language indicates the receiver's locality of action. Taken in connection with that of Chancellor Walworth in Mitchell v. Bunch, it shows *that the receiver's right to the possession of the* debtor's property is limited to the jurisdiction of his appointment, and that he has no lien upon the property of the debtor, except for that which he may get the possession of without suit, or for that which, after having been permitted to sue for, he may reduce into possession in that way. Our industry has been tasked unsuccessfully *to find a case in [*335 which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor. So far as we can find, it has not been allowed in an English tribunal; orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the last.

We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit. He is not within that comity which nations have permitted, after the manner of such nations as practice it, in respect to the judgments and decrees of foreign tribunals, for all of them do not permit it, in the same manner and to the same extent, to make such comity international or a part of the laws of nations. But it was said that receivers in New York are statutory officers, as assignees in bankruptcy are. That being so, he had, as assignees in bankruptcy have upon the property of the bankrupt, a lien upon the property of a judgment debtor, under an appointment in a creditor's bill. But that cannot be so. An assignee in bankruptcy in England, and in this country when it had a bankrupt law, is an officer made by the Statute of Bankruptcy, with powers, privileges and duties prescribed by the Statute, for the collection of the bankrupt's estate for an equal distribution of it among all of his creditors.

In England, the property of the bankrupt is vested in the assignees in bankruptcy by legislative enactment. Where commissioners have been appointed, it is imperative upon them to convey to the assignees the property of the bankrupt, wherever it may be or whatever it may be, and it is done by deed of bargain and sale, which is afterwards enrolled. It vests the assignees with the title to the property from the date of the conveyance, it having been previously vested in the commissioners for conveyance by them to the assignees. As to the bankrupt's personal estate, the Statute looks beyond the debts and effects of a trader within the kingdom, and vests them in the commissioners in every part of the world. The last is done in England, upon the principle that personal property has no locality, and is subject to the law which governs the person of the owner. As by that law the property of a bankrupt becomes vested in the assignee, for the purposes of the assignment, his title to such property out of England is as good as that which the owner had, except where some positive law of the country in which the personal property is, forbids it. Cullen, 244.

In claiming such a recognition of assignees in bankruptcy from foreign courts, England does no more than is permitted in her courts, for they give effect to foreign assignments made *under laws analogous to the English [*336 bankrupt laws.

Solomons v. Ross, 1 H. Bl. 131, n.; Jollet v. Deponthon, Ib. 132, n.

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But such comity between nations has not become international or universal. It was not admitted in England until the middle of the last century in favor of assignees in bankruptcy. Lord Raymond decreed it in 1811, in the case of a commission of bankruptcy from Holland. Sir Joseph Jekyll, in 1715, said the law of England takes no notice of a commission in Holland, and therefore a creditor here may attach the effects in the City of London, and proceed to condemnation. 3 Burge, 907. Lord Mansfield, in Warring v. Knight (sitting in Guildhall, after Hil. Term, Geo. III., Cooke's Bank. Laws, 300, 3 Burge, 906), ruled, that where an English creditor proceeded, subsequent to an act of bankruptcy, by attachment in a foreign country, and obtained judgment there and satisfaction by the sale of the debtor's personal property, the assignees in an action in England could not recover from such creditor the amount of the debt which had been remitted to him. Again; his Lordship ruled, that the statutes of bankrupts do not extend to the colonies of any of the King's domains out of England, but the assignments under such commissions are, in the courts abroad, considered as voluntary, and as such take place between the assignee and the bankrupt, but do not affect the rights of any other creditors.

So the law stood in England until the case of Folliott v. Ogden, 1 H. Bl. 123, when Chancellor Northington stimulated it into a larger comity, by giving effect to a claim to the creditors of a bankrupt in Amsterdam over an attaching creditor in England, who had proceeded after the bankrupt had been declared to be so, by the proper tribunal in Amsterdam. England had just then become the great creditor nation of Europe, and of her provinces in North America. Her interest prompted a change of the rule, and her courts have ever since led the way in extending a comity which had before been denied by them. The judicial history of the change, until the comity in favor of assignees became in England what it now is, is given in Burge, 2d Vol. ch. 22; Bankrupt Laws, 886, 906 to 912, inclusive, and from 912 to 929. It may now be said to be the rule of comity between the nations of Europe; but it has never been sanctioned in the courts of the United States, nor in the judicial tribunals of the States of our nation, so far as we know, and we know that it has been repeatedly refused in the latter. Our courts, when the States were colonies, had been schooled, before the Revolution, in the earlier doctrines of the English courts upon the subject. The change in England took place but a few years before the separation of the two countries.

337*] *That comity has not yet reached our courts. We do not know why it should do so, so long as we have no national bankrupt laws. The rule which prevailed whilst these States were colonies, still continues to be the rule in the courts of the United States, and it is not otherwise between the courts of the States. It was the rule in Maryland before the Revolution. It is the rule still, as may be seen in Birch v. McLean, 1 Harr. & McH. 286; Wallace v. Patterson, 2 Harr. & McH. 463. An assignment abroad, by act of law, has no legal operation in Pennsylvania. We find from McNeil and Colquhoon, 2 Haywood, 24, that it has been the rule in North Carolina for sixty years. South Carolina has no other.

Const. Rep. (S. C.) 283; 4 McCord, 519; Taylor v. Geary, Kirby, 313.

In Massachusetts, the courts will not permit an assignment in one of the States, whether it be voluntary or under an insolvent law, to control an attachment in that State of the property of an insolvent which was laid after the assignment, and before payment to the assignees. The point occurred recently in the Circuit Court of the United States for that district, in the case of Betton, Assignee, v. Valentine, 1 Curtis, 168; and it was ruled that the assignee of an insolvent debtor, appointed under the law of Massachusetts, does not so far represent creditors in the State of Rhode Island as to be able to avoid a conveyance of personal property in the latter State, good as against the insolvent, but invalid as against creditors, by the law of Rhode Island.

In New York, the "ubiquity of the operation of the bankrupt law, as respects personal property," was denied in Abraham v. Plestoro, 3 Wend. 538. Chancellor Kent considers it to be a settled part of the jurisprudence of the United States, that a prior assignment under a foreign law will not be permitted to prevail against a subsequent attachment of the bankrupt's effects found in the United States. The courts of the United States will not subject their citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control. We think that it would prejudice the rights of the citizens of the States to admit a contrary rule. The rule, as it is with us, affords an admitted exception to the universality of the rule that personal property has no locality, and follows the domicil of the owner. This court, in Ogden v. Saunders, 12 Wh. 213, disclaimed the English doctrine upon this subject; and in Harrison v. Sterry, 5 Cr. 289, 302, this court declared that the Bankrupt Law of a foreign country is incapable of operating a legal transfer of property in the United States.

Such being the rule in the American courts, in respect to *foreign assignments in [*338 bankruptcy, and in respect to such assignments as may be made under the insolvent laws of the States of the United States, there can be no good reason for giving to a receiver, appointed in one of the States under a creditor's bill, a larger comity in the courts of the United States, or in those of the States or Territories. On the contrary, strong reasons may be urged against it. A receiver is appointed under a creditor's bill for one or more creditors, as the case may be, for their benefit, to the exclusion of all other creditors of the debtor, if there be any such, as there are in this case. Whether appointed as this receiver was, under the Statute of New York, or under the rules and practice of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extraterri-

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torial power of official action: none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek.

In those countries of Europe in which foreign judgments are regarded as a foundation for an action, whether it be allowed by treaty stipulations or by comity, it has not as yet been extended to a receiver in chancery. In the United States, where the same rule prevails between the States as to judgments and decrees, aided as it is by the first section of the 4th article of the Constitution, and by the Act of Congress of 26th May, 1790, by which full faith and credit are to be given in all of the courts of the United States, to the judicial sentences of the different States, a receiver under a creditor's bill has not as yet been an actor as such in a suit out of the state in which he was appointed. This court considered the effect of that section of the Constitution, and of the Act just mentioned in McElmoyle v. Cohen, 13 Pet. 324, 327. But apart from the absence of any such case, we think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the 339*] debtor, and the application *and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver.

Besides, there is much less reason for allowing the complainant in this case to be recognized as receiver for the fund out of the State of New York and in this jurisdiction, even if the practice in chancery in respect to receivers was different from what we have said it was. The remedies which the judgment creditor in New York had under his creditor's bill against his debtor, were not applied as they might have been in that State, according to the practice in chancery in such cases. When Clark had been enjoined under the creditor's bill, and the receiver had been appointed, both judgment creditor and receiver knew at the time—certainly, as the record shows, in a short time afterwards—that Clark *had a pecuniary* claim upon the Republic of Mexico. No attempt was made, according to chancery practice, to coerce Clark by the attachment of his person under the injunction, to make an assignment of that claim for the payment of Camara's judgment. It cannot be said that Clark had not property to assign, and that it was therefore unnecessary to attach him. That would make no difference; for whether with or without property, he might have been compelled to make a formal assignment, even though he had sworn he had none. It was so ruled in Chapman v. Sabbaton, 7 Paige, C. R. 47, and in Fitzhugh v. Everingham, 6 Paige, 29.

There was a want of vigilance in this matter, which does not make any equity which he may have in New York upon Clark's property superior to that of Clark's creditors, who are pursuing the funds in this district. Nor according to the rule prescribed in the United States, that personal property has no locality on account of the domicil of the owner, to transfer it under a foreign assignment, can the receiver have in this case anything in the nature of a lien to bind the property of Clark not within the State of New York. When we take into consideration also the origin of the fund in controversy, the manner of its *ultimate recovery [*340 from Mexico, the congressional action upon it in every particular to secure it after the awards were made, to those who might be entitled to receive it; the jurisdiction given to the Circuit Court of this district, with an appeal from its decision to this court upon the principles which govern courts of equity to adjudge disputes concerning it, and that such cases were to be conducted and governed in all respects as in other cases in equity, we must conclude that the complainant in this case, as receiver, cannot be brought under the rule prescribed for our decision. We concur with the court below in the dismission of the bill.

Decree of the Circuit Court affirmed, with costs.

LEVI D. BOONE, Adm'r of Jesse B. Thomas, Deceased, Comp't,

v.

THE MISSOURI IRON COMPANY et al.

(See S. C. 17 How. 340-344.)

Specific performance—when not decreed.

The specific performance of a contract will not be decreed where the consideration agreed is due and has not been paid by plaintiff.

He who asks a specific performance of his contract must show performance, or offer to perform on his part.

Nor will specific performance of a contract to convey land be decreed, where the land has been sold on a judgment rendered for the purchase money.

Submitted Feb. 19, 1855. Decided Mar. 1, 1855.

APPEAL from the Circuit Court of the United States for the District of Missouri.

The case is fully stated by the court.

The court below having dismissed the bill, the case is here on appeal.

Mr. Britton A. Hill, for the appellees:

The complainants are not entitled to a specific performance of the title-bond of Miss

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Bullett to Jesse B. Thomas, dated November 2, 1836, as against the defendant Zeigler or the American Iron Mountain Co., for the reason that said Thomas has been in default for twelve years prior to the filing of his bill, and has not taken any steps towards the performance of the contract on his part.

2 Story Eq. sec. 771; 1 Fonb. Eq. B, 1, ch. 6, sec. 2, and notes; Gilbert, Lex Præter, 240; Brashier v. Gratz, 6 Wh. 528; Colson v. Thompson, 2 Wh. 336, 341; Taylor v. Longworth, 14 Pet. 172; 8 Cr. 471; Kendall v. Almy, 2 Sumn. 278; Boone v. Chiles, 10 Pet. 177; 9 Pet. 405, 416, 417; 10 Wh. 168.

A specific performance cannot be decreed in such a case upon any principle known to a court on equity. In Rector v. Price, 1 Mo. 264, the court held that "a party seeking a specific performance must show that the other party can be placed in statu quo; that he was, on his part, desirous and actively diligent to perform his agreement, but that he was, notwithstanding, prevented by intervening obstacles which he, as an active diligent man, could not remove."

See, also, Benedict v. Lynch, 1 Johns. Ch. 375; McKnight v. Taylor, 1 How. 161; Piatt v. Vattier, 9 Pet. 405; Bowman v. Wathen, 1 How. 189; Taylor v. Benham, 5 How. 237; King v. Hamilton, 4 Pet. 311, 328; Durretts v. Hook, 8 Mo. 374; McNeil v. Magee, 5 Mass. 244; Watts v. Waddle, 6 Pet. 389; Coulson v. Walton, 9 Pet. 62; 5 Ves. 720, and note.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Missouri.

The bill prays the specific execution of a contract between Thomas and the Missouri Iron Company, dated 15th August, 1839, which requires the defendants to give up and cancel the notes of Thomas to Nancy Bullett for $10,000, dated 2d November, 1836; to pay a debt due to Martin Thomas; to sell or transfer on the books of said Company, for the use of the complainant, $43,000 worth of stock of said Company, or, in the alternative, that the American Iron Company may be decreed to reconvey the one undivided seventh part of the Iron Mountain tract to the complainant.

The complainant died in 1849, and his death being suggested, an amended bill was filed praying for an account of rents and profits, for the use of the land and consumption of ores, timber, etc., by the defendants, and for a decree of title, etc.

On the 2d of November, 1836, Nancy Bullett, widow, sold to her brother, the complainant, one undivided seventh part of a tract of 20,000 arpents of land, in Washington County, Missouri, known as the Iron Mountain tract; and she executed to him a title-bond of that date, with the condition that she would convey to him the above interest, on the payment of two notes for $5,000 each, one payable at six, the other at twelve months from the date of the bond. On the 15th of November, 1836, Thomas made a similar title-bond to John L. VanDoren, with the condition to make a deed, upon his paying the two notes of $5,000 each to Mrs. Bullett; and also three notes of $5,000 each, given by him to Thomas, at eighteen, twenty-four, and thirty months, from the date of the bond.

On the 31st of December, 1836, the Missouri Iron Company was incorporated by the Legislature of Missouri, and VanDoren, Pease & Co. were named in the Act as corporators. The Company was organized; books were opened to sell the capital stock; Van Doren was appointed to obtain subscribers, but, being unsuccessful, he failed, made an assignment, and became insolvent. Agents were appointed to visit foreign countries; who returned, making a report that a banker in Amsterdam subscribed $600,000 of stock. The stock was raised to $5,000,000, but the Company soon became hopelessly embarrassed.

*On the 22d of February, 1839, James [*342 Bruce, who married Mrs. Bullett, conveyed all their interest in the one seventh of the Iron Mountain tract to Allen & Sloan, and also, assigned the notes of Thomas to them, for the consideration of $4,500. At the same time, Allen & Sloan gave a bond to Bruce and wife, to convey to Thomas all their interest in the one seventh of the tract, on his paying to them $9,000, the amount due on the original purchase.

On the 15th of August, 1839, A Jones, President of the Company, executed the following receipt to Thomas, under which he claims a specific performance against the Missouri Iron Company and the other defendants, to wit: "Received of Jesse B. Thomas, of Sangamon county, Illinois, a transfer of $71,400 of the capital stock of the Missouri Iron Company, $43,000 of which is to be transferred to Julius Sichel, of Amsterdam, to consummate a contract entered into with him. The residue of the stock to be appropriated to pay the balance due on the two notes given to Mrs. Bullett," etc.

On the 2d September, 1841, the Board resolved, that the President be authorized to receive back from Thomas the stock issued to him, etc., and the secretary addressed to him a letter, saying: "You will perceive that, by the above resolution, the President is authorized to cancel the bond or agreement, in relation to the transfer of your interest in the Iron Mountain tract. As the chance of doing something with the property is better than the stock, I presume you can have no objection to making the transfer; the Company is about to be dissolved, and the stock is worth nothing," etc.

It does not appear that this communication was ever answered by Thomas. He never paid, or offered to pay, the money due to Mrs. Bullett, or to Allen and Sloan, her assignees. He did not transfer to the Company the 714 shares of stock, nor demand the cancellation of Mrs. Bullett's title-bond, that he had assigned to the Company. Nor does it appear that he did any act to fulfill his contract with Mrs. Bullett.

In January, 1842, it appears that the Company failed, and all its property was sold on execution. In the amended bill, it is averred, that in 1842, the Missouri Iron Company was dissolved, being insolvent. C. C. Zeigler became the purchaser, at sheriff's sale, of all the Iron Mountain tract, for which he received the sheriff's deed, dated 6th July, 1841; and on the 6th of January, 1842, the Missouri Iron Company sold the tract to Zeigler, and executed a deed to him.

A decree had been rendered in the Circuit Court of St. Francois County, at the suit of Al-

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len and Sloan, assignees of Mrs. Bullett, against Thomas and J. L. Van Doren, for the 343*] sum of $11,475, *which was the consideration for the purchase of the undivided seventh part of the Iron Mountain tract, which was declared to be an equitable lien on the interest purchased; and under the decree of May 8, 1843, the property was sold to Zeigler, and both Thomas and Van Doren were barred and precluded by the decree from enforcing any rights against the same. Pending that suit, Zeigler purchased the interest of Allen and Sloan in the title-bond of Mrs. Bullett to Thomas, and the notes of Thomas given to Mrs. Bullett, for $6,500.

It appears that on the 24th of January, 1843, the American Iron Company was incorporated, and that Zeigler sold the Iron Mountain tract to the Company.

There is no evidence showing a connection between the Iron Mountain Company first formed, and the present American Iron Company, except that the latter Company is in possession of the same property, claiming it by sheriff's sale and deeds of conveyance under a decree, and from parties who were corporators of the first Company, and who represented the Company.

It would be difficult to find any case where the objections to the specific execution of a contract are more insuperable than in this case. In the first place, the consideration for which the property was purchased has not been paid, and the Statute of Limitations would have barred a recovery on the notes given, if suit had been brought on them at the time this bill was filed. It is true the purchaser from Thomas, Van Doren, agreed to pay these notes; but not having done so, the assignment affords no excuse for the negligence of Thomas in his lifetime. And there is no principle in equity better settled than that he who asks a specific execution of his contract must show a performance on his part, or that he had offered to perform. Neither of these has been done in this case.

In addition to this, it appears that the property claimed by the representatives of Thomas, which he never paid for, was sold in 1841, under a judgment obtained by Martin v. Van Doren, Pease & Co., the corporators named in the Missouri Iron Company, by the sheriff, and that C. C. Zeigler became the purchaser; and after this, the 6th of January, 1842, the Missouri Iron Company sold the Iron Mountain tract to Zeigler, and executed to him a deed. In the same year the Company was dissolved, being insolvent.

It also appears that a decree was rendered for the purchase money in 1843, which the court held was an equitable lien upon the land, and the land was decreed to be sold for the payment of consideration money; and one seventh of the whole tract, the amount purchased by Thomas, was, on the 8th of May, 1843, sold. This proceeding was had, on the ground that Thomas had abandoned his claim to the land. 344*] *By various efforts and contrivances, the stock of the first Company was advanced to $5,000,000, but as might be expected, after such inflation, the stock proved to be worth nothing, and the owners became insolvent.

Under the American Iron Company, which succeeded the first Company, extensive works have been established, and a prosperous business in mining is carried on.

On a full consideration of this complicated case, there seems to be no ground of equity on which relief can be given to the complainants. On the contrary, their equity appears to have been extinguished by negligence, in not paying the consideration, by the sale of the property by the sheriff, also under a decree of a court having jurisdiction of the case, and also by a conveyance of the Missouri Iron Company. A minute statement of the facts would be tedious, and cannot be necessary, as the case is free from doubts by the outline above given.

The decree of the Circuit Court, which dismissed the complainant's bill, is affirmed.

Decree of the Circuit Court affirmed, with costs.

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*MORGAN V. HINKLE, in his own [*353 right, and as Adm'r de bonis non of John Fisher, Deceased, Comp. and App't,

v.

MOSES WANZER, James F. Johnson, and John S. Hunter.

(See S. C. 17 How. 353-369.)

Assignment of fund, or chose in action—assignee or trustee as agent of, or debtor to, the creditor—what creates the relation.

Where notes are left by a debtor in the hands of attorneys for collection, their proceeds to be appropriated by them to the payment of debts of the debtor, the attorneys become trustees for his creditors with full power to appropriate the funds provided for their payment.

No particular words are necessary for an assignment, but any words are sufficient which show an intention of transferring a chose in action for the use of the assignee.

A mere expectancy, as that of an heir at law to the estate of his ancestor, or the interest which a person may take in the will of another then living, or the share to which such person may become entitled under an appointment or in personal estate as presumptive next of kin, is assignable in equity.

Where a creditor, in whose behalf a sum has been deposited by the debtor with a third person, receives notice of that fact from the third person, the notice will convert him into an agent for, and debtor to, the creditor.

(Mr. Justice CAMPBELL, having been of counsel, did not sit in this cause.)

Argued Jan. 18, 1855. Decided Mar. 2, 1855.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

The bill in this case was filed in the Circuit Court of the United States for the Southern District of Alabama, by the appellant, to restrain the collection of an execution on a certain judgment in favor of Wanzer. The bill having been dismissed in the court below, the case is now here on appeal.

A further statement appears in the opinion of the court.

Messrs. P. Phillips and A. F. Hopkins, for the appellant:

There was no assignment or appropriation of the note in question by Fisher to Hunter, nor any intention to make one. But on the contrary, the attorneys were at all times bound to hold the surplus funds that might accumu-

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late in their hands at the free disposal of said Fisher, as well after the said "verbal or written instructions" as before.

Tiernan v. Jackson, 5 Pet. 595; Rogers v. Lindsey, 13 How. 441; Williams v. Everett, 14 East, 582; Grant v. Austen, 3 Price, 58; Hoyt v. Story, 3 Barb. 265; Cowperthwaite v. Sheffield, 3 N. Y. 243; 18 Wend. 319; Watson v. Duke of Wellington, 1 Russ. & Myl. 602; 72 Law Lib. 231; Scott v. Porcher, 3 Mer. 662; Wallwyn v. Coutts, 3 Mer. 707.

These instructions conferred a power upon the attorneys of a revocable character; but even if the power were irrevocable during life, it became extinct by the death of Fisher.

In those cases where the power is coupled with an interest, the rule is otherwise; but there it must be an interest in the thing itself.

Hunt v. Rousmanier, 8 Wh. 204; 7 Barb. 412; Eastm. v. Moreton, Ohio, June Term, 1854; Am. Law Reg. Aug. 1854.

This answer, as the appellant contends, is not of that character which requires two witnesses, or one witness and corroborative facts to disprove it. It does not contain a "clear and positive denial" of the charge in the bill. A general denial is not sufficient, but there must be an answer to sifting inquiries upon the general question.

Welford, 366, 367, 369; Freeman v. Fairlie, 3 Mer. 41; Welford, 309, 310; 2 Eq. Cas. Abr. 67; Paxton's case, Sel. Cas. In. Ch. 53; 6 Ves. 792; 1 Sim. & Stu. 235; Hepburn v. Durand, 1 Bro. Ch. 503; Prout v. Underwood, 2 Cox, Ch. 135; Daniel v. Mitchell, 1 Story, 188; Bank of Georgetown v. Geary, 5 Pet. 110; 9 Cr. 160; 2 Daniel Ch. 984; Hughes v. Garner, 2 Y. & C. 333; Parkman v. Welch, 19 Pick. 234; Greeley, Eq. 4.

The record contains upon the subject of payment the precise statement of the bill sworn to; and the positive evidence of Mrs. Long, opposed by the loose, indefinite and evasive response of the answer. The oath of the complainant is a full offset to that of the defendant.

Garrow v. Carpenter, 1 Port. 374; Searcy v. Pannell, 1 Cook, 110; 1 McLard v. Linnville & Gammon, 10 Humph. 164; Union Bk. Georgetown v. Geary, 5 Pet. 99.

Messrs. **Reverdy Johnson, Reverdy Johnson, Jr.,** and **Daniel Chandler,** for appellees, after stating the case, made the following points:

1. If the state of accounts between Hunter and Fisher's estate be as shown in the answer, Hunter is, under the circumstances, entitled to the proceeds of the judgment.

2 Story's Eq. secs. 1044, 1047; 5 Wh. 277; 5 Pet. 600; 1 Ves. Jr. 281; 5 Paige, 632; 1 Johns. Ch. 205; 4 Cond. Eng. Ch. 690; 4 Myl. & Cr. 702; 1 Story, Com. Eq. sec. 499; 3 Barb. 264; Wash. C. C. 424; 1 Wh. 233; 4 Myl. & Cr. 702; see particularly 2 Tudor & White, 175-203.

2. The answer being responsive and sworn to, as to facts in the personal knowledge of the defendant, and denying long satisfaction of the judgment, it can only be overcome by two credible witnesses, or one, and strong corroborating circumstances; neither of which requisites exists in the present case. And the whole *equity of the bill being sworn away, it was properly dismissed.*

6 Wh. 453; 5 Pet. 99; 9 Cr. 153; 6 Cr. 51; 7 Cr. 69; 7 Wh. 60; 16 Wh. 600; 1 Cow. 711; 1 Wash. C. C. 230; 10 Johns, 525; 1 Mass. 516.

Mr. Justice **Daniel** delivered the opinion of the court:

The appellant, by his bill in the Circuit Court, alleged, that on the 17th day of April, 1837, John Fisher and James F. Johnson, of the mercantile firm of Fisher & Johnson, were the holders and owners of a promissory note, made by Thomas Long, George D. Fisher, and the appellant, Hinkle, bearing date on the 19th of December, 1836, for the sum of $1,520, payable twelve months from the date of said note to William Ryan, surviving partner of the firm of Porter & Ryan, and which had been transferred, by indorsement, from Ryan to Fisher & Johnson; that this note was, by Fisher & Johnson, on the 17th of April, 1837, together with various other notes, placed in the hands of Messrs. Gordon, Campbell & Chandler, attorneys, for collection, as appears by the receipt of these persons, filed as an exhibit with the bill, and marked A.

That about the 17th of April, 1837, James F. Johnson, for valuable consideration, sold and assigned all his interest in the note above mentioned, and in the firm of Fisher & Johnson, to his partner, John Fisher.

That John Fisher having departed this life in 1838, administration of his estate was duly committed to his widow, and to his brother, William P. Fisher, who, having afterwards surrendered their rights and powers, as representatives of the estate of John Fisher, administration de bonis non of that estate was, on the 3d of December, 1839, duly committed to the complainant, who makes profert of the letters of administration granted to him.

*That Messrs. Gordon, Campbell & [*359 Chandler, the attorneys with whom the note had been deposited, instituted a suit thereon, in the name of Moses Wanzer, as plaintiff, against the makers of that notice, in the Circuit Court of the United States for the Southern District of Alabama, and on the 11th day of April, 1839, recovered a judgment against Thomas Long and the appellant, in the name of Wanzer, for the sum of $1,691 in damages, and costs of suit.

That after the rendition of the said judgment, the appellant was informed by Wanzer that Fisher & Johnson, or Fisher had owed him a small sum of money which had been fully paid off, and that he did not know why suits had been brought in his name on the said note, and on other notes mentioned in the receipt of the said attorneys; and at the same time, further stated that he had no right, and did not pretend to have any right or interest whatsoever, in the judgment recovered in his name.

That Hunter claims a right to this judgment, upon what precise authority the appellant does not know, as he has never heard, and does not believe, that it has been ever transferred or assigned to him by Wanzer, but on the contrary, believes and alleges that any such transfer or assignment by Wanzer has never been made.

That Hunter, as the appellant has been informed and believes, was bound as surety or indorser for Fisher & Johnson, or Fisher, but in what manner, or for what amount, if so

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bound, the appellant is not informed; that he does not know whether the said Hunter has paid out of his own funds any money as surety or indorser, either for Fisher or Fisher & Johnson, but to the best of his knowledge and belief, Hunter has not paid from his own funds any money, as surety or indorser for either, or, if he has, such payment has been fully reimbursed to him.

That for a large portion, if not for the whole liability of said Hunter for Fisher, or Fisher & Johnson, he was secured and indemnified by a mortgage or deed of trust on real estate and slaves, which have been sold under said mortgage or deed of trust; in addition to which, there came to the hands of the said Hunter, and were collected by him, promissory notes, accounts, credits, property and effects of Fisher & Johnson, and of the said Fisher, both before and since his death, of great value, and were appropriated by Hunter to his indemnity, as surety and indorser as aforesaid, and to an amount greatly exceeding any liability he may have incurred as surety or indorser as aforesaid, leaving the said Hunter largely indebted to the estate of said John Fisher.

360*] *That Thomas Long, one of the defendants, against whom, conjointly with the appellant, the judgment aforesaid was recovered, and who died sometime in the year 1843, did, in the year 1841, inform the appellant that John S. Hunter having claimed of Long the amount of said judgment, it was fully paid off and discharged by Long, who showed to the appellant a statement or receipt for the amount of the judgment, in the handwriting of Hunter, with whose writing the appellant is well acquainted.

That Hunter, under the pretext of an indemnity for his liabilities for Fisher, has been permitted by the attorneys by whom the judgment in the name of Wanzer was obtained, to assume entire control over said judgment; and in pursuance of said permission, did, on the 2d of May, 1839, sue out a writ of fieri facias, and on the 10th of January, 1840, an alias fieri facias upon that judgment, on each of which writs a return of nulla bona was duly made.

That from the date of the return upon the alias fieri facias, no proceeding was had upon said judgment, until the 17th of September, 1849, when a pluries fieri facias thereupon was sued out, as the appellant charges, by the direction of John S. Hunter, and has been levied upon the property of the appellant; and since then a summons has been served, in virtue of the said judgment upon John N. Smith, as a garnishee, upon the alleged ground that said Smith is a debtor to the appellant, or has property of the appellant in his possession.

That Hunter is wrongfully and oppressively, by means of the last-mentioned execution, and of the summons of the garnishee, Smith, harassing the appellant, by an effort to coerce from him the amount of the said judgment, when in truth nothing is due thereon either to Wanzer or Hunter.

Upon the allegations above set forth, the prayers of the appellant are for a decree, 1st. That the judgment against the appellant and Long may be decreed to have been satisfied; or 2d. That the appellant, as administrator de bonis non of John Fisher, deceased, may be declared entitled to the said judgment and the control of the same, if anything shall be found due thereon. 3d. That the said John S. Hunter and Moses Wanzer may be restrained from proceeding against the appellant on the said judgment, and may be ordered to account for and pay to the appellant any money they may have collected upon the said judgment. 4th. That if the said Hunter shall claim the judgment as an indemnity for any liability of himself, as surety or indorser of Fisher & Johnson, or of John Fisher, he may be ordered and required to show on what debt or debts he was bound as indorser or surety, and what portion of such debt or *debts he has paid out [*361 of his own individual funds, and that he may be ordered to discover and account for all the property, real and personal, moneys, credits, etc., of the said Fisher & Johnson, or of the said Fisher, ever claimed, used or received by him, for the purpose of his indemnity, as surety or indorser of Fisher & Johnson, or of Fisher individually.

The appellant, with the view of sustaining his case, and of eliciting from the appellee any disclosure which might tend to such a result, has, in his bill, propounded a number of interrogatories.

In our examination of this cause, we have deemed it necessary to consider such only of the interrogatories so propounded, as connected with and arising out of the allegations of the bill, do, by a comparison with the statements in the answer, present the true points or questions involved in this controversy.

Those questions relate:

1st. To the extent of liability of the respondent, Hunter, as surety or indorser for John Fisher, and to the sufficiency or excess of the means of indemnity alleged to have been actually received by him for losses incurred under that liability.

2d. To the alleged payment by Long to Hunter in discharge of the judgment recovered in the name of Wanzer.

3d. To the fact of a transfer, either legal or equitable, of the judgment just mentioned, and to the right or authority of the attorneys, or of their principal, Fisher, to make a transfer or appropriation of that judgment.

Of the several defendants to the bill of the appellant, John S. Hunter alone answered that bill.

By the answer of Hunter is set out the assumption by him, as indorser upon bills and drafts drawn by Fisher & Johnson, under an arrangement between this firm and Messrs. Gordon, Campbell & Chandler, representing as counsel and attorneys the creditors of Fisher & Johnson, of debts to the amount of $28,227.25.

The facts of this undertaking, and of its subsequent fulfillment by Hunter, chiefly by his individual resources, are abundantly established by the exhibition of the agreement itself; by the testimony of Messrs. Campbell & Chandler, with whom, for the benefit of the creditors, the agreement was made, and through whose hands the indorsed bills passed: by the evidence of Stodder and of Jayne, to each of whom a portion of those bills was transferred, in satisfaction of debts due to them from Fisher; and also by the evidence of Barney, to whom, as

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the agent of the United States Bank, a much larger portion of those bills was delivered.

In addition to the liabilities set forth as 362*] above, it is proved *by the testimony of John A. Campbell, Esq., that Hunter, on the 16th of April, 1838, by his attorneys, Gordon, Campbell & Chandler, paid to the Bank of Columbus, upon a judgment obtained by that bank against him, the sum of $4,818.27, which sum, the witness was informed by Fisher, was a debt incurred by Hunter for Fisher.

The answer contains a statement purporting to be a full exhibit of the money raised by sales of the property pledged by Fisher for the indemnity of his sureties and indorsers, as well as of all other sums derived from Fisher or from his debtors, and which have been applied for Hunter's reimbursement. This statement in the answer, including the judgment against Hinkle and Long, amounts to $16,558.28. To this statement, however, must be added the sum of $2,200, proved by the witness, Sadler, to have been paid to Hunter, upon the compromise of a debt due from Sadler & Barnes, and also a sum of $175, shown to have been received from a witness, Gilchrist; which sums, though derived from Fisher, are not comprised in statement in the answer. There is also exhibited in proof, in this case, a list of claims, by notes and open accounts, making an aggregate of $2,115.83, assigned by the executor of Fisher to Hunter & Cook, attorneys, which claims, it is stated in the assignment, were intended to meet the liabilities of Hunter for said John Fisher; but of these claims, many of which were not above $3, and resting upon open accounts, it is not in proof that any portion of them was certainly applied to Hunter's indemnity, or indeed, was ever collected. But conceding the fact that the sums spoken of by Sadler & Gilchrist, and the entire list of claims assigned as above mentioned, were realized by Hunter, they would, when added to the sum of $16,558.28, admitted in the answer, compose an aggregate falling far short of the liabilities which Hunter, as the indorser and surety for John Fisher, and Fisher & Johnson, under the agreement with Gordon, Campbell & Chandler, has actually incurred, and is proved to have satisfied. Upon a correct view, therefore, of the proofs in this cause, we are led to the conclusion, in opposition to the allegations in the bill, and in accordance with the answer and the proofs, that Fisher & Johnson, and John Fisher, who, at the time of his death, was utterly insolvent, had failed, by a large deficiency, to reimburse to Hunter the losses incurred by the latter as indorser and surety for the former.

The second question which we have mentioned as arising in this cause, viz.: that of satisfaction by Long of the judgment against Long, Hinkle and Fisher, has not been entirely free from embarrassment when tested by the 363*] rules *which govern proceedings in courts of equity. Correctly viewed, however, we deem that embarrassment rather apparent than real, and such as yields necessarily under a correct interpretation of the pleadings and evidence in this cause. It has been contended that the interrogatory propounded by the bill, as to the payment by Long to Hunter of the judgment in the name of Wanzer, and the execution by Hunter of a receipt in full discharge of that judgment, is not directly answered; that the answer as to this interrogatory is evasive, and therefore is deprived of that weight which, if directly responsive, it would require the testimony of two witnesses, or that of one witness with strong corroborating circumstances, to overthrow. Hence it is insisted, that the testimony of the single witness, Mrs. Long, swearing positively to the written discharge or receipt of the amount of the judgment, must be taken as conclusive upon the subject of payment.

The rule of proceeding in equity here appealed to, is too well established and to familiar to require the citation of authorities for its support, or even to admit of its being questioned. The proper inquiry upon the point under consideration is, to ascertain how far the requirements of that rule have been complied with.

The charge in the bill in terms is as follows: "That your orator, sometime in the year 1841, was informed by Thomas Long, that he had fully paid off and satisfied to the said Hunter the amount of the said judgment; and the said Long then produced and showed to your orator a receipt or statement, in writing signed by said John S. Hunter (whose handwriting was well known to your orator), showing that the said judgment had been so paid and satisfied by said Long."

Upon the basis of this charge is constructed and propounded the 13th interrogatory, in these words, viz.: "Did or did not the said Thomas Long, at any time or in any manner, pay, satisfy, settle or secure to the said John S. Hunter the amount of the said judgment or any part thereof? Did or did not the said Hunter give or sign any receipt or statement, showing the payment, settlement, satisfaction, or securing the said judgment or any part thereof?"

Divesting this interrogatory of unnecessary verboseness and tautology, it may be remarked, that the substance or meaning of the charge in the bill, and the object of the interrogatory framed upon that charge, are made up of the alleged facts of payment by Long to Hunter, and of a written acknowledgment of such payment by the latter. The terms "pay, satisfy, settle or secure," are equipollent words, when used to express the fulfillment by Long of his liability upon the judgment, and in *a similar [*364 sense must be understood the terms "receipt" and "statement" when used to describe a written acknowledgment of payment by a party making or signing such acknowledgment. And here it may be remarked, that whatever may be the technical meaning and effect of the word "release" at law, it can hardly be doubted that a receipt or written acknowledgment of payment or settlement would be construed as a release in a court which looks rather to the substance of things than to their forms; and whose maxim is ut res magis valeat quam pereat. The reply to the 13th interrogatory is, that the respondent had not received from Long any settlement, payment or satisfaction. So far the reply to the interrogatory falls within the literal terms of that inquiry. But it proceeds to state further, that the respondent has never released Long from his liability to satisfy the judgment, and this form of denial, it is insisted, does not exclude the execution of a written re-

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ceipt such as has been alleged in the bill, and mentioned by the witness, Mary Long. We have already said, that in equity at least, a receipt for the payment of debt would be regarded as a release from further demand by the creditor; and we think that, according to the generally received acceptation of language, a creditor who, in speaking of his debtor, denies having received of him either settlement, payment or satisfaction, and in the same statement avers that he has never released that debtor, must be understood as intending to declare that he had given him no written acknowledgment of payment, nor acquittance of any description whatsoever. The exception now urged to the answer to the 13th interrogatory, even upon the face of that response, appears to partake more of the character of a verbal criticism than of that of a fair and substantial impeachment. And we are the less inclined to extend the scope of this exception, since the complainant below, by a more timely and regular proceeding, might have obtained what he now contends for, without hazard of injury or surprise to the respondent.

We regard the answer as substantially responsive, and entitled to every legal effect incident to it as such.

With respect to the circumstances connected with this charge of payment in the bill, we think that so far as they have been disclosed, their preponderance is decidedly to the statement in the answer.

The bill admits the insolvency of Long at the period of his death. At what precise time he became insolvent is not stated. It is not probable that he became insolvent just at that period; and the widow of Long, whose testimony is relied on to establish the payment and the existence of the receipt in 1841, assigns as a reason for her knowledge of these transactions, her familiarity with her husband's embarrassments at that date.

365*] *Alfred Harrison, in December, 1851, swears, that from the 4th of March, 1839, to the 4th of March, 1842, he was sheriff of Lowndes County, in which Long lived and died, and was also sheriff of that county at the time of his testifying. That, as sheriff, he has had in his hands various executions against Long, and although some of them were for very small sums, he was never able to collect any one of them, and had returned on them "No property."

B. Harrison, another witness, states that from March, 1839, to March, 1842, he acted as deputy-sheriff of the County of Lowndes, and from March, 1842, to March, 1845, was sheriff of that county; that, as sheriff and deputy-sheriff, he had opportunities of knowing the pecuniary situation of Long, against whom the witness had held various executions, not one of which could be collected, but all of which were returned, "No property found." It should be remarked here that the statement of these sheriffs covers the entire interval from 1839 to 1845, including the period of the alleged payment by Long, as well as that of his death. It is proper further to observe, that on the judgment now under consideration there were sued out two writs of fieri facias, one of them as late as January, 1840, on each of which writs was made the return of nulla bona. It would, we think, challenge no ordinary degree of credulity to believe that a man in whose possession no property could be found for five years previous to his death, and who in the case before us had resisted to the very extreme of the law, should, during the same time, have voluntarily discharged an obligation which it is shown he was both unable and unwilling to fulfill.

The returns upon the fi. fa. and alias fi. fa. sued upon this judgment, afford a satisfactory explanation of the circumstance from which it has been endeavored to deduce a presumption unfavorable to the appellee. That circumstance is the lapse of time between the return upon the alias and the suing out of the pluries fi. fa. upon the judgment. The solution is this: the plaintiff in the judgment having ascertained, by two experiments, the futility of process against the defendants, was unwilling, for the time being, to repeat such experiments, which were not only useless but expensive; but were, perhaps, induced subsequently to renew their efforts, by some change in the condition of parties, from which success was rendered more probable.

The remaining inquiry for consideration relates to the assignment or appropriation of the judgment, and the right of power of Fisher or his attorneys to make such appropriation for the benefit of Hunter. The true character of the transaction *with reference to this judg- [*366 ment is disclosed in its history contained in the deposition of John A. Campbell, Esq., taken in this cause. The facts as therein narrated are substantially these: The law firm of Gordon, Campbell & Chandler, in the year 1837, having in their hands a very large amount of claims of the creditors of Fisher, in order to avoid being sued upon these claims, Fisher arranged a portion of them by giving the drafts specified in the answer of Hunter, and which were indorsed by Hunter. The residue of those claims he arranged by depositing various notes with the firm of Gordon, Campbell & Chandler, to be collected by that firm, and by them to be applied in satisfaction of the debts of Fisher. Amongst the notes so deposited was that executed by Thomas Long, George D. Fisher, and the appellant Hinkle, on which the judgment in the name of Wanzer has been obtained. And it may be in this place remarked, that in exhibit A, filed with the bill of the complainant below and relied on by him, and which exhibit is the receipt of Gordon, Campbell & Chandler, for the notes deposited with them by Fisher, after an enumeration of those notes, is contained the following stipulation, viz.: "The proceeds of all which notes, as they shall be collected, are to be appropriated by us to the payment of any demands we may hold against the said Fisher & Johnson, upon their own debts, and not upon indorsements or liabilities for others." Here, then, we have a contract between Fisher & Johnson and their creditors, represented by Gordon, Campbell & Chandler, who held various claims of those creditors against Fisher & Johnson—a contract founded on the consideration of forbearance as well as on the claims themselves, and therefore beyond the power of Fisher & Johnson to revoke or control—constituting Messrs. Gordon, Campbell & Chandler trustees for the creditors of Fisher & Johnson, and with full power to appropriate the funds provided for their payment.

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It is probable that every one of the notes placed in the hands of Messrs. Gordon, Campbell & Chandler bore upon it the indorsement of Fisher & Johnson, or of John Fisher; but as it is not rational to impute to these persons the design to frustrate their arrangement in the very act of making it, we must conclude that such indorsement, if made, was designed to give more complete control of these notes to the persons to whose management the notes and their proceeds were expressly intrusted. Wanzer was a creditor of Fisher, on a note for $885.89, which note was in the hands of Gordon, Campbell & Chandler, and was provided for and paid out of the funds or notes deposited with the firm; but it would be absurd, as well as unjust to the other creditors of Fisher 367*] & Johnson, to suppose *that to this demand on behalf of Wanzer there was to be specifically appropriated, out of the funds designed for all the creditors of Fisher, an amount equal to double that demand. This pretension, too, would contradict the explicit statements on oath of Messrs. Campbell & Chandler, who held and discharged the note due to Wanzer, who also recovered the judgment against Long, Fisher & Hinkle, and who state that Wanzer's claim had been paid out of other securities of Fisher in their hands, and that Wanzer had no interest whatsoever in the judgment rendered in his name.

Such being the history of this case, it would seem to follow that the right to the judgment against Long, Fisher and Hinkle remained in Campbell & Chandler, to be appropriated by them under their agreement, to the creditors of Fisher, or to be disposed of by Fisher, with their assent. Upon this view of the law, we can perceive no valid objection to the authority given by Gordon, Campbell & Chandler, especially with Fisher's express sanction, to Hunter, the chief creditor of Fisher, to control and apply to his indemnity the judgment sought to be enjoined. No such objection, surely, can be sustained, unless it can be shown that an equitable interest cannot be assigned—a position which could rest upon no principle of justice, and which, at this day, it would be idle to attempt to sustain upon authority.

If the general indorsement by Fisher, accompanied with the delivery of the note of Long, Fisher and Hinkle, to Gordon, Campbell & Chandler, created in the latter an absolute legal right and property in that note, no exception could, of course, be taken to any exercise or application of the right and property so vested in them. If, on the other hand, the indorsement and delivery of the note created a trust for the benefit of the creditors of Fisher, and consequently for the benefit of Fisher himself, by his exoneration pro tanto, there remained in Fisher an equitable interest in the note and in the judgment rendered thereon, which he had a right, with or without the assent of the trustees, to assign or apply in payment of his creditors; such assignment or application he has made, in co-operation with those trustees, to his principal creditor, Hunter, and this act of Fisher in his lifetime has, since his death, been sanctioned by his personal representative.

Notwithstanding the strictness, particularly in the earlier cases in the course of common law, with respect to assignments of equitable interests and choses in action, the books abound with cases showing that the rule at the common law has been much relaxed, or almost disregarded, by the courts of equity, which, from a very early period, have held that assignments for valuable *consideration, of a mere [*368 possibility, are valid, and will be carried into effect upon the same principle as they enforce the performance of an agreement, when not contrary to their own rules or to public policy. In the case of Wright v. Wright, 1 Ves. 412, it is said by Lord Hardwicke: "That such an assignment always operates by way of agreement or contract, amounting, in the consideration of the court, to this: that one agrees with another to transfer and make good that right or interest." By the same judge it is said, in the case of Row v. Dawson, 1 Ves. 331, that for such an assignment no particular words are necessary, but any words are sufficient which show an intention of transferring the chose in action for the use of the assignee.

It has been expressly ruled, that a mere expectancy, as that of an heir at law to the estate of his ancestor, or the interest which a person may take under the will of another then living, or the share to which such person may become entitled under an appointment, or in personal estate, as presumptive next of kin, is assignable in equity.

Hobson v. Trevor, 2 P. Wms. 191; Wethered v. Wethered, 2 Sim. 183; Smith v. Baker, 1 Y. & C. 223; Carleton v. Leighton, 3 Mer. 671; Hinde v. Blake, 3 Beav. 235.

The numerous authorities upon this point are collated in the second vol. of White & Tudor's Leading Cases in Equity, in the note of the editors upon the cases of Row v. Dawson, and Ryall v. Rowles, p. 204, et seq. A decision which bears very directly upon the case before us is that by Sir James Wigram, Vice-Chancellor, of Kirwin v. Daniel, 5 Hare. 500, in which it was ruled: "That where a creditor, in whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for, and debtor to, the creditor."

In the present case, Gordon, Campbell & Chandler were put in possession, by Fisher, of funds to be applied by them to Fisher's creditors, and had, by their written agreement, undertaken so to appropriate those funds. Hunter, a principal creditor of Fisher, is, by information received both from Fisher and from Gordon, Campbell & Chandler, made cognizant of this deposit, and of the purpose to apply it to his indemnity. He accepts the proffer made him, and claims the benefit of it. And by instructions from Fisher, both verbal and written, as is proved in this cause, those depositaries were directed to apply the funds under their control (amongst those funds the judgment against Long, Fisher and Hinkle) to the benefit and protection of Hunter. Upon this single aspect of the transaction, can it be doubted that these depositaries were authorized and bound to conform *to the instructions [*369 thus given? We think that both their authority and duty so to do, admit of no doubt. The decree of the Circuit Court, dismissing the bill of the complainant in that court, being war-

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ranted by the view we have taken of the law and evidence in this case, we order that decree to be affirmed.

Decree of the Circuit Court affirmed, with costs.

ELI AYRES and Thomas N. Niles, Complainants on Cross Bill, Appellants,

v.

HIRAM CARVER, Joseph W. Matthews, James Brown, Jacob Thompson, John P. Jones, William H. Dukes, and John D. Bradford.

(See S. C. 17 How. 591-596.)

Jurisdiction—final decree—what is not.

The complainant sought to establish an equitable title to large tracts of public lands in Mississippi; having offered to comply, as he alleges, with the law providing for the entry and purchase at private sale of the several tracts, but was prevented from making the entries and obtaining the necessary certificates by the illegal and unwarranted acts of the register and receiver at the Land Office. The bill is filed against the defendants, who had subsequently entered and paid for the land, obtained the necessary certificates, and upon which patents have since been issued.

The defendants are alleged to be very numerous, and the court below dispensed with the necessity of making all of them parties; and directed that their interests should be represented by seven of them, on whom process was directed to be served.

After answer served, two of these defendants filed a cross bill, setting up title to the lands in dispute paramount to that of their co-defendants, and asked a decree to that effect, which cross bill the court below, on demurrer, dismissed.

Held that the decree on the cross bill, of the court below, is not a final decree in the suit, and not the subject of an appeal to this court. The appeal is therefore dismissed for want of jurisdiction.

The decree disposes of a proceeding simply incidental, and can only be reviewed on appeal from the final decree disposing of the whole case.

Argued Jan. 2, 1855. Decided March 3, 1855.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

The case is stated by the court.

Mr. S. Adams, for the appellants:

This court has jurisdiction, because this is a cross bill.

A cross bill may be filed in the United States courts. 6 Cond. R. 394. If these courts entertain cross bills, they must be governed by the rules which govern courts of equity generally. Story on Const. 608, sec. 855.

A cross bill is proper when necessary for the purpose of "making a complete decree between all the parties, the plaintiff and defendant, and bringing every matter in dispute completely before the court."

Story, Eq. Pl. p. 415, secs. 391, 392, A, 396; Mitf. 122-124; Dan. Ch. Pr. 1742-1747.

It is a mode of defense.

Story's Eq. Pl. 415, sec. 393; 419, sec. 399.

In Dunn v. Clarke, 8 Pet. 1, an injunction of a judgment at law was allowed, although all parties were citizens of the same state. The court there say that the injunction "is not an original suit," and that where jurisdiction has once attached, no change in residence or condition of the parties can take it away.

See, also, U. S. v. Myers, 2 Brock C. C. 516.

Mr. C. Cushing, for appellees:

The court is without jurisdiction; Ayres and Niles are citizens of the same State and district as the defendants, Brown, Jones, Thompson, Duke, and others; and therefore the United States District Court had no jurisdiction to hear and determine the case made by their bill. As between Ayres and Niles, and Carver, it may be pretended that the cross bill is a continuation of the proceedings under the original bill. In a proper case it might be necessary to a proper determination of the original suit, but this is clearly otherwise as to the co-defendants of Ayres and Niles. As to them, the cross bill is a new suit, instituted to determine questions in which the original claimant has no interest, and which are not necessarily involved in their controversy with him. Opposing claims are controverted between citizens of the same state, and the question of the superiority of one over the other, forms no portion of issue in the original suit, and its determination cannot govern the controversy under it. Should Ayres and Niles defeat all their co-defendants, it would not determine their issue with Carver in their favor, nor if they were beaten would it settle it against them. Their co-defendants, Ayres and Niles, are attempting to settle a new and distinct controversy, the latter claiming under Indian deeds, and the former under government patents. This cross bill is not admitted to be used as a defense, but to assert and secure rights claimed by others. Hence, the cross bill is clearly a new and distinct suit, instituted by two citizens of Mississippi against other citizens of the same State, of which the United States court had no jurisdiction.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the District Court of the United States for the Northern District of Mississippi.

A bill was filed by Hiram Carver, of the State of Alabama, against Joseph W. Matthews, of Mississippi, and some two hundred others, part of them residents of this State, part of Tennessee, but most of them without any residence mentioned, setting forth the Treaty made with the Chickasaw tribe of Indians at Pontotoc Creek, in 1832, confirmed in 1833, by which said tribe ceded to the government all their lands east of the Mississippi River; and also a Treaty with the same tribe, 24th May, 1834, confirmed 1st July, the same year, modifying the provisions of the first one; which Treaties provided for certain reservations of land to be granted in fee to the heads of Indian families; and for the survey and sale of the residue, as in the case of the other public lands, with this difference: that the lands remaining undisposed of at public sale, should be liable to private entry, at $1.25 per acre, for the first year thereafter; at $1 the second; at 50 cents the third; at 25 cents the fourth; and thereafter at 12½ cents per acre.

The bill further states, that down to January, 1843, there remained subject to private entry, at 12½ cents per acre, several tracts of land particularly set forth in a schedule annexed; and that on that day the complainant

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offered to purchase, at the Land Office, all the lands described in the aforesaid schedule, at the price of 12½ cents per acre; and for this purpose made an application to A. J. Edmondson, the Register of said Land Office, but that the said Register illegally refused to permit him to make the said purchase; that he also tendered to J. F. Wray, the receiver, the amount of the purchase money for the tracts he had thus applied to enter, but that he refused to receive the money or issue the proper certificates. 593*] *The complainant further states, that since his application, as above set forth, the register and receiver have permitted the defendants to enter and purchase the several tracts, in sections and subdivisions, and at the times mentioned in the schedule above referred to; and charging that the said defendants had notice of the rights and equities of the complainant at the time.

The complainant then prays to make all the defendants, before enumerated, parties to the bill; and as they are very numerous, that the court will designate a small portion of them to represent the whole body, and upon whom personal service of the subpœna shall be made. And further, that the several entries and purchases made by the defendants be set aside; and that the complainant be permitted to enter and purchase the several tracts at the price of 12½ cents per acre, or that the defendants be decreed to convey the same to the complainant, and to deliver up the possession.

It appears from the record, the court, on the application of the complainant, ordered that the cause should proceed against seven of the defendants, James Brown, Jacob Thompson, John P. Jones, William H. Duke, John D. Bradford, Thomas N. Niles, and Eli Ayres, and upon whom process was afterwards served, and who appeared in said cause.

Separate answers were put in by these defendants, setting forth the entry and purchase at private sale from the register and receiver of the several portions of the tract claimed by each of them, and also patents for the same from the government. To which answers replications were filed.

It further appears from the record, that at this stage of the proceedings; Thomas N. Niles and Eli Ayres, two of the defendants, filed a cross bill, against the complainant, Carver, and all of their numerous co-defendants, setting forth the substance of the original bill, and then charging that they had obtained a title to the several tracts in controversy, or to portions of them, long prior to the title claimed by their co-defendants, setting forth also particularly the source of title. They pray that this cross bill may be heard at the same time with the original bill of Carver, and that any claim he may set up to the several tracts of land claimed by them in the cross bill, may be set aside and annulled; also, that the other defendants to the cross bill be required to produce their patents to any and all of the lands claimed by them; that they may be canceled, and that possession be delivered to the complainants.

It further appears from the record, that afterwards the complainants moved the court that the five co-defendants, who had appeared in the original bill, and the complainant in that bill, be made defendants to represent the other defendants mentioned, *as they are so [*594 numerous as to render it inconvenient to make all of them parties to the suit; which motion was granted.

These defendants were afterwards personally served with process, or appeared in the cause, and demurred to the cross bill; which demurrer was sustained by the court, and the bill dismissed. The case is now before us on an appeal from this decree.

It will have been seen from the brief reference to the original bill in this case, that Carver, the complainant, sought to establish an equitable title to large tracts of the public lands, which had been laid off in townships, ranges and sections, situate in the State of Mississippi; having offered to comply, as he alleges, with the law providing for the entry and purchase at private sale of the several tracts, but was prevented from making the entries and from obtaining the necessary certificates, by the illegal and unwarranted acts of the register and receiver at the Land Office. The bill is filed against the defendants, who had subsequently entered and paid for the land, obtained the necessary certificates, and upon which patents have been issued.

The defendants are alleged to be very numerous, and for this reason the court below dispensed with the necessity of making all of them parties; and directed that their interest should be represented by some seven of them, on whom process was directed to be served.

Without intending to express any definitive opinion in this matter, we must say that it is difficult to see any interest or estate in common among these several defendants that would authorize the rights of the absent parties to be represented in the litigation by those upon whom process has been served, and who have appeared to defend the suit. Their title to the land claimed, by the complainant, is separate and independent, without anything in common, it would seem, that could have the effect to make a decree against one, binding upon the others, or even require them to join in the defense. Smith et al. v. Swormstedt et al. 16 How. 288. We do not intend, however, to pursue this branch of the case.

As it respects the cross bill, it may be proper to observe that the matters sought to be brought into the controversy between the complainants in that, and their co-defendants, do not seem to have any connection with the matters in controversy with the complainant in the original bill. Nor is it perceived that he has any interest or concern in that controversy. These two complainants in the cross bill set up a title to the lands in dispute, which, they insist, is paramount to that of their co-defendants, and seek to obtain a decree to that effect, and to have the possession delivered to them. This is a litigation exclusively between these parties, and with which the complainants *in the original bill should not be em- [*595 barrassed, or the record incumbered. The same matter has been set up in their answer to the original bill against the equitable title claimed by the complainant, presenting the only issue in which he is interested, and upon which the questions between them can be heard and determined.

A cross bill is brought by a defendant in a

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suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties, as to the matters charged in the original bill.

It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject matter of an original independent suit. The cross bill is auxiliary to the proceeding in the original suit and a dependency upon it.

It is said by Lord Hardwicke, that both the original and the cross bill constitute but one suit, so intimately are they connected together. Field v. Schieffelin, 7 Johns. Ch. 252.

The office of a cross bill has been very fully discussed at this term by Mr. Justice Curtis, in the case of Victoire Shields et al. v. Barrow, and I need not therefore pursue it, but refer only to that opinion for the true doctrine on the subject.

It is manifest, from this brief reference to the doctrine, that any decision or decree in the proceedings upon the cross bill is not a final decree in the suit, and therefore not the subject of an appeal to this court, under the 22d section of the Judiciary Act. The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. That appeal brings up all the proceedings for re-examinations when the party aggrieved by any determination in respect to the cross bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the case.

For these reasons the appeal in this case must be dismissed, for want of jurisdiction, and the case remanded to the court below.

Mr. Justice Catron:

In this instance, the bill and cross bill are 596*] but one suit, and *ought regularly to have been heard at the same time, and if an appeal was prosecuted from the decree to this court, by any party who supposed himself to be aggrieved, the whole suit would necessarily be brought up.

Here the cross bill was heard and dismissed, pending the original suit of which it was part. The decree pronounced was partial; and as no appeal lies from any but a final decree, and this decree not being final, the consequence is that this court has no jurisdiction to examine the merits presented and insisted on in the argument. All that we can properly do is to dismiss the appeal, because it brought up nothing. Now, as to the matters discussed in the opinion just delivered, founded on a copy of the proceedings had below, and filed in this court, I can only say that I have no opinion in regard to them, never having even read the record further than to ascertain that this court had no jurisdiction in the supposed case presented to us. I therefore concur in the judgment that the case shall be dismissed for want of jurisdiction, without going further.

Cause dismissed for want of jurisdiction.

THE STATE OF FLORIDA, Complainant, v. THE STATE OF GEORGIA.

(See S. C. 17 How. 478-525.)

Boundary between States—appearance by United States—practice.

In a bill filed in this court by the State of Florida against the State of Georgia to establish a boundary between them, the Attorney-General filed an information, and moved to intervene on behalf of the United States. Held that the Attorney-General may intervene and appear in behalf of the United States, adduce evidence written and parol, examine witnesses, and be heard on the argument, without making the United States a party, in the technical sense of the term.

He will have no right to interfere in the pleading, evidence, or admissions of the States, or of either of them.

In deciding on the boundary line, the court will consider the evidence offered by the United States, or either of the States.

The United States being neither plaintiff nor defendant, are not liable to a judgment against them, nor entitled to one in their favor.

Argued Jan. 9, 1855. Decided Mar. 6, 1855.

ON MOTION of Mr. Attorney-General Cushing to intervene in behalf of the United States.

Now, on the 15th day of December, 1854, Caleb Cushing, Attorney-General of the United States, in his proper person comes here into the court, and for the said United States gives court to understand and be informed, that a certain bill of complaint is pending in said court, by or in behalf of the State of Florida, complainant, against the State of Georgia, defendant, wherein is in controversy a certain portion of the boundary line between said States, and of the lands contiguous thereto.

That by Mariano De Papy, the Attorney-General of the State of Florida, formal notice in the name and behalf of said State has been given to the United States that the matter of said bill is of interest and concern to the said United States.

Whereupon, and in consideration of the interest and concern of the United States maniestly apparent in said bill of complaint, the said Attorney-General of the United States prays the consideration of the court here, and moves the court that he be permitted to appear in said case, and be heard in behalf of the United States, in such time and form as the court shall order.

Mr. Cushing, in favor of the motion, made the following argument:

1. Some little uncertainty has been supposed to remain as to the condition and circumstances of intervention in this court. See U. S. v. Patterson, 15 How. 10.

2. Intervention is the generic designation in the civil law, of the various technical processes, by which, when a suit is pending between two parties, a third party is allowed to interpose for the assertion of some collateral, implicit or ulterior right, adverse to that of either or both of the others, or to defend a responsibility involved in the issue of the controversy.

Dig. L. 42, Tit. I, No. 63; I. L. XLIX. Tit. I, No. 5; Cod. Jur. Civ. L. VII. Tit. 56, Nos. 1-4.

3. Under proper conditions the third party may intervene by the civil law, vel consentiente aut desiderante alterutro litigantium, vel utro-

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que invito et reluctante, Voet, J., ad Pandectas, Lib. 5, Tit. I, secs. 34–38.

4. For the right of intervention stands upon the rule of universal justice, that res inter alios judicatas aliis praejudicare non debere. Vinnii Partit. Juris. L. 4, C. 47; Calvin Lex. Jurid, S. Voc.

5. This doctrine, as one of high equity, enters into all the jurisprudence of christendom. Examples will be given from the laws only of those countries of Europe whose colonies now constitute the United States.

6. In the jurisprudence of Spain intervention exists by the name of terceria.

The intervenor is called tercer opositor, third party opposing, and he is either opositor coadyuvante, appearing in aid of one of the litigants, or opositor escluyente, appearing adversely.

Novis. Recopil. L. 11, Tit. 28, L. 16; La Canada, Jucios, Civiles, p. 359; Tapia, Febrero Novis, Lib. 3, Tit. 7; Bolanos, Curia Filipica, ed. 1853, p. 176, ed. Mejicana, p. 309; Sala, Derecho de Espana, Tit. 12, s. 6; La Serna, Procedimientos Judiciales, tom. 2, p. 55; Escriche, s. Vocc.

7. In France intervention is found eo nomine before judgment, and afterwards, under that of opposition tierce.

Code de Procedure Civile, Nos. 339–341, Nos. 474–479; Dalloz. Dic. s. Vocc.; Merlin, Repert. s. Vocc.; Id. Recueil, s. Vocc. Louisiana Code of Pract. n. 364.

8. In the Netherlands intervention is admitted eo nomine. Vander Linden's Institutes by Henry, bk. 3, s. 19.

9. In England, intervention exists eo nomine in Admiralty and Ecclesiastical Law, and under other names in statute, common law, and equity procedure.

Bouvier's Dic. s. Vocc. sec. 1; In Admiralty, Clerke's prax. Adm. 38, sec. 2; In Ecclesiastical Law, Creighton's Ordo, tit. 14; Donegal v. Chichester, 3 Phillim. Eccl. 586; Chichester v. Donegal, 1 Add. Eccl. 5, 6; Rogers' Eccl. L. 566.

Sec. 3. Intervention, it is affirmed, is "unknown" to the courts of common law and chancery. Chitty's Practice, Vol. II. p. 492.

But that assertion is an error of words. Intervention is the generic name for the case where a third person, not an original party to the suit, intervenes, that is, comes in between the original parties to assert a right of his own. The fact exists some way in every forum in England.

Ex. Gr. Bill of Interpleader in England by Stat. 1 & 2 Wm. IV. ch. 59; Chitty's Prac. Vol. II. p. 343; Ex. Gr. appearance of landlord to defend in ejectment by 11 Geo. II. ch. 9. See Adams on Eject. ch. 19, sec. 5. At common law without Statute:

Ex. Gr. As in the case of a warrantor vouched in.

Fitzherbert, Nat. Br. Vol. I. p. 134; Coke Lit. 101, b; Viner's Abr. Voucher, h. 4.

Sec. 6. In equity is the familiar example of a bill of interpleader.

Daniel Ch. Pr. by Perkins, ch. 32, Vol. III. p. 1707; Mitford's Pleadings, p. 164.

But cases are not wanting in chancery in which the court allow a party to intervene *without* being made a technical party.

Mitford's Eq. Pleadings, p. 178; Weld v. Bonham, 2 Sim. & S. p. 91; Cockburn v. Thompson, 16 Ves. 329; Good v. Bliwit, 19 Ves. 336; S. C. 13 Ves. 397; Angell v. Haddon, 1 Madd. 529; Dunch v. Kent, 1 Vern. 260.

10. All these rules as to admiralty and ecclesiastical proceedings and statute, common law and equity have their analogies in the jurisprudence of the United States.

Adm. Rules Sup. C. Nos. 34 and 43; Conkling's Adm. p. 549, 862; Bishop on Marriage, s. 314, 702; Story's Equity Juris. Vol. II. s. 800; Jackson's Real Actions, p. 14.

The admissions of third parties in equity proceedings frequently without being made technical parties is also recognized in the United States as well as in England.

Story's Equity pleadings, p. 122; West v. Randall, 2 Mason, 195; Wood v. Dummer, 3 Mason, 317.

11. Thus far intervention has been dealt with as a question between private persons. It remains to apply the doctrine to the action of the Attorney-General.

This part of the argument will be confined to proceedings in equity in England or Ireland and in the United States.

12. In England or Ireland the Crown is heard in chancery as follows:

Sec. 1. The Crown may appear by the Attorney-General in reference to a suit pending, and assert any rights of its own, collateral to the case; that is, may intervene without becoming a technical party.

Penn. v. Lord Baltimore, 1 Ves. Sr. 444, 445; Hovenden v. Annesley, 2 Sch. & Lef. 607, 617.

The Attorney-General v. Mayor of Galway, 1 Molloy, 95 (deciding that the Solicitor-General may appear without being made a party).

These cases are particularly applicable to the present one.

In Penn v. Lord Baltimore, the question was of the boundaries between the proprietary provinces of Pennsylvania and Maryland.

In Hovenden v. Annesley, the question was of the King's fee farmer being ousted, under an alleged prior grant from the Crown.

Sec. 2. And where the result of the suit may prejudice the Crown the court cannot proceed, rege inconsulto.

Reeve v. Attorney-General, 2 Atk. 223; Hovenden v. Annesley, 2 Sch. & Lef. 607, 617.

13. In the United States the following steps of induction are suggested, in support of the right of the Attorney-General to appear in the same way as in England or Ireland.

Sec. 1. The Constitution provides that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority." Art. 3, s. 5.

Sec. 2. The word "equity" in the Constitution, carries with it legal consequences, in virtue of which the jurisdiction of the Supreme Court in equity is the same in nature and extent, and so far as applicable, substantially the same in doctrine as the equity jurisdiction and principles of England.

Gordon v. Hobart, 2 Sum. 401, 405; Mayor v. Foulkrod, 4 Wash. C. C. 354; Fletcher v. Morey, 2 Story, 55; Robinson v. Campbell, 3 Wheat.

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212; Parsons v. Bedford, 3 Pet. 433; U. S. v. Howland, 4 Wheat. 115; Story on Const. 506-644; Story's Equity Juris. Vol. I. s. 57; Laws U. S. courts, p. 38, note 1.

Sec. 3. As to practice and procedure, by rule 7, the Supreme Court has declared that it considers the practice of the courts of chancery in England as affording "outlines for its own practice." 2 Dall. 411.

This rule of the Supreme Court was promulgated on the 8th of August, 1791. See Rule Book.

This court had full power to make such a rule either in virtue of its constitutional jurisdiction or by act of Congress. See Act of Sept. 24, 1789, s. 17; 1 Stat. at L. 83.

Sec. 4. The temporary Process Acts of Congress of 1789 and 1791, which severally expired by their own limitation, had prescribed that the forms of process in equity as well as admiralty should be "according to the course of civil law." 1 Stat. at L. 93, 191.

That was giving a generic rule instead of a specific one, for the doctrines and processes of admiralty and equity, though they have their source alike in the civil law, yet are separate streams flowing from the same fountain, and each in many respects differing from the other.

Thus two different States in Europe, composed of fragments of the Roman Empire may have the civil law for the foundation of their jurisprudence, and yet each have added thereto distinct and varying usages of its own. Brown's Civil Law, ch. 1. Processes in admiralty or equity are not identical, though both are according to the civil law.

This want of specific definition and consequent vagueness of the previous acts was corrected by the Process Act of 1792, which provided that the proceedings in equity and admiralty should be "according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law;" subject of course to such alterations and modifications as the competent courts of the United States may in their discretion deem expedient. 1 Stat. at L. 276.

The Statute does not say "courts of equity and courts of admiralty" in England, but that is what it signifies.

Hind v. Vattier, 5 Pet. 398; Manro v. Almeida, 10 Wheat. 473.

But it is the equity practice of the courts of chancery proper, not of the courts or exchequer, which is observed in the courts of the United States.

Smith v. Burnham, 2 Sum. 612; see, also, Story v. Livingston, 13 Pet. 359, 368; Rhode Island v. Massachusetts, 12 Pet. 657, 735, 739; S. C. 14 Pet. 210, 256.

Sec. 5. The practice of the courts of chancery of England is adopted here, not without qualification, and only so far as it may reasonably be applied consistently with local circumstances; and its rules are analogies rather than positive rules in the United States.

Rules of the circuit courts in equity passim and especially Rule 90.

Emerson v. Davies, 1 Wood. & M. 21, 24.

Sec. 6. There is allusion in one case to the question how far the English law as to public charities applies in the United States, and what are the relations of the Attorney-General to such a question here, but the point is not material to the present matter.

See Baptist Association v. Hart's Ex'rs, 4 Wheat. 1.

Sec. 7. From the general premises adduced it follows that, there being no express rule or decision of this court to the contrary, the Attorney-General may in equity intervene here for the United States in the same manner that he does for the Crown in England in the High Court in Chancery, unless there be something in the Constitution or in Acts of Congress to forbid.

14. Analysis of the theory of the Constitution and of the relation of the general government to a case like this will show, that instead of its being forbidden here, stronger reasons exist for the proposed form of intervention by the Attorney-General here than in England.

Sec. 1. The Act of Congress establishing the office of Attorney-General makes it his duty "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned."

1 Stat. at L. 93.

The cases are all "in which the United States shall be concerned;" not suits in which the United States are a party eo nomine, but in which they are "concerned."

He is "to prosecute and conduct" such suits.

These words very imperfectly describe his duties. In truth, he is to appear in all cases before this court in which the United States are concerned, and represent the rights or interests of the United States in such mode and in such relation to each case as the rules of law may in the judgment of this court authorize and prescribe.

Thus, in suits against collectors of customs, for alleged unlawful levy of duties, the Attorney-General defends in the name of the Collector.

Ex. Gr., in Ring v. Maxwell, 17 How. 147, of this term, he appears for the defendant nominally, but in fact for the United States.

So where in a plea of land between two individuals the United States are concerned as grantor of one of them, he appears through that party.

Ex. Gr., at the last term in Renault's Heirs v. Ruggles, 16 How. 242, in Choteau v. Molony, 16 How. 203, and in Clark v. Braden, 16 How. 635, the Alagon Grant.

So even where the United States are the nominal plaintiffs but some private person pursues his remedy by mandamus in their name, but the United States are "concerned" in the case of the defendant, the Attorney-General appears in the name of the latter, but really for the United States.

Ex. Gr., Kendall v. U. S. 12 Pet. 524, and Decatur v. Paulding, 14 Pet. 497. So, also the present term in the case of the U. S. v. Guthrie, 17 How. 284.

These facts constitute a recognition of a right of intervention by the Attorney-General in suits to which the United States are not a party, but in which they are "concerned," and show that the right here is maintained not only by precedents in chancery or usage as in England, but also in virtue of express terms of Acts of Congress.

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Sec. 2. If the Government cannot be heard in this case by intervention it cannot be heard at all.

The United States cannot be made a party in any form to an original suit in this court between two states.

The entire clause of the Constitution as to this (a portion of which has been quoted before) is as follows:

"The judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction, in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

In construction of this it is well settled that no suit lies against the United States as a technical party defendant.

The Federalist, No. 81; 2 Story on Constitution, sec. 1675; Cohens v. State of Virginia, 6 Wheat. 411, 412; Sargent on the Const. 45, 927.

In this case, it being an original action, the court can have jurisdiction of the United States only by the government voluntarily appearing as plaintiff or defendant.

But if the United States enter the suit as a technical party plaintiff, by bill of interpleader or otherwise, that would be to put an end to the suit, according to the constitutional doctrine of parties.

The court has jurisdiction in this case only in virtue of the clause of the Constitution which authorizes it to adjudicate on "controversies between two or more states."

To be sure, afterwards it is said, that "in all cases . . . in which a state shall be party the Supreme Court shall have original jurisdiction." But this is not the delegation of a new class of jurisdictions as to subject matter. The clauses are to be taken together so as to signify that the original jurisdiction shall embrace either of the foregoing enumerated cases in which the jurisdiction attaches to a state.

The court is not empowered by the Constitution to entertain an original suit between the United States and a state, or the United States and two states.

It is the settled rule of law that where the jurisdiction of the courts of the United States depends on the character of the parties, and each party, either plaintiff or defendant, consists of a number of individuals, each one must be competent to sue or be sued in those courts; and otherwise jurisdiction cannot be entertained.

Ward v. Arredondo, Payne C. C. 410; Strawbridge v. Curtiss, 3 Cr. 267; Wormley v. Wormley, 8 Wheat. 421, 451, and note; Conklin's Jurisdiction, p. 77; Curtis on Jurisdiction, Vol. 1. s. 74.

Of course the right now claimed for the United States is a necessity of justice.

15. If there were no precedents to justify the right claimed for the Attorney-General, then the court should make one.

Taylor v. Salmon, 4 Mylne & C. 141.

This court has repeatedly decided that it has ample power to regulate chancery practice for the new and purely American question of suits in equity between states, subject of course to the control of Congress in this respect.

Grayson v. State of Virginia, 3 Dall. 320; Huger v. State of South Carolina, 3 Dall. 339; State of New York v. State of Connecticut, 4 Dall. 1; State of New Jersey v. State of New York, 5 Pet. 283; State of Rhode Island v. State of Massachusetts, 12 Pet. 657.

It can as well provide rules in equity, according to the exigencies of the case, for this first example of the more complex contingency of the collateral interest of the United States, in a suit between two states, as it could for the primary and simple contingency of the suit between two states.

16. It will not answer to say that the United States may appear in the name of the State of Florida.

Sec. 1. If so, then the condition of the United States in the premises is precarious, depending on the discretion of the State of Florida, or of any other state which may stand in like circumstances.

Self-defense on the part of the government will no longer be its right, but a favor to be granted or withheld by any litigant state. The essence of a right is, that it may be exercised contentiously, adversely.

Sec. 2. The proposed appearance for the United States is not a volunteer act; for the State of Florida demands of the general government to intervene.

But a case might arise in which neither of two or more litigant states desired the presence of the United States.

The matter before the court is therefore of a legal principle to be determined, not of a privilege to be conceded, or of one enjoyed indirectly under favor of a state.

Sec. 3. Nor is the possibility of distinct and separate rights on the part of the United States a suggestion or a supposition merely.

The United States have granted certain lands by patent to individuals, or by statute cession to Florida, which, according to the claims of Georgia, belong to her, not to the United States. Here is responsibility of the latter to its grantees.

The warrantor comes in because of his responsibility to his grantee, but also in order to see that the case is fully and well tried with all just defenses fully before the court, either technical or on the merits.

Sec. 4. The rights of the United States might be prejudiced in a suit between two states through the forms of law.

The Constitution provides (art. 4, sec. 3) as follows:

"3. New states may be admitted by the Congress into this Union; but no new state

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shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states or parts of states without the consent of the Legislatures of the states concerned as well as of the Congress."

By the Constitution also (art. 1, sec. 10), "no state shall, without the consent of Congress, . . . enter into any agreement or compact with another state."

These two clauses of the Constitution are in pari materia, and to be construed together; and they establish that two states cannot change their common boundary without consent of Congress.

The United States had a general interest in the question of the boundaries of states because of sundry political or legislative relations of the subject: as, for instance, apportionment of members of the House of Representatives, election districts, judicial districts and many other things having reference to the boundaries of states.

Treaty rights may likewise be involved as in the present case where the line in dispute is defined by the Treaty of 1783, between the United States and Great Britain, art. 2 (8 Stat. at L. p. 81), and by the Treaty of 1795, between the United States and Spain, art. 2 (8 Stat. at L. p. 140). These Treaties are a part of that supreme law which it is the peculiar duty of the United States, its officers and its tribunals, to maintain and execute.

Special Acts of Congress may be in question as here in the present case.

By the Act of March 3, 1845, for admitting the State of Florida into the Union (5 Stat. at L. p. 743, ch. 68, sec. 5), "said State of Florida shall embrace the Territories of East and West Florida which by the Treaty of Amity, Settlement and Limits, between the United States and Spain on the 22d day of February, 1819, were ceded to the United States.

And by the 7th section of that Act the State of Florida was admitted into the Union upon the express condition that the State shall never interfere with the primary disposal of the public lands within the State, nor levy any tax on the same whilst remaining the property of the United States.

The Attorney-General, in proposing to intervene here to protect the interests of the United States, desires to do so not as a technical party; not as joining with the one or the other party; not in subordination to the mode of conducting the complaint or defense adopted by the one state or by the other, nor subject to the consequences of their acts or any possible mispleading, insufficient pleading, omission to plead, admission or omission of fact by either or both; but free to co-operate with, or to oppose both or either, and to bring forth all the points of the case according to his own judgment whether as to the law or to the fact; for ex facto oritur jus.

As the States of Florida and Georgia cannot, by any direct agreement or contract between them, without the consent of Congress, change the boundary of Florida as established by the said Act of Congress, it follows that they ought not to be permitted to alter that boundary in the suit pending either by possible mispleading, mistake in pleading, omission of pleadings or direct confession, or by omission of evidence, by any of which means the true, faithful and full view of all the facts pertinent to the question might be withheld from the view and judgment of the court.

It is on this consideration, among others, that the whole doctrine of equity, as to the necessity of proper parties in court, stands. Each party interested is to defend his own rights lawfully, according to his view of their merits without being prejudiced through the acts or omissions of any co-party.

See Story's Equity Pleadings, ch. 4.

Sec. 5. If the United States are not present, no decree in the case can be made to the prejudice of the United States.

17. The claim of the Attorney-General is not a question of prerogative, as in England, but of rights of the United States under the Constitution.

Sec. 1. In England the Crown is the political representative of various public rights; thus criminal prosecution and prerogative writs are in its name. Here certain correspondent rights delegated by the Constitution are represented by and asserted in the name of the United States.

Now, in England, not only may the Crown sue, as the United States may here, but the Crown can in effect be sued as by the process called petition of right, in which the Attorney-General becomes a party defendant for the Crown.

Finch's L. 243; Cooper's Eq. Pl. 31; Mitford's Eq. Pl. 31; Reeve v. The Attorney-General, 2 Atk. 223; Calvert on Parties, 301, 308; Rhode Island v. Massachusetts, 12 Pet. 657, 749; 1 Blackst. Com. 243; see note in Tucker's edition; Com. Dig. Prerog. D. 78.

But no such remedy exists here against the United States.

See Story's Eq. Pl. sec. 69, note.

Of course the necessity is greater than where any individual is sued, in whose person rights of the United States are involved the Attorney-General should be permitted to intervene, otherwise the United States are without legal means to defend the rights of the United States in this respect, which, though in the technical language of the law they may be prerogative rights, in truth, are rights of the several States, and of their people, the custody of which they have by the Constitution delegated to the United States.

Messrs. J. McPherson Berrien and George E. Badger, for the State of Georgia:

The object of the motion as appearing on its face, and as explained by the brief of the Attorney-General, is:

That he on the part and as the representative of the United States may be made a party to this suit in fact but not in form; may exercise all the rights of a party without becoming a party, may be, without seeming to be, party.

On the part of the State of Georgia, it is insisted that the motion cannot be granted because:

First. Under the Constitution this court has, not, and cannot have, any jurisdiction of this cause but as a controversy between states of the Union; and the appearance of any other party therein, would determine the jurisdiction and put the cause out of court.

Second. To allow the United States to be

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come in fact a party without appearing on the record to be one, would be a mere evasion of the constitutional inhibition—a violation in substance though not in form—and therefore utterly unworthy of this high constitutional court.

Third. If the motion should be granted, the United States would judicially appear on the record to be a party, though not made so by the process or in the manner usual in this court, and therefore the jurisdiction of the court would at once be gone.

Fourth. There is no precedent or example of any such intervention as is here sought to be obtained.

We put aside all the references in the learned brief to proceedings under the civil law, as being utterly irrelevant to the question; for that law neither gives the rule of judgment nor regulates the practice of this court. This cause is one of equity jurisdiction governed as to the principles of decision by the law of courts of equity, and not by the statutes and treaties of the United States, and as to the course of proceeding by the practice of the Court of Chancery in England in subordination to the paramount authority of the rules of this court.

In England no intervention, whether voluntary or involuntary, if that term may be properly used in this connection, is known except by the intervenor becoming a party and submitting his rights in the matters in dispute to the decision of the tribunal so that its judgment shall conclude those rights.

On the contrary, where third persons are found to have such an interest in the subject of litigation that they ought to be heard before a judgment, these persons are entitled to be made parties to the intent that all persons in interest may be concluded by the final award of the tribunal. This is emphatically true in regard to equity pleading in the court of chancery, and not less in regard to the Crown than to private persons.

This is abundantly evident from cases cited by the Attorney-General in support of this motion. For example: Penn v. Baltimore, 1 Ves. Sr. 444, was a bill for specific execution of an agreement to settle the boundaries of their provinces in America. When the cause came on "it was ordered to stand over, that the Attorney-General should be made a party." This he declined doing, and in answer to an argument that the Planters, etc., ought to be made parties, Lord Hardwicke says (page 449): "Suppose two bordering manors had been granted out in tail, in recompense of services, the reversion in fee to the Crown, in a suit between the Lords concerning the boundaries, it is not necessary to make the King or tenants parties to this suit. Indeed, the Crown would not be bound to that agreement or decree, but it is still binding between the parties." The question was, whether the Crown had such an interest as made it improper to proceed without its representative being before the court, that is, without being made a party.

In Hovenden v. Annesley, 2 Sch. & Lef. 607, there were two grants from the Crown for the same lands, reserving different rents, and an injunction was moved to put the grantee at the lower rent into possession, which would have been manifested to the prejudice of the Crown. Lord Redesdale said: "The court could not, rege inconsulto, make a decree in such a case." He doubted the jurisdiction of the chancery over the subject, and inclined to believe that it belonged to the Court of Exchequer." "It is clear, therefore," said His Lordship (p. 17), "that this court could not proceed without the Attorney-General, and I doubt whether it could proceed if the Attorney-General were a party." "I take it, however, to be clear that the King's fee farmer cannot be ousted under a former grant from the Crown without the King being a party, unless it be for the benefit of the King that he should be so ousted. However, if I should be of opinion, on the rest of the case, that there is no ground for release, there is no use in turning the parties around to make the Attorney-General a party to this suit." His Lordship accordingly found "on the rest of the case" what he sought, and dismissed the bill.

In Attorney-General v. Galway, 1 Molloy, 95, we learn, at page 101, that Lord Manners who heard the cause said: "if the Crown may have any resulting trust for itself, the Solicitor-General ought to have been made a defendant to protect the pecuniary interest of the Crown against the charity," and Ld. Ch. Hart, on the re-hearing, at page 106, thus expressed himself: "When the Attorney-General sues for a general public purpose, the Crown is no further concerned, but as the King has his private property as an individual, if any interest of that kind may come in question in such a suit, then the King as an individual must be represented by the Solicitor-General, who may be a defendant. From all which it is evident that "rege inconsulto" means not without having a consultation or conference between the judge and the King's counsel, or hearing an argument or motions from such counsel as an intervenor in a cause to which the King is not a party, but without the King becoming a party to the cause, in the only way consistent with his royal dignity, that is, through his proper representatives, the Attorney or Solicitor-General, according to the nature of his interest.

Fifth. The United States is not "concerned" in the questions involved in this cause, within the meaning of the Act of Congress, prescribing the duties of the Attorney-General. That term means concerned in interest, and is exactly equivalent to "interested," and cannot be used in any other meaning in reference to an impersonal sovereignty like the United States.

Here no interest of the United States appears on the record. It is a question merely as to the boundary between two states. However resolved, the United States gains no right and suffers no loss, neither of the states holding under the United States as a tenant, or owing any payment or other duty to the United States for or on account of her possession or jurisdiction.

The United States have no interests, real or apparent, and therefore are not a necessary or even a proper party to the controversy.

Sixth. Supposing the United States to have some interest, indirect, consequential and contingent, in the decision of the question in the cause; and supposing that in England such an interest of the Crown might be represented by the Attorney-General there, it does not follow

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that the Attorney-General here can assume virtute officii to represent such interests.

The offices, though bearing the same name, are very different in their character, and have very different relations to the sovereignties of the respective countries. Here the office is created by statute, and all its powers are conferred by statute, and the officer represents the public, and has authority to represent the public and to interfere in its affairs only when, where, and how, that law authorizes. There is no place for inference; there are no customs or ancient precedents; there is no common law by which powers may be conferred or implied. Whatever he has not by statute, he has not at all. Between this office and that of the Attorney-General in England, there is a wide difference in all these respects. The latter is an ancient officer, with many powers and privileges depending on no statute grant. He represents, in a peculiar manner, not the public, but a personal sovereign, in his high political character, as the supreme head of the state, and his relations to him are such that when the Attorney-General speaks in a judicial tribunal, his words are the words of the King himself. He is thus distinguished from all other representatives of the Crown. This distinction is well put by Mr. Justice Yates, in the case of Wilkes, 4 Burrough, 2570, in these words: "The Attorney-General is the officer of the King; the master of the Crown office, the officer of the public. Informations exhibited by the King's Attorney-General are considered as the King's own prosecutions, and are called 'declarations for the King.' Therefore no costs are paid upon them. In the other informations, costs are often payable," hence it follows that here no one can represent the United States in any judicial court but under the authority of Congress by direct provision of law. The President appoints the officer, but the office must be created and its duties and powers declared by law, and therefore, the Attorney-General has no right to represent such interests of the United States anywhere, because no law authorizes him.

Seventh. Even an Act of Congress could not enable him to intervene for the United States in this suit in this court. For if made a party, either the court would proceed with a party not a state before it, in which case, according to the Constitution, this court cannot hold original cognizance, or dismiss the bill for want of jurisdiction; and thus a jurisdiction conferred by the Constitution expressly and exclusively upon this court, would be withdrawn from it by force of an Act of Congress and in defiance of the Constitution.

If the United States have any consequential interest which ought to be represented, the court cannot, as did Lord Chancellor in Reeve v. The Attorney-General, 2 Atk. 223, dismiss the bill in order that proceedings might be taken in another court, for there is no such court—this court, and this only, having cognizance of the controversy between the two states; and the court cannot decline the exercise of its exclusive jurisdiction over the two principal parties because of such incidental and subordinate interests.

We submit, as a necessary and inevitable consequence, that the court must proceed with the cause between the present parties without intervention, formal or informal, of any third party whatever.

Messrs. James D. Wescott and Reverdy Johnson, for the State of Florida:

We insist—1. That the jurisdiction of this court in this case is founded exclusively upon those clauses of the federal Constitution which declares that "the judicial power of the United States shall extend" to controversies between two or more states, in connection with that power that provides, that "in those cases (referring to the cases enumerated in the Constitution as being of federal judicial cognizance) in which a state shall be a party, the Supreme Court shall have original jurisdiction."

2. That the clauses of the federal Constitution cited, extending "the federal, judicial power," "to controversies between two or more states," refer exclusively to cases in which states only are parties therein, and make these cases a distinct and separate class from all the other cases enumerated in the Constitution; and they do not reach or apply to any other cases either in law or equity wherein there is a co-plaintiff or co-defendant other than the state with a state or states.

3. That if the court should hold that the joinder of another party, not a state, with either of the parties as a co-defendant, would not affect the jurisdiction of this court over the present case; then it is insisted that the complainant cannot, without an Act of Congress authorizing the same, make the United States a party to this bill. This court does not possess the power to order (either ex mero motu, or upon the express application of said Attorney-General, or at the instance of either or both of the litigant states), such joinder of the United States as a party complainant or party defendant in this case.

4. That insomuch as the United States in the admission by the Act of Congress of the Floridas as a sovereign and independent State into the federal Union, yielded to that State all rights of sovereignty or "eminent domain," they had within the boundaries of the States as declared by the state Constitution, and thereby became a mere proprietor of unsold and ungranted lands included within said boundaries; they have not now any higher or other prerogatives in reference to this "controversy" than a citizen or alien proprietor of land situate on the territory in dispute between the two litigant States, the titles of said proprietors of such land being derived from the United States; and consequently, if the claim of the State of Georgia is sustained, will be destroyed; nor than the several thousand residents of said territory who have up to this time been considered resident citizens of the State of Florida, and have exercised the rights, privileges and immunities of such citizenship, and whose state allegiance will be changed by a decree of this court confirming the claim of the State of Georgia; and the complainant insists that the rights and interests of all said proprietors (including the United States), and of said residents, are in this regard entirely subordinate to those of the State of Florida now in contest, and are subject to her action as her political sovereign in the premises.

5. That by reason of the anomalous character of a suit at law or in equity "between two

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or more (sovereign and independent) states;" involving their rights of sovereignty as well as of property, instituted in virtue of a federative compact before a judicial tribunal by legal process summoning a defendant state to the bar of the court to submit her claims and abide by the arbitrament and decree of that tribunal, from which decision there is no appeal. Most of the rules of procedure in ordinary cases before the courts of common law or of chancery in England are inapplicable to this suit, ineffective as aids to counsel in its prosecution or defense, and useless to the court in its investigation of the "controversy," or in its arbitrament and decision; and by consequent additional different and extraordinary formulæ of procedure must be prescribed by the court; and conformed to by the parties in every "controversy" in this court "between two or more states."

6. That in the adoption of such necessary additional, different and extraordinary rules of procedure "in controversies between two or more states," brought before this court, it is not restricted to guides furnished by the rules of procedure of the English common law or chancery tribunals (wherein no like case is to be found), nor in the determination of such case is this court limited to the consideration of the principles supplied by the English system of English jurisprudence to which such case is unknown, and the principles controlling it are above the reach and beyond the scope of those systems. This honorable court rightfully may, in a case so peculiarly and exclusively American, and its jurisdiction whereof is so entirely based on the constitutional compact between the States, devise, adopt and enforce such original rules of procedure appropriate to such cases as in its judgment may best tend to "establish justice," insure domestic tranquillity, and promote the other declared objects of that compact; and this though there cannot be cited any transatlantic precedent or example therefor.

7. That, as there are involved in this case not only the rights of sovereignty and of property in controversy between the two litigant States, but also important rights and interests of other not parties in the record, founded on the identical facts and law to be submitted to the court as the basis of its decree therein, all which rights and interests of those not parties will necessarily be affected if not conclusively determined by said decree. The complainant concedes the rightfulness and propriety of this court so devising the rule of procedure in this case as to allow those immediately interested, though not parties, the privilege and opportunity of maintaining and defending their rights and interests and of adducing proofs, and of being heard in argument before this court to that end; and that the same should be done in such liberal form and to such full extent as may be consistent with the progress of the cause without embarrassment and prejudice to the parties as will not abridge or compromit the rights of the respective parties to the exclusive control and management of the mode and means of enforcing their own rights and interest; and the complainants also concede that insomuch as the title of the United States to some 1,200,000 acres of unsold and ungranted lands claimed to be, or usually designated as "public lands of the United States," of the estimated value of $1,200,000, and of which the United States are the constitutional trustees for the several States of the confederacy and the people thereof; and insomuch as the liability of the federal Treasury to refund large amounts paid into it as purchase money by patentees of the United States for lands heretofore sold by the United States to them, and also to pay large sums for improvements and damages, will be affected, and in some respects determined conclusively, if the claims made by Georgia (suggested in the bill of complaint) be established by this court, which amounts and sums will probably exceed $1,500,000, this complainant, whilst he denies any special prerogative appertaining to the United States as a government or any special privilege of the Attorney-General of the United States, virtute officii, to interfere in this case except as aforesaid, yet because of all said premises above set forth, and especially for the reason that the United States cannot be made a party complainant or defendant in this case, doth concede that the rules of procedure so adopted by this court may rightfully and properly be extended in this case as aforesaid in the United States, and that the Attorney-General may be allowed to "intervene," as he hath applied to the court, under such restrictions as above suggested by complainant or such others as may be deemed proper by this honorable court.

8. That if it be held by this honorable court that the complainant is in error as to the above points presented, and that the United States may be made a party complainant or a party defendant in this case, either without an Act of Congress therefor or by authority of an act that may be passed therefor, and that such joinder is necessary for the protection of the admitted important rights and interests of the United States involved therein as aforesaid, then this complainant respectfully insists that if no Act of Congress be requisite to enable them to be made such party, this honorable court ought not to dismiss the said bill of complaint, for that the complainant did not join them as such party in said bill, but should state proceedings and the decision in the case until the same be done under an order of this court thereof; and if such Act of Congress be deemed proper and necessary that a suggestion thereof be made in this case by this honorable court in an order to stay proceedings in the case until the Executive and Legislative Departments of the federal Constitution may be enabled to adopt such course in that behalf under the application of this complainant as they may respectively deem advisable to that end, or otherwise in the premises.

Mr. Chief Justice Taney delivered the opinion of the court:

The court proceed to dispose of the motion made by the Attorney-General for leave to be heard on behalf of the United States, in the suit between the State of Florida and the State of Georgia.

*It appears that the boundary line between these two States is in controversy and a bill has been filed in this court by the State of Florida to ascertain and establish it. [*491

The Attorney-General has filed an informa-

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tion stating that the United States are interested in the settlement of this line; that the territory in dispute contains upwards of 1,200,000 acres of land, and was ceded to the United States by Spain as a part of Florida; and that the United States have caused the whole of it to be surveyed as public land, and sold a large portion of it, and issued patents to the purchasers. And upon these grounds he asks leave to offer proofs to establish the boundary claimed by the United States and to be heard in their behalf on the argument.

The motion is resisted on the part of the States, and the question has been fully argued by counsel for the respective parties. And as it is, in some degree, a new question, and concerns rights and interests of so much importance, we have taken time to consider it.

If the motion was merely to be heard at the argument, there would, we presume, have been no opposition to it on the part of the States. For it is the familiar practice of the court to hear the Attorney-General in suits between individuals, when he suggests that the public interests are involved in the decision. And he is heard, not as counsel for one of the parties on the record, but on behalf of the United States, and as representing their interests. This was done in several instances at the last term, where the United States had sold lands as a part of the public domain, which were claimed by individuals under grants alleged to have been made by France or Spain previous to the cession to this country.

In these cases, however, they were argued by the Attorney-General upon the evidence produced by the respective parties. No new evidence was offered on behalf of the United States. And the objection now made is, that he cannot be permitted to adduce evidence in the case, unless the United States are parties on the record; and that they cannot, under the provisions of the Constitution, become parties in this court, in the legal sense of the term, to a suit between two States.

We proceed to consider this objection.

The Constitution confers on this court original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. And it is settled by repeated decisions, that a question of boundary between States is within the jurisdiction thus conferred.

But the Constitution prescribes no particular mode of proceeding, nor is there any Act of 492*] Congress upon the subject. *And at a very early period of the government a doubt arose whether the court could exercise its original jurisdiction without a previous Act of Congress regulating the process and mode of proceeding. But the court, upon much consideration, held, that although Congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases, as fully as in any other court, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred; that it was a duty imposed upon the court; and in the absence of any legislation by Congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given.

There was no difficulty in exercising this power where individuals were parties; for the established forms and usages in courts of common law and equity would naturally be adopted. But these precedents could not govern a case where a sovereign State was a party defendant. Nor could the proceedings of the English Chancery Court, in a controversy about boundaries, between proprietary governments in this country, where the territory was subject to the authority of the English government, and the person of the proprietary, subject to the authority of its courts, be adopted as a guide where sovereign States were litigating a question of boundary in a court of the United States. They furnished analogies, but nothing more. And it became, therefore, the duty of the court to mold its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this, it was without doubt one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained.

It is upon this principle that the court appear to have acted in forming its proceedings where a State was a party defendant. The subject came before them in Grayson v. Virginia, 3 Dall. 320. And the court there said that they adopted, as a general rule, the custom and usage of courts of admiralty and equity, with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable. And they at the same time passed an order directing process against a State to be served on the Governor or Chief Magistrate, and the Attorney-General of the State. This was in 1796. And the principle upon which its process was then framed, as well as the mode of service then prescribed, has been followed ever since, with this exception, that in subsequent cases the chancery practice, and not the admiralty, is regarded as furnishing the best analogy. But the power and *propriety of deviating from the or- [*493 dinary chancery practice, when the purposes of justice require it, have been constantly recognized; and were distinctly asserted in the case of Rhode Island v. Massachusetts, 14 Pet. 247, and again in the same case, in 15 Pet. 273, and was recognized in the case of New Jersey v. New York, 5 Pet. 289.

We proceed to apply these principles to the case before us. It is manifest, if the facts stated in the suggestion of the Attorney-General are supported by testimony, that the United States have a deep interest in the decision of this controversy. And if this case is decided adversely to their rights, they are without remedy, and there is no form of proceeding in which they could have that decision revised in this court or anywhere else. Justice, therefore, requires that they should be heard before their rights are concluded. And if this were a suit between individuals, in a court of equity, the ordinary practice of the court would require a person standing in the present position of the United States, to be made a party, and would not proceed to a final decree until he had an opportunity of being heard.

But it is said that they cannot, by the terms of the Constitution, be made parties in an origi-

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nal proceeding in this court between States; that if they could, the Attorney-General has no right to make them defendants without an Act of Congress to authorize it.

We do not, however, deem it necessary to examine or decide these questions. They presuppose that we are bound to follow the English chancery practice, and that the United States must be brought in as a party on the record, in the technical sense of the word, so that a judgment for or against them may be passed by the court. But, as we have already said, the court are not bound in a case of this kind to follow the rules and modes of proceeding in the English chancery, but will deviate from them where the purposes of justice require it, or the ends of justice can be more conveniently attained.

It is evident that this object can be more conveniently accomplished in the mode adopted by the Attorney-General, than by following the English practice in cases where the government have an interest in the issue of the suit. In a case like the one now before us, there is no necessity for a judgment against the United States. For when the boundary in question shall be ascertained and determined by the judgment of the court in the present suit, there is no possibile mode by which that decision can be reviewed or re-examined at the instance of the United States. They would, therefore, be as effectually concluded by the judgment as 494*] if they were parties *on the record, and a judgment entered against them. The case then is this: here is a suit between two States in relation to the true position of the boundary line which divides them. But there are twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the court. For their interests may be different from those of either of the litigating States. And it would hardly become this tribunal, intrusted with jurisdiction where sovereignties are concerned, and with the power to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. A suit in a court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country. It is a new case, and requires new modes of proceeding. And if, as has been urged in argument, the United States cannot, under the Constitution, become a party to this suit, in the legal sense of that term, and the English mode of proceeding in analogous cases is therefore impracticable, it furnishes a conclusive argument for adopting the mode proposed. For otherwise there must be a failure of justice.

Indeed, unless the United States can be heard in some form or other in this suit, one of the great safeguards of the Union provided in the Constitution would in effect be annulled.

By the 10th section of the 1st article of the Constitution, no State can enter into any agreement or compact with another State, without the consent of Congress. Now a question of boundary between States is in its nature a political question, to be settled by compact made by the political departments of the government. And if Florida and Georgia had by negotiation and agreement proceeded to adjust this boundary, any compact between them would have been null and void without the assent of Congress. This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States which might affect injuriously the interests of the others. And the right and the duty to protect these interests is vested in the general government.

But, under our government, a boundary between two States may become a judicial question, to be decided in this court. And when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the court; and that decision, when pronounced, is conclusive upon the United States, as well as upon the States that are parties to the suit. *Now, as in a case [*495 of compact, it is by the Constitution made the duty of the United States to examine into the subject, and to determine whether or not the boundary proposed to be fixed by the agreement is consistent with the interests of the other States of the Union; it would seem to be equally their duty to watch over these interests when they are in litigation in this court, and about to be finally decided. And if such be their duty, it would seem to follow that there must be a corresponding right to adduce evidence and be heard, before the judgment is given. For this is the only mode in which they can guard the interests of the rest of the Union, when the boundary is to be adjusted by a suit in this court. For if it be otherwise, the parties to the suit may, by admissions of facts, and by agreements admitting or rejecting testimony, place a case before the court which would necessarily be decided according to their wishes and the interest and rights of the rest of the Union excluded from the consideration of the court. The States might thus, in the form of an action, accomplish what the Constitution prohibits them from doing directly by compact. Nor is this intervention of the United States derogatory to the dignity of the litigating States, or any impeachment of their good faith. It merely carries into effect a provision of the Constitution which was adopted by the States for their general safety; and moreover, maintains that universal principle of justice and equity which gives to every party whose interest will be affected by the judgment, the right to be heard.

Upon the whole, we think the Attorney-General may intervene in the manner he has adopted, and may file in the case the testimony referred to in the information, without making the United States a party, in the technical sense of the term; but he will have no right to interfere in the pleading, or evidence, or admissions of the States, or of either of them. And when the case is ready for argument, the court will hear the Attorney-General, as well as the counsel for the respective States; and in deciding upon the true boundary line, will take into consideration all the evidence which may be offered by the United States, or either of the States. But the court do not regard the United States, in this mode of proceeding, as either plaintiff or defendant, and they are, therefore, not liable to a judgment against them nor entitled to a

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judgment in their favor. We consider the Attorney-General as the proper officer to represent the United States in this court; and that the general government, in bringing before us for consideration the rights and interest of the Union in the question to be decided, does nothing more than perform a duty imposed upon it by the Constitution. And, as the mode in which 496*] that duty is to be performed *here is not regulated by law, but must depend upon the rules and regulations prescribed by the court, we shall not embarrass the proceedings by endeavoring to conform them strictly to English precedents and pleadings, and regard the mode in which the information on behalf of the United States has been presented, to be the simplest and best manner of bringing their interest before the court, and of enabling it to do justice to all parties whose rights are involved in the decision.

Dissenting: Mr. Justice Curtis, Mr. Justice McLean, Mr. Justice Campbell, and Mr. Justice Daniel.

Mr. Justice Campbell, dissenting:

I dissent from the opinion of the court. The Attorney-General suggests to the court that the State of Florida has filed here an original bill against the State of Georgia, for a settlement of the boundary between the States. He represents that the line claimed by Florida is that which the United States have recognized in the surveys, sales and other operations of the Land Office, and that the line of Georgia diminishes the domain of the United States in Florida twelve hundred thousand acres. "Whereupon, and in consideration of the interest and concern of the United States," he moves for leave "to appear in said cause, and be heard in behalf of the United States, in such time and form as the court will order." The condition of the cause, in relation to which the motion is made, is, that a bill and answer have been filed, but no issue exists, and none of the ulterior stages in the course of the cause attained; nor has there been any motion to the court requiring an examination of the record; and so the motion, as understood from its terms, is certainly premature. But the words "to appear in said cause and be heard in behalf of the United States," very indifferently explain the significance of the motion. The application is, that the Attorney-General may "intervene," not as a technical party; not as joining with the one or other party; not in subordination to the mode of conducting the complaint or defense adopted by the one State or the other, nor subject to the consequences of their acts, or of any possible mispleading, insufficient pleading, omission to plead, or admission or omission of fact by either party, or both; but to co-operate with or to oppose both or either, and to bring forth all the points of the case according to his own judgment, whether as to the law or fact."

Though the pleadings show that the interests of the State of Florida and of the United States unite to maintain the same line, the Attorney-General declines to adopt her suit, lest the condition of the United States might become "precarious," "depending on the discretion of Florida." Nor will the Attorney-General file a bill for the United States, nor agree that Florida may make them defendants to hers, for, "that the court is not empowered by the Constitution to entertain an original suit" of the kind.

Nor is the motive for this intervention merely that the United States have a fiscal interest, for the Attorney-General suggests that the Constitution may be violated by agreements and compacts of States, "entered of record" "thereby altering the limits *of the States and [*514 the structure of the Union, "to the direct prejudice of the rights, interests and laws of the United States." These suggestions of possible injustice arising from collusive compacts "entered of record" may be used in any judicial controversy between states, and in this case no evidence of such appears of record; and if such suggestions are heeded, the Attorney-General must be constantly an applicant for leave to appear, "not as a technical party," but to employ some oversight, superintendence or censorship, in suits between States of the Union in this court; and surely such a claim requires new modes of proceeding, and that now proposed is as peculiar as the claim. The United States appear, with the assertion of their exemption from suit in this court—that the original jurisdiction of the court does not embrace them as a party. Thus declaring independence of process pleading, and decree, in an original suit in the court, they ask to assist or to assail at their pleasure, suitors legally before it, and to mold the decree in their case by allegations, evidence and arguments, introduced without, and perhaps against their will.

The principle of common law and chancery procedure is, that suits are commenced, prosecuted and defended, by parties to the record in their own names; and the intervention of third persons, not parties, is unknown to the system; and we may affirm confidently, in a case like this, where the party is above and beyond the jurisdiction of the court such a case is without a precedent. 2 Chit. Pr. 343. The case of Pentland v. Quorrington, 3 My. & C. 249, was that of a trustee, with a full assignment, suing in the name of the assignor, under his power of attorney, and obtaining a decree with notice to the defendant. The nominal plaintiff agreed to an order for delay and the trustee petitioned for a discharge of the order, and that he might conduct the suit. Lord Cottenham said: "It is a perfectly new equity. The only suit in court is a suit between the defendant and the party (assignor) with whom the contract was made. The plaintiff (assignor) is a party to the arrangement for effectuating which the present order has been made. Your case is against him, that whereas he has authorized you to carry on this suit in his name, he has entered into the arrangement in question without your concurrence. If I were to make such an order, I should be giving you the right of carrying on this suit against the defendant; I should be displacing the plaintiff on the record." He asked: "Is there any instance of such an interference on the part of the court as you now ask?" The eminent solicitor answered: "I admit that I have never seen a case like the present." So in Drever v. Manderley, 4 M. & C. 94, an order allowing a third person to control a suit where the subject *belonged to him by assignment, but to [*515 which he was not a party by any proceeding was pronounced by the same chancellor "perfectly irregular." The court did not object

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to the right to the subject of dispute, but to the mode of enforcing the right, by the attempt to control the suit. It required the assignee to exhibit his right by bill, according to the practice of the court, in his own name.

Chief Justice Marshall, in describing the controversies to which the judicial power of the United States extends, says: "The words are of well understood and limited signification. It is a controversy between parties which had taken a shape for judicial decision." "To come within the description of a case in law and equity, a question must assume a legal form for forensic litigation and judicial decision. There must be parties come into court who can be reached by its process and bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound to submit." 5 Wh. Ap. 16, 17. The supposed cases of exception cited by the Attorney-General only display the pervading extent of this principle. The instances quoted are rules under the interpleading Act of Wm. IV.: landlords defending for tenants in ejectment; vouchees in warranty in real actions; bills of interpleader, and suits by representative parties for or against themselves and others. The cases referred to in courts of common law arise where a person having the primary right or obligation is called as a party to the suit to defend that right or to fulfill the obligation; and Lord Coke speaks of the common law instance of a vouchee as "seeming strange" and depending upon "ancient, continual and constant allowance." (2 Ins. 241); and so, in interpleading suits, parties having an adverse interest are called in by process, as parties, to disengage a neutral who may have the subject of controversy and desires to relinquish it to the owner, when he shall be ascertained, and in representative cases the court acts upon the parties to the record, and determines the cases made by them. In this case the United States admit no representation on their behalf, nor will they undertake the suit of either, nor admit the jurisdiction of the court to treat them as a suitor or party, but contest the authority of the court; are ready to contest or strengthen the positions of either party; and thus they seek, by an anomalous Austrian intervention, to overlook and control the proceedings of the litigants to their own aggrandizement. I find no precedent in the direct and straightforward course of the common law, nor in the statutes altering it, for such a conduct. I will briefly examine the precedents to which we have been cited, in the codes of procedure of those tribunals which apply the jurispru-
516*] dence of imperial or *papal Rome. The French code permits the interposition of third persons in existing suits. An intervenor may guard a present or future interest, or one certain, contingent, conditional or collateral, whether pecuniary or personal, or held as a representative. But the inquiry is, how and under what circumstances? And the answer is, by propounding his pretensions to the court as a suitor, inviting contest, alleging proofs, recognizing the jurisdiction of the court, and submitting to its decree. 4 Bioche Dic. de Pro. 590; La. Code Prac. sec. 324.

La Cañada, describing the Spanish system, says, there are necessarily two parties to every suit (actor and reo); and when a third litigant comes, he is called by that number (tercero); and because he can oppose either of the parties, or both, the word opposer is added, (tercero opcsitor), and his act is called third opposition. If he comes to aid another party in the same right he accepts the suit as he finds it, and acts conjointly. If his rights are independent, adverse or paramount, his suit is treated as an original suit, and is conducted as ordinary suits.

The third opposer is technically a party to the cause, and really subject to the decree. La Cañada, Juicos Civiles, 393.

Nor do the admiralty or ecclesiastical codes afford any sanction to the motion. Their jurisdiction being largely in rem, they allow persons who have a present and certain claim to the res, to propound their interest, if the court has jurisdiction; and by the act the persons become parties to the suit, liable for costs and entitled to appeal. The various codes, then, differ in the time and manner of calling parties before the court. The conditions of a suit at the common law in general, are settled at its institution, and new and independent parties are not introduced in the subsequent stages. The courts of chancery are more liberal in reference to the time of making parties and in the extent of their amendments. But in both courts the plaintiff is the dominus litis, and third persons may not come in unless he amends the proceedings, or his bill is fitted for it, as being a representative bill. But in the civil, admiralty and ecclesiastical courts, the power of third persons to propound their rights in the subject of dispute is not so dependent upon the will of the prior parties. But all the codes of procedure unite in this, that persons must come in according to a regular course of procedure, accepting the authority of the court, citing adverse parties to defend, and yielding to whatever decree it may pronounce. The more than imperial claim in this instance, is for all the faculties of a suitor, without a submission to the obligations and restrictions of one. But it is supposed that precedents in the English chancery support a pretension of the Attorney-General to intervene according to his motion. *An important class of the rights of the [*517
Crown are represented there by the Queen's Attorney-General; but how? He is introduced upon the record as a "technical" party to the suit, and the Crown is bound by the decree. When the right is adverse to the plaintiff, the Attorney-General is made a party by prayer in the bill and the service of a copy. If he fails to appear it is a nil dicit; and if he appears and will not answer, a decree pro confesso is taken. Danl. Ch. Pr. 175, 501, 548, Dick. 729; 1 Y. & J. 509.

And courts there exercise over the Attorney-General the same authority which they exercise over every other suitor, and he would not be permitted more than any other suitor to prosecute any proceeding merely vexatious, or which had no legal object. The Queen v. Prosser, 11 Beav. 306.

The cases cited, of Penn v. Lord Baltimore, Hovenden v. Annesly, Att'y-Gen. v. Galway, and the analogous cases of Dolder v. Bank of England, and Burgess v. Wheatc, Cas. H. 332; 2 Sch. & Lef. 617; 1 Moll. 95; 10 Ves. 352; 1 Eden. Ch. 177, are instances of the application

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of the rule that the court will require the Crown to be made a party to the record, under the name of the Attorney-General, and that he comes as an actual and obedient party, and not in any illusory and indeterminate form; so that if the claim of the Attorney-General to represent the United States in courts to the extent claimed, is tenable, the manner of the intervention here is inadmissible.

But I do not admit that the Attorney-General has any corporate or juridical character, or that he can be introduced upon the record in his official name as an actor or respondent in a suit. His duties are strictly professional duties, and his powers those of an attorney at law. Whatever he may do for the United States, a special attorney might be retained to do; nor can the United States appear in his name, nor by his agency, in cases where they may not be a party.

I have considered this motion upon the concessions of the argument; but the principle lying at the foundation of the case should not form the basis of a judgment merely on the strength of such concessions; and hence I proceed to its examination.

The judicial power of the United States extends to all cases in law and equity arising under the Constitution and laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to controversies to which the United States shall be a party; to controversies between two or more States; and between a State or the citizens thereof and foreign states, citizens and subjects.

518*] *"In all cases affecting ambassadors, etc., and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction only." It was not in the design of the Constitution to alter or even modify the existing relations of any of the sovereign parties named in this Article, to legal jurisdictions, by enlarging their liableness to suit; but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence, or might voluntarily submit or were subject to, according to their pre-existing conditions. Thus no suit can be commenced against the United States, foreign states or ambassadors, and public ministers; nor are they brought within the jurisdiction of the courts of the United States to any decree beyond that to which they were liable, without this constitutional clause. The construction which allows the exemption of these parties as sovereigns, or their representatives, to operate, sanctions also the title of the States to the same right, for they are mentioned in the same clause; and the jurisdiction conceded to this court in reference to them is expressed in similar or identical language.

I am aware, that at an early day in the existence of this court a contrary opinion was expressed by a majority, upon a motion for an interlocutory order in a suit against a State, and I propose to examine the principle established in the controversy, of which that opinion is a part.

While the Constitution was under discussion General Hamilton (Federalist, 81) said, "that it is in the nature of sovereignty not to be amenable to the suit of an individual without its consent," and contended, "that to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such consequences would be altogether forced and unwarrantable." So Mr. Madison, replying to the vehement and prophetic denunciations of Patrick Henry, in a careful exposition of the judiciary clause, calmed the Virginia convention by assuring it that "it is not in the power of individuals to call any State into court. The only operation the clause can have is, that if a State should wish to bring a suit against a citizen, it must be brought in the federal court." And the late Chief Justice Marshall supported him, saying: "With respect to disputes between a State and citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think a State will be called at the bar of a federal court. It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is to enable *States to recover claims of individuals [*519 residing in other States. I contend this construction is warranted by the words." Virginia Deb. 387, 405, 406.

When these assurances from the most accredited friends of the new government were disappointed, by the institution of suits in this court against several of the States, by individual plaintiffs, shortly after the adoption of the Constitution, a strong sentiment of wrong was felt, and corresponding indignation expressed. This indignation was not occasioned by any apprehension of consequences to the States as debtors, but by the fact that they supposed their rights to be violated. The history will bear no other interpretation. In Chisholm v. Georgia, that State instructed counsel to present to the court a written remonstrance and protestation against the exercise of jurisdiction, but not to argue the cause. The Attorney-General opened the case of the plaintiff by saying: "He did not want the remonstrance of Georgia, to satisfy him that the motion for judgment was unpopular. Before that remonstrance was read he had learned from the acts of another State that she, too, condemned it." The court awarded a writ of inquiry upon the default of the State, sustaining the jurisdiction upon arguments of the utility, justice and safety of the delegation of the power, and of the diminution and abasement wrought upon the States by the Constitution. Mr Justice Wilson states the case "as one of uncommon magnitude." He says: "One of the parties is a State, certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States. This question, important in itself, will depend on others more important still; and may perhaps be ultimately resolved into one no less radical than this: do the people of the United States form a nation." It is not difficult to perceive the profound misconception of the relations of the States to the Union which dictated his judgment. The following year the Legislature of the Common-

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wealth of Virginia adopted a resolution which contains a reply to the question: "Resolved unanimously, that a State cannot, under the Constitution of the United States, be made a defendant at the suit of any individual or individuals, and that the decision of the Supreme Federal Court, that a State may be placed in that situation is incompatible with and dangerous to the sovereignty and independence of individual States, as the same tends to a general consolidation of these confederated Republics;" and instructed their senators and representatives "to unite their utmost and earliest exertions to obtain such amendments as will remove or explain any clause which can be 520*] construed to imply *or justify a decision that a State is compellable to answer in any suit by any individual or individuals in any court of the United States."

One month after (January, 1794), the Senate was moved by Mr. Strong, of Massachusetts, to adopt the Eleventh Amendment to the Constitution, declaring that the Constitution should not be construed to authorize such suits. Various attempts were made in both branches of Congress to limit the operation of the Amendment, but without effect. It was accepted without the alteration of a letter, by a vote of 23 to 2 in the Senate, and 81 to 9 in the House of Representatives, and received the assent of the State Legislatures. Georgia ratified the Amendment as "an explanatory article," her Legislature "concurring therewith, deeming the same to be the only just and true construction of the judicial power by which the rights and dignity of the several States can be effectively secured." Thus the supreme constitutional jurisdiction of the United States, the concurrent action of Congress, and the State Legislatures, expressing a consent nearly unanimous, corrected the opinion of the Supreme Court, and intercepted its final judgments in these cases, by declaring that the Constitution should not be so construed as to allow them.

The reporter of the court closes the volume which contains the case of Chisholm, by saying "the writ of inquiry was not sued out and executed; so that this cause and all other suits against States were swept at once from the records of the court by the Amendment of the Constitution." The course of argument which excluded the jurisdiction of such cases, applies with equal force to suits by foreign States against the States of the Union. And the considerations which forbid suits against the States by individuals, indicated with such clearness in the Federalist, form the basis of the luminous and masterly judgments in the English chancery, in the case of the Duke of Brunswick v. King of Hanover, 6 Beav. 1; 2 H. L. Ca. 1, where the delicacy, difficulty and danger of the jurisdiction, and its want of practical value are fully set forth, and the conclusion announced "that it is a general rule, in accordance with the laws of nations, that a sovereign prince, resident in the dominions of another, is exempt from the jurisdiction of the courts there." It is clear the Constitution did not abrogate any law of nations, and the only question is, whether the States consented to suits without any reciprocal right, or whether the existence of such a power in foreign States could possibly assist any objects of the Confederacy. On the contrary, would not such a promiscuous grant jeopard its tranquility and peace? The answer of Mr. Madison to the Virginian convention is positive and direct. "I do not *conceive," he says, "that any [*521 controversy can ever be decided in these courts, between an American and foreign State, without the consent of parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant with the law of nations." Virginia Deb. 391. To this consent, it may be that Congress would be a necessary party.

The nature of the jurisdiction in regard to the States having been considered, the inquiry can now be made, can the United States be a party to a suit between two or more States. The Constitution does not mention such a case. There were before the Federal convention propositions to extend the judicial powers to questions "which involve the national peace and harmony;" "to controversies between the United States and an individual State;" and in the modified form, "to examine into and decide upon the claims of the United States and an individual State to territory." None were incorporated into the Constitution, and the last was peremptorily rejected. The jurisdiction of this court over cases to which the United States and the States are respectively parties, is materially different—the one original, the other appellate only. There was no encouragement, nor serious countenance, to the proposition to vest this court with jurisdiction of such cases. This court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this court, their means of reputation with its powers, their habitual connection with the Federal legislation naturally inspires a sentiment in favor of the Federal authority. These operative causes of bias were known; and apprehensive as the States were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat that the enumeration of the parties in this Article of the Constitution did not enlarge the liabilities of the States to suits, but it only provided tribunals where suits might be brought, to which they were already subject, or might desire to commence. Nor does the clause authorizing suits between two or more States afford any contradiction to this conclusion.

The Articles of Confederation, by which they were then combined, allowed Congress, as the occasion might arise to appoint special tribunals "to which all disputes and differences now subsisting, or that might hereafter arise, between two or more States, concerning boundary, jurisdiction, or any other cause whatever," should be submitted.

Similar provisions for special and occasional tribunals, in matters of jurisdiction and boundary, formed a part of the plan of the Constitution till near the close of the convention, when *they were stricken out, and the general [*522 jurisdiction over those as well as other controversies delegated to this court. My conclusion, after an examination of the clause is, that it is only in controversies between the States that one of their number can be impleaded in this court without its explicit consent; and that this

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jurisdiction is special, as to the controversy and the parties, embracing none except those between the States of the Union; that the court has no original jurisdiction of the United States, and none of a controversy between them and an individual State; and consequently, that they have no title to appear as a party to the record; nor in any undefined and uncertain relation to it.

And now the question arises, whether the United States can or ought to be concluded as to their property, without a privilege to appear and be heard, by a judgment of the court, upon a question of boundary submitted by two or more of the States, for its adjudication.

Without assigning any effect to the judgment that may be rendered, or anticipating whether the rights of the United States may be reserved, I will assume that the United States will be estopped by the judgment, and that no reservation of their proprietary rights can be made; and consider whether, under such circumstances, there is injustice. The government of Florida involve in this suit her highest claims—those of sovereignty and jurisdiction—and fulfill their chief political obligations in its prosecution. If individual claims are affected by the decree in such a suit, it is because they are so incorporated in the rights of their sovereign as to have no separate or independent existence. She is the representative of all the proprietary rights and interests of her people in their contest with another sovereign. The United States, in resigning their sovereignty over the Territory of Florida to the people, and by recognizing their government, relinquished their authority over this controversy, and consented that their proprietary claims to the waste and unappropriated lands should abide the issue to which the State, in her wisdom and fidelity, should attain. This sovereign control of Florida was modified upon her accession to the Union. After this, if the controversy was settled by negotiation and compact, the consent of Congress was necessary to its binding operation, as in other cases of compact. If it was settled contradictorily, then this tribunal was appointed to make the determination.

Nor do I perceive that the Executive Department has any title to disturb the parties or the court, with the expression of anxieties or apprehensions that this court will be allured to perform what Congress alone may do, or 523*] that these constitutional conditions *will not be honorably fulfilled. The existence of this Federal government in its whole extent is a testimonial to the magnanimous and disinterested polity of the States of the Union; nor is the concession which submits to a tribunal of justice the peaceful and rational adjustment of the controversies between the sovereign States the least weighty of the proofs of those dispositions. It seems to me that it is the duty of this court to come to the exercise of the jurisdiction the States have conferred in the same spirit; to exercise it according to the letter of their submission; to exclude from it suspicion, jealousies, interventions from any authority, but to meet the parties to the controversy with confidence.

Dissenting from every part of the order, I have filed the reasons for the dissent.

Mr. Justice Curtis, dissenting:

It is in accordance with natural justice, and with a principle of jurisprudence, that no one should be affected by a judgment or decree without an opportunity to present to the court, either by himself or his lawful representative in some regular and legal course, his allegations and proofs, and to be heard thereon; and therefore, I should have assented to the application of the Attorney-General in this case, and would willingly concur with a majority of the court in the order they direct to be entered, if I did not find it to be subject to objections too grave for me to disregard, and which careful reflection, even under the influence of the great respect I feel for the opinions of my brethren, has not enabled me to overcome.

I will state, as briefly as I can, what these objections are. In doing so, I shall first examine the nature and effect of the application of the Attorney-General, to see whether it is in the power of the court to grant it, as made; and I will then consider whether the order directed by the court is subject to the same difficulties in part or in whole.

That application is, in substance, an ex-officio information, in which the Attorney-General of the United States informs this court of the pendency of a suit here by the State of Florida against the State of Georgia, wherein there is in controversy a portion of the boundary line between those States; that it appears from an inspection of the bill of the State of Florida, and of the answer of the State of Georgia, that, if the pretentions of the State of Georgia shall be sustained by this court, the boundary line in controversy will be so run as to include within the territorial limits of that State a tract of land of about twelve hundred thousand acres, which have been considered and treated heretofore as public domain of the United States, and surveyed as such, and much of which has been sold and granted by the United States, as being part of the territory of East Florida, acquired from Spain.

*In support of this information, the [*497 Attorney-General has filed certain documents and a map; and he prays that, in consideration of the interest and concern of the United States, he may be permitted to appear in the case, and be heard in behalf of the United States, in such time and form as the court shall order.

The case to which this information relates, now stands on the original docket of this court, upon a bill filed by the State of Florida and an answer by the State of Georgia. No replication had been put in, and of course, no proofs taken.

It is quite apparent, therefore, since the case is not now in a condition to be brought to a hearing, and since much time must necessarily elapse, considering the course of the court and the nature of the controversy and the character of the parties, before it can be put into a state to be heard, that this application of the Attorney-General is not designed merely to obtain the privilege of taking part in the hearing of the cause, by making an argument at the bar, upon the pleading and proofs as they may exist when the cause may be set for hearing, if that time shall ever arrive. It seems to me not consistent with that respect which is due to the Attorney-General, to suppose that he has caused

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the States of Florida and Georgia, by their counsel, to appear here, and has called on the court to listen to and consider elaborate and learned arguments upon questions of constitutional law and general jurisprudence, merely to present the question whether, in the contingency that this case should, at some future day, be brought to a hearing, and in the event that, at that time, the interest of the United States should remain as it is now alleged to be—the court would hear the law officer of the United States, in support of its interests.

Courts of justice make orders and decrees upon actually existing states of fact, not upon what may possibly occur at some period in the future. And this obvious dictate of ordinary prudence is rigidly obeyed by courts of equity, when acting on subjects like that now before the court.

In England, the sovereign has a great number and variety of interests and rights which may be affected by decrees of courts of equity. As will be more fully stated hereafter, the Attorney-General represents the Crown in respect to those rights, and no decree affecting them is made until he has had opportunity to become a party to the suit. But the question, whether he is a necessary party, is raised in the same way, and at the same time, as the question whether a private person is a necessary party. And, I believe, we should search in vain for an instance in which any court had made an order in a cause, before it was at is-498*] sue, *that, if it should come to a hearing the Attorney-General should be heard at the bar.

I have made these observations concerning the nature and objects of this application, because the information does not specify, or in any way indicate, what particular order it is desired the court should pass. If I felt at liberty to understand it simply as an application to be heard at the bar, by way of argument on the pleadings and proofs of the complainant and the defendant, I should think the proper answer would be, that the court would advise thereon when it was made reasonable certain that the cause would be heard. But I am not at liberty so to view this information, not only for the reasons I have suggested, but because the Attorney-General, with becoming frankness, has declared, both orally at the bar, and in his printed brief, that what he desires passes far beyond this. He has thus made known to the court that he seeks to intervene in the cause in behalf of the United States; and he has explained his understanding of the term intervention, and of the effect of an order of the court allowing it, to be, that he is to come into the cause "not in subordination to the mode of conducting the complaint or defense adopted by one State or by the other, nor subject to the consequences of their acts, or of any possible mispleading, insufficient pleading, omission to plead, or admission or omission of fact, by either or both; but free to co-operate with or oppose either or both, and to bring forth all the points of the case according to his own judgment, whether as to the law or the facts; for ex facto oritur jus."

Can this, or anything like this, be allowed, consistently with the Constitution and laws of the United States?

In answering this inquiry it is necessary to determine what would be the relation of the United States to this controversy if the Attorney-General was thus admitted. In my opinion, they would thus become substantially and really a party to the controversy. I say substantially and really a party, for I quite agree with the majority of the court in thinking that this question is not to be decided according to any strict technical rules or even viewed solely by the light which they impart. As I consider it, the question is one of constitutional law; and though the Constitution was framed and intended to operate in connection with those systems of law and equity existing in our country at the time of its adoption, and many terms in it can be correctly understood only by resorting to the interpretation of those terms in those bodies of law, yet I concede, that in examining this question, we are to look to the substance and nature of the relation to the suit, and not merely to forms and names; and therefore, I have inquired whether, if the Attorney-General *be admitted on the record in accordance [*499 with the prayer of his information, the United States will be substantially and really a party to this suit. And, in the first place, I think there can be no substantial distinction in this matter between the United States and the Attorney-General. If what is done is sufficient to make him a party, the United States is, in substance and in legal effect, a party. The rights and interests which he brings before the court are the rights and interests of the United States. He presents those rights and interests, not as a trustee in whom they are vested; not as specially empowered by law to sue in his own name for the recovery of something belonging to the government; but he acts simply as an attorney and counselor at law.

The Postmaster-General is empowered by law to bring suits in his own name, in the courts of the United States, upon contracts made with him as the head of a department; and the United States, though exclusively interested, is not deemed a party to the controversy. Osborn v. The Bank of the U. S. 9 Wh. 855. So an executor or administrator, though he may have no beneficial interest in the cause of action is deemed the party to the suit for the purpose of jurisdiction. 4 Cr. 308; 8 Wh. 668; 12 Pet. 171. But, in these and similar cases, the officer or executor has, by law, the legal right of action vested in him.

On the other hand, it has been repeatedly decided, that where a law required a bond to be taken in the name of a public officer, but for the benefit of individuals, as in a case of sheriff's bonds, the person for whose use the suit was brought, and not the obligee in whose name it was brought, was the party to the suit, within the meaning of the Constitution. Browne v. Strode, 5 Cr. 303; McNutt v. Bland, 2 How. 1; Huff v. Hutchinson, 14 How. 586.

These decisions go much beyond what I maintain in this case. The rights and interests which the Attorney-General desires to assert in this case are in no manner and for no purpose vested in him, any more than the rights and interests of the private parties litigating in court are vested in the attorneys and counsel whose names are on the docket, or who argue the causes at the bar.

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He is not what was termed in the cases of Browne v. Strode, and the other cases just referred to, a conduit, through whom the remedy is afforded on a contract made in his name. He is simply a law officer of the government, empowered to act for the United States in this court. In such a case it does not seem to me to admit of a doubt, that whatever is done by him, though in his name, will be done by the United States.

500*] *The case of Ga. v. Brailsford, 2 Dall. 402, was a bill by "His Excellency, Edward Telfair, Esquire, Governor and Commander-in-Chief in and over the State of Georgia, in behalf of the said State." The jurisdiction was sustained, as of a suit by the State, and an injunction granted and a trial had at the bar of this court. 4 Dall. 1. Yet, to give the court jurisdiction, a State must be a party on the record. Osborne v. The Bank, 9 Wh. 738. In this case, the court must have considered the State was made a party on the record by a proceeding in its behalf in the name of its chief executive magistrate. So it was declared by the court in the case of the Governor of Ga. v. Madrazo, 1 Pet. 122; and in this last-mentioned case it was decided, on great consideration and after examining all the previous decisions, that a claim filed by the Governor of Georgia, in his own name as Governor, but in behalf of that State, made the State itself a party to the record, within the meaning of the Constitution and laws of the United States.

In Benton, District Attorney of the U. S. for the Northern Dist. of N. Y. v. Woolsey et al. 12 Pet. 27, the District Attorney of the United States for the Northern District of New York had filed an information in his own name to foreclose a mortgage belonging to the United States. The case came to this court by appeal. In delivering the opinion of the court, Mr. Chief Justice Taney said: "Some doubts were at first entertained by the court whether this proceeding could be sustained in the form adopted by the District Attorney. It is a bill of information and complaint in the name of the District Attorney, in behalf of the United States. But upon carefully examining the bill, it appears to be, in substance, a proceeding by the United States, although in form it is in the name of the officer. And we find that this form of proceeding in such cases has been for a long time used without objection in the courts of the United States, held in the State of New York; and was doubtless borrowed from the form used in analogous cases in the courts of the State, where the State itself was the plaintiff in the suit. No objection has been made to it, either in the court below or in this court, on the part of the defendants, and we think the United States may be considered as the real party, although, in form, it is the information and complaint of the District Attorney. But although we have come to the conclusion that the proceeding is valid and ought to be sustained by the court, it is certainly desirable that the practice should be uniform in the courts of the United States; and that, in all suits where the United States are the real plaintiffs, the proceedings should be in their name, unless it is otherwise ordered by Act of Congress."

*Now, it is plain, that the only ground [*501 upon which this proceeding could be sustained as within the jurisdiction of a court of the United States, was, that an information by a law officer of the government in his own name as such officer, but asserting rights of the United States, is a controversy to which the United States is a party within the meaning of those words in the Constitution; for it was only because the United States was a party to the controversy, that the jurisdiction attached. It would have been in conformity with what this decision declares to be the correct practice, if this information, and all the proceedings which may ensue thereon, were to be in the name of the United States; but it is also in conformity with it to say, that though in the name of the Attorney-General, for the United States, the United States will thereby be made a party to this controversy; provided what is done is sufficient to constitute anyone a party to it. It remains to inquire whether the rights and privileges claimed by the Attorney-General in behalf of the United States, if conceded, will make them a party to this controversy.

It seems to me somewhat difficult to reason about so plain a proposition. The Attorney-General has already filed an information, alleging the interest of the United States, and showing what it is and how it arises. If an order is made thereon, allowing him to appear and support those allegations, the United States will appear, on the record asserting their interest in this controversy. They will so appear, that they may enjoy the rights of a party to be heard by proper allegations and proofs, and by arguments at the bar. The process of the court must be accorded to them to obtain their proofs, in those modes and under those sanctions appropriated exclusively to the taking of evidence to be used in judicial controversies. They are to be at liberty to oppose the pretensions of the other parties, and to assert and maintain their own, in a regular course of judicature; and they, in common with the others, are to be bound by the decree, which is to be the product of their allegations, proofs and arguments, as well as of those of the two States of Florida and Georgia.

If all this does not make the United States a party to this controversy, it would be difficult for me to show that it has any parties.

Under our system of jurisprudence, what constitutes a person a party to the record? Is it not sufficient, if it appears by the record that he had a direct interest in the subject matter of the suit; that he placed before the court, in his own name, and not in the name of another, by some appropriate allegations, his claim or defense; that he introduced legal evidence in support of that claim or defense, which was heard by the court; that he *was heard by [*502 his counsel; that his rights, and what he presented to the court in support of them, were taken into consideration by the court in making a decision; and that these rights were intended to be bound, and in point of law are bound, by the decree? All this must appear from this record, if the United States be allowed to do what has been prayed for.

The Attorney-General, in his very learned and able argument, has referred the court not only to the practice of some of the courts of

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England, but to the Roman law, and to the modern civil law of the continent of Europe, concerning intervention. This practice differs, in details, in the different countries. But so far as I have been able to examine, a third person who comes in after the institution of a suit, to assert a right of his own involved in the controversy, is considered and expressly denominated a party. The definition given in the Code of Practice of Louisiana, which is substantially borrowed from the French Code of Procedure, is: "An intervention, or interpleader, is a demand by which a third person requires to be permitted to become a party in a suit between other persons, either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff; or it may be lawful for him, where his interest requires it, to oppose both." See, also, Merlin, Rep. vol. 16, and Recueil, voc. Intervention, Dalloy Dic. s. vocc.

The English law is equally clear. When the Attorney-General is brought into a suit between third persons as the representative of the Crown, and to protect its rights, though possessed of some privileges which do not belong to private persons, he is not only called a party, but he is treated as one. He is attended with a copy of the bill, and if he does not appear it is considered as a nihil dicit; and if he does appear and fails to answer the bill is taken pro confesso as against the Crown. 1 Dan. Ch. Pr. 169, 170, 531, 548.

Indeed, I am not aware of any case, either in equity or admiralty, or at law, under particular statutes, in which a third person who intervenes is not considered and called a party. The ground upon which a decree in rem is held to bind all persons, is, that every one having an interest has a right to make himself a party to the cause, and that the seizure or arrest of the thing gives notice to all concerned of the pendency of the proceedings, and thus enables them to become parties. In Rose v. Himely, 4 Cr. 277, Chief Justice Marshall states this familiar rule: "Those on board a vessel are supposed to represent all who are interested in it; and if placed in a situation which enables them to take notice of any proceedings against a vessel and 503*] cargo, *and enables them to assert the rights of the interested, the cause is considered as properly heard, and all concerned are parties to it."

And so in equity. Those who come in even before the master, are, as Lord Redesdale says, (Mit. Pl. 178, 179) considered parties to the cause in the subsequent proceedings.

With great respect for my brethren, I cannot agree that the reasons advanced by them why the United States will not be a party to the record are sufficient. Those reasons I understand to be, that no decree will be made against the United States, and that the Attorney-General will not be allowed to interfere in any way with the pleadings or proofs, of either the State Florida or Georgia. As to the first of these reasons, it is certainly true that no decree will be made against the United States, in form, or by name; but, if I understand the opinion of the majority of my brethren, they consider as I do, that substance, and not form, is to be looked to in this case; and that the only inducement for allowing the United States to be heard is, that, from the nature of the controversy, all the world must necessarily be precluded by the decree from disputing the correctness of the line of boundary fixed by it. Whether the United States shall or shall not be named in the decree, would seem, therefore, to be formal rather than substantial, since their rights and duties will be the same, whether named or not. In either case, the decree will conclusively operate thereon.

And as to the other reason, that the Attorney-General is not to be allowed to interfere with the pleadings or evidence of the States of Florida or Georgia, I must say, with deference for the better opinion of my brethren, that it seems to me a restriction which, while it still leaves the United States a party to the suit, deprives them of some of the rights of a party, and to that extent fails to carry out the very principle which requires them to be heard at all.

The right to have this case stated by Florida in the bill, so as to present it in its entire substance, is a substantial and important right of the United States. If the case is defectively or untruly stated there, the decree must be affected thereby, for Georgia has the right to insist that the decree shall conform to the bill. An explicit and full answer to the bill is also material to the United States, that they may know what is to be relied on, and what proofs and arguments are necessary to be adduced. The power to cross-examine witnesses, and to except to proofs when offered, has been deemed essential to the administration of justice. I would respectfully ask, upon what principle known to our jurisprudence are the United States to be deprived of these rights, if they are admitted at all to contest the claims of Georgia? *If both Florida and Georgia may cross- [*504 examine the witnesses of the United States, and except to their proofs, what intrinsic property or judicial reason can there be, why the latter may not cross-examine the witnesses and except to the proofs of the former?

With submission to a majority of my brethren, I confess it seems to me, that to deprive a party of some rights which under all systems of law known to us, are deemed essential, while other rights are allowed to him which can be conceded only a party to the controversy, proves the embarrassment which was felt in carrying out the idea of making him a party, but does not overcome the difficulty or even avoid it. It appears to me to declare, in effect, justice requires that you should be admitted as a party on this record; but, in order to make some distinction between yourself and other parties, you shall not enjoy all the rights of a party; and the particular rights which you are not to enjoy are the power of excepting to the pleadings and proofs of the other parties.

This is not satisfactory to my mind. Whether I consider only the substantial relations of the United States to the controversy, of the analogous provisions of positive or customary law in our own and other countries, I cannot avoid the conclusion that if they are admitted upon this record to assert their rights—to show what they are, and how they are involved in this controversy; to maintain them in the regular course of judicature, by allegation, proof and argument, against the State of Georgia; to have the

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process of the court to enable them to do so; to profit by the decree if favorable, to lose by it if adverse—they are a party to this controversy, within the meaning of the Constitution of the United States. And this raises the question, which in my opinion is a very grave one, whether the Constitution permits the United States to become a party to a controversy between two States in this court.

The judicial power of the United States extends, among other things, to controversies to which the United States shall be a party—to controversies between two or more States—between a State and citizens of other States or of foreign States, where the State commences the suit, and between a State and foreign States.

In distributing this jurisdiction, the Constitution has provided that, in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction. One of the other cases before mentioned is a controversy to which the United States is a party.

I am not aware that any doubt has ever been 505*] entertained by *anyone that controversies to which the United States are a party come under the appellate jurisdiction of this court in this distribution of jurisdiction by the Constitution. Such is the clear meaning of the words of the Constitution. So it was construed by the Congress in the Judiciary Act of 1789, which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day.

There was a case of the U. S. v. Yale Todd, commenced in this court in 1794, which is not reported, but it is stated from the record, by Mr. Chief Justice Taney, in a note to the case of the U. S. v. Ferreira, 13 How. 52. Of this case the note says:

"The case of Yale Todd was docketed by consent in the Supreme Court, and the court appears to have been of opinion that the Act of Congress of 1793, directing the Secretary of War and the Attorney-General to take their opinion upon the question, gave them original jurisdiction. In the early days of the government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate."

The decision of this court in Marbury v. Madison, 1 Cr. 137, settled this construction of the Constitution; and, as stated in this note, no one who has examined the subject now questions it.

We have, then, two rules given by the Constitution. The one, that if a State be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the Constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

It is not to be admitted that there is any real conflict between those clauses of the Constitution, and our plain duty is so to construe them that each may have its just and full effect. This is *attended with no real [*506 difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the Constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

And when it says, "in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction," it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so in express terms, when it speaks of the other cases where appellate jurisdiction is given.

So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

It is true, this course of reasoning leads necessarily to the conclusion, that the United States cannot be a party to a judicial controversy with a State, in any court.

But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The Constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the 4th section of the fourth article of the Constitution pledges the power of the nation to guarantee to every State a republican form of government; to protect each against invasion; and, on application of its Legislature or Executive, against domestic violence. This conservative duty of the whole towards each of its parts forms no exception to the general proposition, that the Constitution confers on the United States powers to govern the people, and not the States.

There is, therefore, nothing in the general plan of the Constitution, or in the nature and objects of the powers it confers, or in the relations between the general and state governments, to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several States. On the contrary, the agency of courts to compel the States to obey laws of the Union, or to concede to the United States its rights or claims, would naturally be deemed both superfluous and impolitic; superfluous, be-

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cause the States can act only through individuals, who are directly responsible, both civilly and criminally, to the laws of the United States, which are supreme, and in the courts of the United States, which have jurisdiction to enforce all laws of the United States, and 507*] *impolitic, because calculated to provoke irritation and resistance, and to excite jealousy and alarm.

It must be remembered, also, that a State can be sued only by its own consent. This consent has been given in the Constitution; but only in cases having such parties as are there described. The particular character of the parties to the controversy, into which a State has consented to enter, constitutes not only an essential element in that consent, but it is the sole description of what is agreed to. The State of Georgia has consented to be sued by one or more States, or by foreign States, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more States, or with a foreign State, and with citizens or subjects of a State other than the one bringing the suit, but with no other person or body politic. Certainly there is no power existing in this government to enlarge that consent so as to embrace in it anything to which it does not, by its terms, extend.

I cannot agree that because the State of Georgia consented to be sued by the State of Florida, Georgia thereby consented to the introduction into the controversy of any party whose rights were so involved in the controversy, that the court is bound, upon principles of natural justice, to have that party before the court, in order to make a decree.

In the first place, if it be conceded that a third party not capable of suing a State, or being sued by one, is a necessary party to a controversy between two States, and that the court cannot make a decree without the presence of that party, it would seem to me to be the legitimate inference, that in such a case the States had not consented to be sued. Having consented to be sued, in controversies having certain described parties, it would seem that a controversy which could not be carried on by them was not one to which the consent applies.

So far as I am aware, the other grants of judicial power by the Constitution, which depend on the character of the parties, have been so construed. Has it ever been supposed that into a suit between citizens of different States a third party not competent to sue or be sued, could come or be brought, because he was a necessary party, without whose presence a decree could not be made? Has the doctrine ever been advanced, that when the Constitution gave jurisdiction over suits between citizens of different States, it thereby, by implication, authorized that jurisdiction to be extended so as to embrace every person whose rights were so involved in the controversy that the principles of natural justice required him to be heard.

Take the case of a suit between a citizen of Florida and a citizen of Georgia, in the course 508*] of which it appears that an *inhabitant of this District, who is not competent to sue or capable of being sued, has such an interest in the controversy that the court can make no decree between the parties before them without affecting that interest; has it ever been supposed that there was any implied power granted by the Constitution and the 11th section of the Judiciary Act of 1789 to make him a party, or has the conclusion been that in all such cases the court cannot act at all? The latter, I apprehend, is the settled conclusion. The 47th rule for the equity practice of the circuit courts provides, that if persons who might otherwise be deemed necessary or proper parties to the suit cannot be made so, because their joinder would oust the jurisdiction of the court, as to parties before the court, the court may in its discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties. This certainly assumes that there is no implied power, arising out of the necessity of the case, to make them parties, or to bring them into the cause so as to hear and bind them without making them parties. The court is to distribute all the justice it can between the parties over whom it has jurisdiction; but if it can do nothing without the presence of a necessary party, the remedy is not to bring him in, or allow him to come in, but to refuse to act, and leave the parties to terminate their dispute by other means. This is declared by this court in Hagan v. Walker, 14 How. 36, and the earlier cases lead to the same conclusion. Russell v. Clarke's Ex. 7 Cr. 98; Cameron v. Roberts, 3 Wh. 591; Wormley v. Wormley, 8 Wh. 451; Carneal v. Banks, 10 Wh. 188; West v. Randall, 2 Mason, 195, 196; Shields et al. v. Barrow, ante, of the present term.

It is true there is a class of cases in which this court has decided that when the jurisdiction of the Circuit Court, by reason of the character of the parties, has once attached, it is not devested by one of the parties losing the character which entitled him to sue, or subjected him to be sued in the Circuit Court, or by his death and administration being granted to a citizen who would not have been competent to sue; and further, that when the judgment operated in rem, as in a suit in ejectment, no change of the property, pendente lite, could prevent the Circuit Court from exercising its jurisdiction over its own execution. The cases of Morgan's Heirs v. Morgan, 2 Wh. 297; Mollan v. Torrance, 9 Wh. 537, are of the first class. It was there held that a change of domicil did not defeat the jurisdiction which had once attached. In the case of Clarke v. Mathewson, 12 Pet. 164, it was held that a bill of revivor was but a continuation of the original suit, and that the jurisdiction having once attached was complete, and continued to enable the court to *adjudicate on that subject [*509 matter. In Dun v. Clarke, 8 Pet. 1, it was held that the Circuit Court had jurisdiction of a bill to enjoin the levy of an execution on a judgment in ejectment, though the land had been devised so that all parties were citizens of the same State.

This was upon the ground that the devisee of the land was to be deemed the mere representative of the plaintiff in the judgment, and that as to him the bill was not an original suit, but a proceeding on the equity side of the court, to

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enable the court to control its own execution; and according to the case of Harris v. Hardeman, 14 How. 334, the same thing might have been done upon motion on the law side of the court. But the court refused to take jurisdiction over the other parties to the bill who had an interest in the land, or to decide the merits of the controversy, and confined itself to staying the execution of the judgment until the merits could be investigated in a suit in a state court.

It will be seen, I think, that none of these cases rest at all on the ground that there is jurisdiction by implication over a third party whose rights are such as to make his presence in the cause necessary. But if they did, they would fall far short of proving that such an implication can be made in this case. The Constitution is merely silent concerning the introduction of a third person, not competent to sue or be sued in the courts of the Union, into a suit in the circuit courts; but it is not silent concerning controversies to which the United States is a party. It declares, in effect, that over such controversies this court shall not have original jurisdiction; for it makes its jurisdiction over such controversies appellate, and this, as has been long settled, excludes all original jurisdiction of this court over such controversies, and even prevents Congress from conferring it. Marbury v. Madison, 1 Cr. 137. To say that there is an implication that when the United States is a necessary party to an original suit in this court, they can become a party here, would be, in my opinion, not only an extension of the original jurisdiction of this court to a case not described by the Constitution as within it, but to a party as to whom we are expressly forbidden to take such jurisdiction.

Nor do I find in the nature and circumstances of this case any such necessity for making the United States a party, as would lay a foundation for the presumption that it must be competent for the court, and consistent with the Constitution and laws, to allow it to be done. This is not a broad question, whether in the exercise of the original jurisdiction of this court we are obliged to exclude all third parties, though they may have the most important rights and interests necessarily involved in the suit. I apprehend no such question arises here. 510*] *I do not doubt that in an original suit in equity here, between two States, or between a State and a foreign State, or between a State as complainant and individuals, or in a suit affecting ambassadors, other public ministers or consuls, any necessary party may be brought in who is competent to be sued by the plaintiff, or to sue the defendant in that suit in this court. Thus, a State may sue here other States, foreign States, all citizens of other States and of foreign States—and this I believe includes every possible party, except its own citizens and inhabitants of this District, and of the Territories—and the United States. Setting aside residents of this District and of the Territories, who cannot be deemed of great moment in this particular matter, and citizens of the State bringing the suit, whose rights the Constitution evidently considers need no protection from this government, the practical effect of the doctrine I maintain will be found to be confined to the United States. They cannot be made a party to such a suit; and in my judgment, it is in accordance with the whole plan of the government, as well as with the particular provisions of the Constitution concerning the judicial power, that they should not be able to interpose and assume an adverse position to a State, in a judicial controversy in this court. Besides, I do not find in this case any real necessity to make the United States a party, according to the principles of equity law. A court of equity generally requires all persons who have an interest in a suit to be made parties. But it is a familiar rule, that when it is impracticable to bring before the court all interested, it is enough to make such parties as have a common interest with those who are absent. In such a case, the parties who are present represent the rights of those who are absent, and the court proceeds to make its decree, binding the rights of the absent parties, with the same confidence that justice is done as if they were before the court. Story's Eq. Pl. 97, 112.

Now, what is this case? The interest of Florida and that of the United States are identical. That interest is, to have the boundary line fixed as far to the northward as the proofs will allow. It is true, that what Florida seeks is the protection of its rightful jurisdiction as a sovereign State; and what the United States desire is the protection of its title as a landholder, and as the grantor of lands now held by their grantees. But both the political jurisdiction of Florida, and the title of the United States to land acquired from Spain, being coextensive with the Territory of Florida, these two parties have a common interest in the subject matter of this suit, and Florida is, in the contemplation of a court of equity, competent to represent the interest of the United States, as an owner of land.

*This would certainly be true in the [*511 case of individual parties, and in my opinion the same rule applies with still greater force to these parties. Florida is a sovereign State, whose suit must be conducted according to the will of its Legislature. There is no room for any suspicion of any unworthy motives or conduct in its management. It is a high duty of that State, which it owes to itself, and which will doubtless be discharged to vindicate its jurisdictional rights, and make good its claims to all the territory which comes within its true limits. Though the question is merely where a line should be run, that line carries with it the sovereignty and territorial jurisdiction of States.

On the other hand, the United States is a landholder, whose title may be affected by running the line in one place rather than another. And so will the titles of hundreds of other landholders in this Territory, whose interest is precisely the same as that of the United States, in kind, though not in amount. To say that it is necessary for the purposes of justice, that the United States, as the proprietor of lands, should be admitted into this suit to take care lest the State of Florida should omit something by way of pleading or evidence, seems to me to be yielding to an imaginary necessity only.

It is not alleged that the United States has any interest in this controversy except as an

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owner or grantor of land. Unquestionably there are political considerations, affecting the federal relations of the States, and connected with the extent of their territory, in reference to which the United States has a direct and important interest. This is not only obvious in itself, but is recognized by the Constitution in various ways, and amongst others, by the prohibition of the States to make any compact without the consent of the United States. But the object of this suit is not to change the limits or territory of States, but to ascertain their true, and actual boundary; and in this question the United States has no interest, except that justice should be done; an interest which is not of a character to warrant the government in interposing in this case to assist in securing it, any more than in any other case pending in this court. It is suggested that the counsel for the two States may make agreements as to evidence, and other matters respecting the suit, and that the United States ought to be a party, in order to supervise such; but it seems to me that if this were a sufficient reason for making the United States a party in this case, it would apply to all cases between two States; for in all cases such arrangements are as likely to be made as in this one. But if such agreements of counsel, respecting the mode of conducting a suit between two States, could be deemed compacts between those States, with- 512*] in the restraining clause of the 10th *section of the first article of the Constitution, Congress, and not the Attorney-General, or this court, must sanction them; and there does not seem to be any satisfactory reason why that officer should be connected with the subject. Any agreement fixing the line of boundary, made by the two States and not sanctioned by Congress, would certainly not be executed by this court, which is to decree on the existing rights of the parties, and not upon new rights created by a compact, which is not valid, without the assent of Congress.

But, if the objection to the jurisdiction could be overcome, I should still be of opinion that the Attorney-General has not authority to make the United States a party to a suit in this court. That officer possesses no powers derived from usage or implied from the name of his office. His powers are co-extensive with his duty; and that is defined by law to be, "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned." 1 Stat. at L. 93. It belongs to Congress alone to decide in what cases the United States may be made a party in the courts, and to designate the officers by whom they may be made a party. This power Congress has exercised. They have conferred upon the district attorneys power to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned. 1 Stat. at L. 92. By the Act of May 29, 1830, sec. 5, 4 Stat. at L. 415, the Solicitor of the Treasury is empowered to instruct the district attorneys in all matters and proceedings appertaining to suits in which the United States are a party or interested; and by the 10th section of the same Act, the Attorney-General is to advise with and direct the Solicitor. But no authority is conferred by any law, upon any officer, to make the United States a party to any suit, except as a plaintiff or prosecutor. If the United States be interested in a suit against an individual, and he thinks fit to allow the law officer of the United States to prosecute or defend in his name, I know of no objection to it, and it is very often done. It may be suggested, that as the line of boundary will be fixed by the final decree in this case, and as the rights of the United States will thereby be concluded, it can do them no injury, but may be beneficial to them, to be a party to this cause. If this be so, and the court has jurisdiction, it may afford sufficient reason why Congress, in its discretion, should authorize an appearance by the Attorney-General in behalf of the United States; but it does not enlarge the power of that officer, or enable him to do what, in my opinion, no law has conferred on him power to do—to make the United States a party to an original suit in this court.

*I am authorized to say that Mr. Jus- [*513 tice McLean concurs in this opinion.

Ordered, that the Attorney-General have leave to adduce evidence, either written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States.

The State of Florida
v.
The State of Georgia.

On motions, to authorize the Attorney-General to take testimony on behalf of Florida; and to authorize the State of Georgia to cause the necessary surveys to be made.

Messrs. Westcott and Johnson, for State of Florida, against the motion.

Mr. Chief Justice Taney delivered the opinion of the court:

The court have considered the above motions.

*The motion to authorize the Attor- [*524 ney-General of the United States to take testimony, and to conduct the proceedings on behalf of Florida, with the assent of the State, is refused. Each State must conduct its proceedings for itself. Whatever the Attorney-General does in the case must be for the United States, and in the name of the United States, and with reference to their interest or duty in this controversy.

The motion on behalf of the State of Georgia, to appoint one or more persons to make the necessary surveys and to report their opinion to the court, is also overruled. Each party is at liberty to cause surveys to be made, and maps prepared and filed, by such person as the State may select, or, if they can agree, they may jointly appoint one. And these surveys and maps, and the proofs applicable to them, will be examined and considered by the court at the hearing, with the other testimony. But the court do not deem it advisable to appoint one or more persons to make these surveys and examinations, as officers of the court; and think the case will be better brought before them by leaving each State to act for itself.

The court, therefore, overrule the motions; and, in order to prepare the case for hearing, make the following order:

On consideration of the several motions filed

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yesterday by the complainant's counsel, and of the arguments of counsel thereupon had, as well in support of as against the same, it is ordered by the court that the said motions be and they are hereby overruled. And it is further now here ordered by the court, that the said parties in said cause be allowed until the first Monday of December, 1855, to obtain, take, and file the testimony and proofs by said parties respectively to be adduced and given in evidence, on the hearing of said cause; and that to enable said parties respectively so to do, commissions, in the usual form, be issued by the clerk, to examine witnesses, upon application of either party, accompanied by interrogatories, a copy whereof has been served upon the adverse party, or its solicitor or counsel, twenty days previous to such application, in order that cross-interrogatories may be filed within said twenty days by such adverse party; and that the commissioner or commissioners in each instance, if not agreed upon by counsel of the respective parties, be named by the Chief Justice or one of the Associate Justices of this court; and that, forthwith, on the return of any commission executed, the clerk do open and file the same and cause the same to be printed for the use of said parties. 525*] *And also, that any exceptions to testimony may be taken at the final hearing; and if exceptions be then taken to the competency of testimony, which the opposite party can remove by further proof, the court will reserve the decision, and give time to the party to produce it.

And also, that said cause be set for final hearing on the bill, answer, replication, exhibits, testimony and proofs, so adduced, filed and admitted, on the second Monday of January, 1856, unless cause be then shown to the court for the continuance thereof.

From the minutes of March 4, 1872:

On motion of H. P. Farrow, Att'y-Gen. of Georgia, it is ordered by the court that this cause be dismissed with costs, unless cause to the contrary be shown on or before the 19th of April next, and that the clerk transmit by mail copies of this order to the Governor and Att'y-Gen. of Florida respectively.

MARY LEWIS, Administratrix of Stephen J. Lewis, Deceased,

v.

EDWARD R. BELL, Assignee of I. Bell, Jr.

(See S. C. 17 How. 616-618.)

Assignment after suit brought—champerty—consideration—assignee entitled to money recovered.

There is no principle in equity which prevents a creditor from assigning an interest in a debt after institution of a suit therefor, as being within the Statutes of Champerty and Maintenance.

Nor will the want of a full money consideration as between father and son, and brother and brother, subject the transaction to such imputation, without further proof.

The assignee of a claim against Brazil, who prosecuted the claim to a final recovery, is entitled to the money awarded thereon, the assignment being absolute, on ample consideration, and there being no evidence of a secret trust.

Argued Feb. 16, 1855. Decided Mar. 6, 1855.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The bill in this case was filed in the Circuit Court of the United States for the District of Columbia, by the appellee, to recover the amount by a certain award.

The court below having entered a decree in favor of the complainant for $11,551.94, the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Samuel Chilton and A. H. Lawrence, for the appellant:

1. The proof shows that the assignment from Lewis to Bell, if ever consummated, was designed and understood between them as a mere security; that said assignment constituted said Bell a quasi trustee; that he could not assign or delegate his trust, and in any event, should have been made a party to the suit.

Hill on Trustees, 175; Corbin v. Emmerson, 10 Leigh, 663; Harrington v. Long, 2 Myl. & K. 592.

2. Edward R. Bell, to make the most of his title under the assignment from his brother, was a mere volunteer, and therefore not entitled to the aid of a court of equity.

Hill on Trustees, 83, 84, 85, and 448-9; 2 Story Eq. 304, sec. 1040; Antrobus v. Smith, 12 Ves. 39; Edwards v. Jones, 1 Myl. & C. 226; Meek v. Kattlewell, Hare, ch. 474.

3. The assignments from Isaac Bell to Isaac Bell, Jr., and from the latter to the appellee, Edward R. Bell, were made to effect a conclusive and fraudulent arrangement of bringing in said Isaac Bell as a witness, to prove a claim of his own, which could not be established by other testimony. Such a purpose is in fraud of the law, against public policy, defeats the ends of justice, tends to perpetuate the offenses of champerty and maintenance; a thing never to be aided or countenanced by a court of equity.

2 Story Eq. pp. 311, 312, sec. 1048, note 3; Bosser v. Edmonds, 1 Young & C. Exch. 481; Harrington v. Long, 2 Myl. & K. 592; Wood v. Downes, 18 Ves. 120; Post v. Avery, 5 Watts & S. 509; Lieper v. Peirce, 6 Watts & S. 555; Cochran v. McTeague, 8 Watts & S. 272.

4. The claim preferred by the bill is a stale demand barred by the Statute of Limitations, uncertain, not bona fide or founded upon valuable consideration; and in fine, is wholly destitute of any equitable relief.

Mr. Jos. H. Bradley, for the appellee:

1. Whatever interest in the said vessel and

NOTE.—Champerty, what is. How it differs from maintenance. Purchase of land in suit.

Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it. 1 Howk. P. C. C. 84; 2 Inst. 208; Co. Litt. 368b; Brown v. Beauchamp, 5 Monr. 416; Key v. Vattier, 1 Ham. 132; Rust v. Larue, 4 Litt. 417; Thurston v. Percival, 1 Pick, 416; Stanley v. Jones, 7 Bing. 369; Meeks v. Dewberry, 57 Ga. 263.

Maintenance differs from champerty in that the latter does not involve any agreement for an interest in the subject matter. Maintenance has been said to be now confined to cases where a stranger having no interest in the suit improperly and for the purpose of stirring up litigation and strife, en-

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cargo was lawfully subject to the disposal of Lewis, and also all his separate property on board the said brig, passed by the assignment of Oct. 1828, to Isaac Bell.

2. If the assignment was on trust to secure debts due by Lewis or by Porter, or by both, to Bell, it is incumbent on the appellee to show the payments of said debts; but the validity of the assignment cannot be impeached by reason of lapse of time, or any defective statement of the amount of debt.

3. The case is free from any infirmity or taint of impurity arising from the original assignment or the conduct of any of the assignees.

2. Story Eq. secs. 1049, 1050, and cases cited; Harrington v. Long, 2 Myl. & K. 592.

Mr. Justice Grier delivered the opinion of the court:

The subject matter in dispute in this case is a sum of money in the hands of the Secretary of the Treasury, which had been awarded to the appellant by the Commissioner appointed under the Act of Congress to adjust claims under the Treaty between the United States and Brazil. Stephen J. Lewis, deceased, is admitted to have been the original owner of the claim. He was owner of one fifth of the brig Caspian, which was illegally seized by the Brazilian squadron, in October, 1827, and condemned. Lewis was on board at the time, and was robbed of his baggage and money to the extent of some $4,000. The whole amount awarded on these claims of Lewis was $11,551.

Isaac Bell, Sr., the father of the appellee, had an assignment of this claim from Lewis, by deed of assignment, dated November, 1828.

The claim was prosecuted to its final recovery in 1852, by Isaac Bell. But having in the meanwhile lost or mislaid his *original [*617 deed of assignment, and not having sufficient legal proof of the copy, the Commissioner awarded the money to the administratrix of Lewis.

Isaac Bell, Sr., assigned his right to his son, Isaac Bell, Jr., and he soon after assigned to his brother, the appellee, who instituted this proceeding in the Circuit Court of the District of Columbia, under the provisions of the Act of Congress of July 3, 1852.

After the institution of this suit, the original assignment was accidentally discovered, and has been satisfactorily proved. The court below awarded the money to the complainant below, and the administratrix of Lewis has taken this appeal.

The objections to the title of Edward R. Bell, as champertous, collusive and fraudulent, and made for the purpose of using the father as a witness, are wholly unsustained by any evidence.

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courages others to bring actions or to make defenses which they have no right to make. Wheeler v. Pounds, 24 Ala. 472; Lathrop v. Amherst B'k, 9 Metc. 489; Quigley v. Thompson, 53 Ind. 317; Flight v. Leman, 4 Q. B. 883.

Maintenance is the generic offense of which champerty is the species. Sedgwick v. Stanton, 14 N. Y. 289.

It is not essential to the offense of champerty that a suit be commenced at the time the agreement is made. Rust v. Larue, 4 Litt. 417.

It is not maintenance to purchase an interest which is the subject of a suit; but if the purchaser gives an indemnity against all costs incurred or to be incurred by the seller in the prosecution of the suit, the transaction amounts to maintenance. Harrington v. Long, 2 Myl. & K. 590.

A purchase of land while a suit concerning the title to it is pending, if made with knowledge of the suit, is void for champerty under the statute of New York. Jackson v. Ketchum, 8 Johns. 479; Jackson v. Andrews, 7 Wend. 152; Murray v. Ballou, 1 Johns. Ch. 573; Murray v. Lylburn, 2 Johns. Ch. 444.

If a person sell lands, held at the time adversely to him, the sale is not a valid consideration for the contract to pay the purchase money, the contract is champertous and void, on general principles of law and public policy. Monnot v. Husson, 3 How. Pr. 447; Ring v. Gray, 6 Monr. 368; Martin v. Pace, 6 Blackf. 99; Brindley v. Whiting, 6 Pick. 355; Whitaker v. Cone, 2 Johns. Cas. 58; Loud v. Darling, 7 Allen, 206; Gibson v. Shearer, 1 Murph. 114; Tomb v. Sherwood, 13 Johns. 289.

There must be knowledge by the vendor of actual adverse possession. Leroy v. Veeder, 1 Johns. Cas. 417; Cassedy v. Jackson, 45 Miss. 397; Etheridge v. Cromwell, 8 Wend. 629; Sessions v. Reynolds, 7 Sm. & M. 161.

A devise or conveyance between near relatives of land held adversely or in litigation is good and not champertous. Morris v. Henderson, 37 Miss. 492.

A conveyance by one out of possession is not champertous. 12 Rich. Law (S. C.) 420.

When the relation of landlord and tenant, master and servant, exists, or when the acts done are charity to the poor or in lawful exercise of the legal profession, there will be no unlawful act of maintenance. Thurston v. Percival, 1 Pick. 417; Thalhimer v. Brinkerhoff, 2 Cow. 647; Perine v. Dunn, 3 Johns. Ch. 508; Findon v. Parker, 11 M. & W. 675; 7 Jur. 903; 12 L. J. Exch. 444.

So, one who is of kin or affinity may assist or apply to counsel to assist. Id. and see Baker v. Whiting, 3 Sumn. 475; Master v. Miller, 4 Term, 320; Gilleland v. Failing, 5 Denio, 308; Persse v. Persse, West, 110; 7 C. & F. 279.

The fact that the plaintiff was a relation of the defendant and had some collateral interest in the suit, did not prevent a contract, by which he was to receive half of what defendant recovered, being champerty. Hutley v. Hutley, 8 L. R. Q. B. 112; 42 L. J. Q. B. 52; 21 W. R. 479; 28 L. T. N. S. 63.

Contracts founded on any species of unlawful champerty or maintenance are void. Champerty constitutes a complete defense to a contract at law or in equity. Thompson v. Warren, 8 B. Monr. 488; Thurston v. Percival, 1 Pick. 415; Burt v. Place, 6 Cow. 431; Mann v. Fairchild, 2 Keyes, 106; S. C. 3 Abb. Ct. App. Dec. 152; Martin v. Clark, 8 R. I. 389.

Contract to collect a note for one half the amount collected is champertous and void. Byrd v. Odem, 9 Ala. 755; or to prosecute a claim against the government for a share, if successful, and nothing, if not. Coquillard v. Bearss, 21 Ind. 479; or to communicate information which will enable a person to succeed by action and to exert influence in procuring evidence to substantiate the claim for a portion of the sum recovered. Staley v. Jones, 7 Bing. 369; 5 M. & P. 193; otherwise, where no suit was pending and there was no stipulation for the commencement of any. Sprye v. Porter, 2 El. & Bl. 58; 3 Jur. N. S. 330; 26 L. J. Q. B. 64.

A fair agreement to supply funds to carry on a suit, for a share of the property, if recovered, ought not to be regarded as per se opposed to public policy. But an agreement of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid. Ram Coomar Coondoo v. Chunder Canto Mookerjee, 2 L. R. App. Cas. 186.

The reasons for a law against champerty and maintenance do not exist in U. S. to same extent as in England. Roberts v. Cooper, 20 How. 467.

The common law on that subject has not been generally adopted in the United States. Maybin v. Raymond, 4 Am. Law Times N. S. 21.

It does not exist in New York except by statute. Sedgwick v. Stanton, 14 N. Y. 289; Zogbaum v. Parker, 66 Barb. 341; Aff'd, 55 N. Y. 120.

It is not part of the common law of Connecticut. Richardson v. Rowland, 40 Conn. 565; see, also, Danforth v. Streeter, 28 Vt. 490; Wright v. Meck, 3 Iowa, 472.

As to champerty and attorney's compensation contingent on success or from proceeds of suit; for a fixed sum, or a percentage. Purchase of interest in the suit or subject of litigation by attorney, —see note to McMicken v. Perin, post, 504.

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There is no principle in equity which prevents a creditor from assigning an interest in a debt, after institution of a suit therefor, as being within the statutes against champerty and maintenance (see 2 Story's Eq. 1049, 1054); nor will the want of a full money consideration, as between father and son, and brother and brother, subject the transaction to such imputation, without further proof. The father's testimony was not offered by the appellee in this case; we are not, therefore, bound to notice the question of its admissibility, or the policy of permitting assignments for the purpose of making the assignor a witness, on which so much of the argument of this case was expended.

It is contended, also, that the assignment of Lewis to Bell, Sr., is not absolute, but a security only, of some debt which has been satisfied; and that it is voluntary, and imports a trust between the parties.

The deed of assignment, after a recital of the capture of the brig Caspian, and the claim preferred by the American Minister at Brazil, on behalf of Lewis, for indemnity, proceeds as follows:

"Now, know all men by these presents, that the said Stephen J. Lewis, for and in consideration of the sum of $1, lawful money of the United States, to him in hand paid by Isaac Bell, of the City of New York, merchant, the receipt whereof is hereby acknowledged, and also for divers other good considerations him thereunto moving, hath granted, bargained and sold, assigned, transferred and set over, and by these presents doth grant, bargain and sell, assign, transfer and set over unto the said Isaac Bell, his executors, administrators and assigns, all and singular, the said claim, and all the sum and sums of money that may be recovered or received, of and from the said Brazilian government, or of and from whomsoever it may concern, for or by reason of the said illegal 618*] capture, or which may arise from *the proceeds of the said brig Caspian and cargo; to have and to hold the same and every part and parcel thereof, unto him, the said Isaac Bell, his executors, administrators and assigns, forever," etc., etc.

This is an absolute assignment of the whole claim of Lewis against the Brazilian government. Besides the consideration of $1, it mentions "divers other good considerations," without specifying them particularly.

The bill alleges that the real consideration was a large indebtedness of Lewis to Bell, which was never paid, Lewis having died in 1844, insolvent. This is denied by the answer. But the evidence, as far as it affects the point, tends to establish the correctness of the allegations of the bill. After the assignment, Lewis does not appear to have interfered in the prosecution of this claim, up to the time of his death, in 1844, nor did his administratrix set up a claim till the money was recovered in 1852.

In December, 1828, it appears that Bell transmitted this assignment to his agent in Buenos Ayers, in order to prosecute the claim, alleging that the "assignment was made by Lewis, in consequence of advances made to him in the purchase of a brig and cargo." In the same year he wrote to the Hon. Henry Clay, inclosing the protest of Lewis, in order that our government might be led to urge the payment of his claim, and alleging as the reason of his interference, that Lewis was indebted to him in the sum of $15,000, and had failed; and had therefore made him the assignment now in question. In a letter from Bell to Mr. Cambreling, in 1830, urging his interference in behalf of the Lewis claim, Bell assigns as the reason for his request, that Lewis had become indebted to him, and had no other means of payment but through that claim; and to confirm the whole matter beyond dispute, the counsel of the respondent below (now appellant) read in evidence the testimony of Isaac Bell, Sr., proving the assignment to have been made in consideration of large indebtedness, by Lewis, to Bell, and that Lewis was then insolvent, and continued so to the time of his death. By their own showing, therefore, there is ample consideration for the assignment, and not the least evidence of a secret trust.

The decree of the Circuit Court is, therefore, affirmed.

Decree affirmed, with costs.

JAMES B. PECK, William Heilman, and Edwin Fresmuth, Owners of the Steamship Columbus, App'ts,

v.

JOHN SANDERSON, Libelant.

(See S. C. 17 How. 178–183.)

Collision—steamer and sailing vessel—no rule holds in emergency.

It is the general rule that a sailing vessel should keep her course when approaching a steamboat, and it is the duty of the latter to keep out of her way.

But when brought suddenly and unexpectedly close to each other, and the ordinary rules will not prevent a collision, it is the duty of each to act according to the emergency, and to take any measure most likely to attain the object.

In such case it is proper for the steamer to stop her engine and back.

Case decided according to the particular facts, showing no fault on part of steamer.

Argued Feb. 8, 1855. Decided Mar. 8, 1855.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Messrs. Waln and F. B. Cutting, for the appellants:

Whatever may be the duty of steamers towards sailing vessels, the latter are not released from their obligations to preserve proper care, caution and skill. They, too, have reciprocal duties to fulfill.

13 How. 101; 6 N. Y. L. Obs. 202; Hurley v. Steamboat New Champion, 7 Jur. 1094; Angell on Car. sec. 8, pp. 648–650.

Where it appears that one of the vessels neglected an ordinary and proper measure of precaution, the burden is on her to show that the collision would have happened, had she performed her duty.

NOTE.—Rules for avoiding collision—see notes, 35 L. ed. U. S. 453; 41 L. ed. U. S. 1058.

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Waring v. Clarke, 5 How. 465; Clapp v. Young, 6 Law Rep. 111.

The principle of the common law, that where there has been mutual negligence on both sides, the negligence of each having contributed to the disaster, no action can be maintained, is in accord with sound and wholesome principles of public policy.

Many eminent jurists have considered it to be equally a principle of maritime law.

3 Pard. 86.

The English courts, however, and many of our own judges, have adopted the rule of apportionment.

Abbott on Ship. 238, and notes; Angell on Car. secs. 634 to 641, and cases there cited.

Mr. Howard, for the appellee:

The law is settled that the steamer should have given way; she did not, and hence did not take a "proper precaution." The schooner followed the rules authorized by this court in 10th How. and held her course, thus exercising ordinary care.

Bullock v. Steamboat Lamar, 8 Law Rep. 275.

As to the duty of steam vessels to give way for sailing vessels, see Handaysyde v. Wilson, 3 Car. & P. 528; The Rose, 2 Wm. Rob. 1; Hawkins v. The D. & O. Steamboat Co. 2 Wend. 452; Lowry v. Steamboat Portland, 1 Law Rep. 313; Larkwood et al. v. Lashell, 15 Law Rep. 391; Abb. Sh. tit. Collision.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This case arises out of a collision between the schooner Mission, of Edenton, in North Carolina, and the steamship Columbus, of Philadelphia. The schooner sunk immediately, 179*] *and all on board perished, with the exception of Wilson G. Burgess, a seaman, who succeeded in getting on board of The Columbus. The libel is filed by the owner of the schooner, and charges that the collision was occasioned by the fault of the steamship. The Circuit Court sustained the libel, and directed the respondents to pay the full value of The Mission and her cargo. And from that decree this appeal has been taken.

The only witness examined by the libelant is the seaman above mentioned. It appears from his testimony that the schooner was bound from Rum Key to Edenton, with a cargo of salt and some specie. The crew consisted of the captain, one mate, two able and one ordinary seaman, a cook, and a son of the captain about twelve years old. About 12 o'clock on the night of the collision, Burgess, and a seaman named Brown, and the master, came from below, it being their watch on deck. The master soon went below again, and remained there till after the collision, leaving no one on deck but the two seamen. Brown took the wheel and Burgess went forward; and at two o'clock in the morning, Burgess took the wheel and Brown went forward. Burgess states that it was a pretty clear night, with a moderate wind from northwest, the schooner heading north by east. The sails were trimmed flat aft, and the schooner was as close-hauled to the wind as she could be. He could see nothing on the larboard side, because the sails intercepted his view. She carried no lights.

He had been at the wheel about half an hour when the collision took place. He heard a heavy crash; the wheel turned, flew out of his hands, and knocked him down. He ran forward, and saw a large vessel into them. Her bowsprit was between the schooner's jib and foremast, and extended over their forecastle deck. He got hold of the bowsprit shroud and got upon her deck. The schooner went down, and the rest of the crew perished.

Burgess states that he neither saw nor heard the steamer until the vessels came together. The Columbus was on the larboard side, and the sails of the schooner prevented him from seeing her. He never saw or heard Brown after he went forward, and he gave the witness no notice of the approach of the steamship.

On the part of The Columbus several witnesses were examined, and among them the mate, a seaman stationed on the lookout and the engineer. There is no material discrepancy in their testimony; and the result of it is this:

The steamship was a propeller, and a regular packet between Philadelphia and Charleston. She was on her voyage from the former place to the latter, with freight and passengers on board.

On the night of the collision it was the mate's watch, from *twelve o'clock to [*180 four o'clock in the morning. He came from below at twelve o'clock, and saw that his men were keeping a lookout forward, and was also on the lookout himself. The wind was west-northwest, varying one or two points, and the steamer was heading southwest and going at the rate of about eight and a half knots an hour. There was a heavy head sea, and the night was starlight, but not very clear, somewhat hazy. The ship carried a signal light (a globe lamp), such as they usually carried, which was burning, and all the state-rooms were lighted. These lights could be seen from a distance, variously estimated by the witnesses from one to five miles. Her usual watch were on deck; two of them stationed on the forecastle deck on the lookout for Cape Lookout light, the ship being then about ten miles from Cape Lookout breakers, and on soundings.

The Mission was first seen by one of the lookout, who immediately ran aft two or three steps, and sang out, "vessel right ahead." She was then at a distance of two or three hundred yards. And on such a night a vessel like The Mission, with her sails hauled flat aft, and coming towards The Columbus, edge on, and without lights, could not be seen at a greater distance.

The mate, as soon as the lookout cried "sail right ahead," jumped from the skylight, ordered the engineer to stop the engine, and ran forward. He saw The Mission a point or a point and a half on the larboard bow, apparently standing west by north, distant, as he conjectured, about two hundred yards. He could not see her very plain, her sails being presented to them edgewise. She was rather to windward of the steam-ship, and close-hauled. He judged that he could not clear her by shifting the helm, and he ordered the engineer to back. The orders were instantly obeyed, and The Columbus was backing when the collision took place. It took place in less

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than a minute from the time the schooner was first seen.

The witnesses testify that when, at night, the lookout cries out, "sail ahead," it is the duty and practice of steam vessels, when they are uncertain of the way the sail is standing, to stop the engine and back; and it is not usual or proper to change her course before the course which the other vessel is steering is first ascertained. And among the witnesses who thus testify is a seaman who has been a pilot in the Bay of Delaware many years, and who happened to be on board The Columbus as a passenger when this disaster happened.

Upon this statement of facts, gathered from the testimony on both sides, we see no just ground for imputing this unfortunate collision to negligence or want of skill in the manage- 181*] ment of The *Columbus. She was well lighted, and could be seen at a great distance. She had a sufficient lookout, properly stationed.

But it is said it was a starlight night, and if the lookout had been watchful The Mission ought to have been seen at a greater distance. Undoubtedly there are nights in which such a vessel might be seen much farther off; and in the night of which we are speaking, she might have been seen at a greater distance, if the whole breadth of her sails had been presented to the approaching vessel. But there are nights which may properly be called starlight, when there is a haze on the surface of the ocean which obstructs the vision. And the court cannot undertake to say, that in any night, whenever the stars are shining, a vessel like The Mission may be seen at a greater distance than two or three hundred yards, although she is approaching head on with her sails drawn flat, and without a light. The distance must depend on the state of the atmosphere, and vary with it. And no one can know or form a safe opinion as to the distance at which the schooner might have been seen, on the night of which we are speaking, unless he was at the place of collision at the time it happened, or derives his knowledge from persons who were there. And when the witnesses on board The Columbus testify that she could not be seen farther off, there is no reasonable ground for doubting the truth of their testimony. It is a fact, proved by eyewitnesses whose testimony is not impeached.

Neither can the order to stop the engine and back, instead of changing the course of the steamship, be regarded as a fault. It would evidently have been unwise to change her course, until the course of the approaching vessel was ascertained. She might be approaching at an angle that would clear the steamship, and a change in the course of the latter might produce a collision instead of preventing it. And stopping the engine lessened the rapidity with which the vessels were nearing each other, and gained time, while he was ascertaining the distance of the sail, and the direction in which it was steering. When he had done this, if there was sufficient distance between them to enable him to avoid her, it was unquestionably his duty to change the course of The Columbus, and allow the schooner to pass on, in the course which he was steering. But, in his judgment, this could not be done.

The testimony shows that he was an experienced and trustworthy seaman. And there is no evidence to impeach the correctness of his opinion in this particular. And if it was impossible to avoid the schooner, by changing the course of his vessel, the order to back was evidently judicious, as it gave more space for the schooner to change her course, and thereby escape the impending danger. Her course could be changed in a much *shorter space [*182 than that required for a steamship of the size of The Columbus.

It is, without doubt, the general rule, that a sailing vessel should keep her course when approaching a steamboat, and it is the duty of the latter to keep out of her way. But this rule presupposes that the steamer discovered, or ought to have discovered, the sailing vessel when at a sufficient distance to avoid her, by changing her own course. But where, as in the present case, they are brought suddenly and unexpectedly close to each other, and the ordinary rules of navigation will not prevent a collision, it is the duty of each to act according to the emergency, and to take any measure that will be most likely to attain the object. Experienced seamen testify that the mode adopted on the part of The Columbus was the usual and best one; and we see no reason to doubt it. And if The Columbus had been seen from The Mission when the engine was stopped, she might, it appears, have passed her in safety. Not a moment appears to have been lost on board of the steamer, in giving or in executing the orders which the occasion called for; and we think she is not in any degree responsible for the disaster.

In this view of the case, it is unnecessary to inquire whether any blame can be attached to The Mission. For, whether she was or was not managed unskillfully or negligently, The Columbus not being in fault, is not liable for any damage sustained by the schooner.

But yet it is evident that there was great negligence on her part. For it is impossible that a vessel, lighted up like the steamer, would not have been seen from the schooner before she actually came in collision, if there had been ordinary care and watchfulness on board. It may indeed have happened that Brown, who went forward as the lookout, fell overboard by some accident, without the knowledge of Burgess, before The Columbus was in sight; and so, the want of a lookout might have been occasioned by misfortune, and not by carelessness. But the conduct of the captain, in going below during his watch, and not remaining on deck to see that the seamen were at their posts and attending to their duty, was hardly consistent with good seamanship. And it is difficult to believe that the approach of the steamer could be unknown to Burgess, who was at the helm, until the actual collision, unless he was asleep at his post. The sails of his vessel might have hid the lights, but it is hardly credible that a wakeful and watchful seaman at the wheel would not have heard the noise of her machinery before he felt the collision. We do not, however, pursue this inquiry, because it is not material to the decision. And as, in the opinion of the court, no fault is imputable to The Columbus, the *decree of the Circuit [*183 Court must be reversed, and the libel dismissed.

Reversed with costs, and remanded to the Circuit Court, with directions to dismiss the libel, with costs in that court.

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JOSEPH IASIGI and Thomas A. Goddard, Plff's in Er.,
v.
JAMES BROWN and Thomas B. Curtis, Trustee of said Brown.

(See S. C. 17 How. 183–204.)

Guaranty—recommendation for credit — bad faith, question for jury.

Where a letter was written by defendant, upon inquiry of him, expressing a favorable opinion of the responsibility of a firm, evidence tending to show the falsity of defendant's statements and his bad faith in writing the letter, raises a question for the jury.

Whatever defendant's motives, he is not to be held responsible, unless his letter was intended to, and did, mislead the plaintiff.

If a false impression was made and authorized by the letter, which was intended by defendant to deceive and mislead the plaintiff, while at the same time the true condition of the firm which did not authorize the representation, was known to the defendant, the latter would be held responsible. These are questions for the jury.

(Mr. Justice CATRON did not sit in this case.)

Argued Feb. 9, 1855. Decided Mar. 8, 1855.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This suit was brought in the Circuit Court of the United States for the District of Massachusetts by the plaintiffs in error for a deceit in an alleged false representation of the credit of a third party.

At the trial in the court below, the judge decided that the evidence presented as to the representations in question, was insufficient in law to entitle the plaintiff to recover, and so charged the jury; whereupon verdict and judgment were rendered in favor of the defendants, and plaintiffs brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Mr. A. H. Lawrence, for plaintiffs in error:

A peremptory direction to a jury to return a verdict for a defendant after the introduction of evidence, competent to sustain the issue, cannot be distinguished in principle, though it differs in form, from an order of nonsuit.

Morgan v. Ide, 8 Cush. 420.

It is not in the power of the judge, without the plaintiff's consent, to order a nonsuit.

Elmore v. Grymes, 1 Pet. 469; DeWolf v. Rabaud, 1 Pet. 476; Crane v. Morris, 6 Pet. 598; Silsby v. Foote, 41 How. 218; see, also, Mitchell v. N. E. Mar. Ins. Co. 6 Pick. 117; Colby's Practice, 225; 2 Lee's Dict. of Practice in Br. and G. B. 958.

Where there is any legally competent evidence offered, the case must be submitted to the jury, with the appropriate instructions.

Thus, in Greenleaf v. Birth, 9 Pet. 292, the court say: "Where there is no evidence tending to prove a particular fact, the court are bound to instruct the jury when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence, and determining what effect it shall have." p. 299.

So in U. S. v. Laub, 12 Pet. 1, the court say: "If the court erred in not giving instructions asked on the part of the plaintiff, it must have been on the ground that no evidence, tending to prove the matter in dispute, had been given to the jury; for it is a point too well settled to be now drawn in question, that the effect and sufficiency of the evidence are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial."

U. S. v. Laub, 12 Pet. 1, 5; Bank of Washington v. Triplett, 1 Pet. 25, 31; see, also, Chesapeake and Ohio Can. Co. v. Knapp, 9 Pet. 541, 568; Scott v. Lloyd, 9 Pet. 418, 445; Roach v Hulings, 16 Pet. 319, 323.

The court have merely the power to advise a verdict, even where a verdict, inconsistent with that advice, ought to be set aside.

Davis v. Maxwell, 12 Met. 286; Morgan v. Ide, 8 Cush. 420.

Demurrers to evidence, are not encouraged in this court.

U. S. Bank v. Smith, 11 Wh. 171.

The next position of plaintiffs is, that if under any circumstances, when competent evidence is offered, it is in the discretion of the judge to direct a verdict, yet that in cases of alleged actual fraud, where the intention of a party is at issue, such course cannot be pursued.

In Etting v. Bank of U. S. 11 Wh. 59, 75, the court say: "Conceding it to be the province of the court to construe any particular paper which was offered in evidence, the report of the 30th of March for example, and to declare the meaning of every sentence and of the

NOTE.—Liability for statements as to solvency, credit or responsibility, of third persons.

A false recommendation of the credit or property of a third person, with knowledge that it is untrue, and with intent to gain credit for such person, is a fraud for which the party giving it may be held liable. Russell v. Clark, 7 Cranch, 69; Weeks v. Burton, 7 Vern. 67; Harris v. Alcock, 10 Gill & Johns. 226; Pasley v. Freeman, 3 Term, 51; Upton v. Vail, 8 Johns. 181; Zabriskie v. Smith, 13 N. Y. 322; Patten v. Gurney, 17 Mass. 182; Wise v. Wilcox, 1 Day, 22; Hart v. Talmadge, 2 Day, 381; Medbury v. Watson, 6 Metc. 247; Stiles v. White, 11 Metc. 356; Ewings v. Calhoun, 7 Vt. 79; Weeks v. Burton, 7 Vt. 69; Lord v. Colley, 6 N. H. 99; Boyd v. Brown, 6 Barr. 310; Harner v. Alexander, 5 Bos. & Pull. 241.

An individual is not bound to answer inquiries in regard to the solvency of a third person, but having undertaken to do so, he is bound to speak truthfully; and he is not at liberty to suppress a material fact within his own knowledge. Allen v. Addington, 7 Wend. 9; Viele v. Goss, 49 Barb. 56; S. C. 51 N. Y. 624; Devoe v. Brandt, 53 N. Y. 462; Fowler v. Benjamin, 16 Upper Can. Q. B. 174; Corbett v. Brown, 1 Mood. & R. 108; Gough v. Dennis, Hill & Denio, 55. See Kidney v. Stoddard, 7 Metc. 252; Eyre v. Dunsford, 1 East, 318.

In Tapp v. Lee, 3 Bos. & P. 367, Judge Chambre says: "If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood." p. 371.

It has been held that a positive assertion of another's solvency, by one who ought to have known and was supposed to have known his condition, with intent to induce a sale, renders the maker liable. Corbett v. Gilbert, 24 Ga. 454; Hall v. Bradbury, 40 Conn. 32; Marsh v. Falker, 40 N. Y. 562; Haycraft v. Creasy, 2 East, 92.

Where inquiry is made with regard to opening an account with a person as a general customer, and fraudulent representations are made by the person inquired of, and loss ensues, an action will lie, though the customer pays for the first bill of goods, on the purchase of which the reference was given, and the loss occurs on subsequent purchases. Hutchinson v. Bell, 1 Taunt. 558. It is for the jury to say how far the representations in-

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whole instrument; yet this report contains a great variety of extrinsic circumstances, suggests measures of deep interest, was followed by numerous successive acts which took place in the country; and which do not derive all their influence on the cause from the construction of the particular papers in which they are communicated, but in a considerable degree, from their connection with each other, from the motives in which they originate, and from the effects they were calculated to produce and did produce on others. These subjects are peculiarly proper for the consideration of a jury."

See, also, Ewing v. Burnet, 11 Pet. 41: Crane v. Morris, 6 Pet. 598; Wood v. U. S. 16 Pet. 342, 360; Aylwin v. Ulmer, 12 Mass. 22; Morton v. Fairbanks, 11 Pick. 368; Farnum v. Davidson, 3 Cush. 232.

3. If it were true that there may be cases in which, after the introduction of competent evidence, the judge can peremptorily direct a verdict according to his view of the weight of the testimony, and if suits where fraudulent intention is the issue, could constitute one of such cases, it is respectfully submitted, that treating the present case as one of demurrer to evidence, the instruction was wholly unwarranted.

It may be proper to suggest on this point, that this court has once determined with regard to inferences from evidence, that "the only case in which the court can make such inferences and pass upon the sufficiency of evidence, is by a demurrer to evidence," and not upon motion for instruction.

Bank of Metropolis v. Guttschlick, 14 Pet. 19, 31.

The established rule as to demurrers of this description is, that "in a demurrer to circumstantial evidence the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit on the record every fact and every conclusion which the proposed evidence conduces to prove."

2 Phillips Ev. Am. ed. 1849, 467; Fowle v. Common Council, etc., 11 Wh. 320; Young v. Black, 7 Cr. 565, 568.

As to the extreme liberality of the court in their inferences against the party demurring, see U. S. Bank v. Smith, 11 Wh. 171; Dickey v. Schreider, 3 S. & R. 185, 187, 413; Copeland v. N. E. Ins. Co. 22 Pick. 135.

The evidence in this case is therefore to be examined, and the opinion of the District Judge regarded in the light of this principle.

Messrs. **Daniel Lord** and **E. Merwin**, for defendants in error:

First. This cause is tried under that section of the Statute of Massachusetts which is similar to 9 Geo. IV., ch. 14, sec. 6, called Lord Tenterden's Act. The following are English cases under that Act:

Lyde v. Barnard, 1 Mees. & W. 101; Haslock v. Fergusson, 7 Ad. & E. 86; Swann v. Phillips, 8 Ad. & E. 487; Devaux v. Steinkeller, 6 Bing. N. C. 84.

Second. By the language and policy of that Statute, the only assurance or representation as to credit, which should be the foundation of an action, shall be in writing.

Shindler v. Houston, 1 Coms. 263, N. Y.

Under no circumstances can a person be held responsible for a fraudulent representation of another's credit to any other person than the one to whom he directly made it, or to whom he was informed it was to be communicated. There is no reported case to the contrary.

Scott v. Lara, 1 Peake Cas, 226; McCracken v. West et al. 17 Ohio, 16.

Wherever at the common law a person has been held responsible for the consequences of a fraudulent representation made to some other than the parties suing, it has been solely in those cases where the person suing was the one actually intended to be deceived by the representation, and where it was made with the intent that it should be communicated to, and acted on, by him.

Langridge v. Levy, 2 M. & W. 519; Winterbottom v. Wright, 10 M. & W. 109; Longmeid v. Holliday, 6 W. H. & G. 761; see, also, Ward v. Weeks, 7 Bing. 211.

3. The representation being a statutory document the construction of it belongs to the court.

In the present case there was no evidence of the use of words in any special or technical sense; nor was there any conflict of evidence as to any fact needed in the understanding of the letters.

Bell v. Bruen, 1 How. 183; Turner v. Yates, 16 How. 23.

4. The plaintiffs are not entitled to recover because of the terms of the letter of Mr. Curtis to which it was a reply.

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fluenced subsequent dealings, also. Zabriskie v. Smith, 13 N. Y. 322; Van Bruck v. Peyser, 28 How. (N. Y.) 292.

But if the inquiry be general, and the goods it was then contemplated to sell were paid for, the third person is not liable, although the person inquired about becomes insolvent, and goods subsequently sold him are not paid for. De Graves v. Smith, 3 Camp. 533.

It is not essential that the false representations should be the sole inducement to the sale. It is sufficient if plaintiffs would not have parted with their goods but for the false representations. Addington v. Allen, 11 Wend. 374. Shaw v. Stine, 8 Bosw. 157. Whether the fraudulent representations induced plaintiff to act, is a question for the jury. Von Bruck v. Peyser, 28 How. (N. Y.) 292.

To represent of a man entirely insolvent, that one has examined into his affairs, considers him solvent and worthy of credit, and that he is going on well, when all he knows is that he owes a large sum, is actionable, if the representation was made from bad motives, to induce a credit. Zabriskie v. Smith, 13 N. Y. 322.

The false representation may be by general letter of credit, and evidence is not admissible to prove that it was given for a particular purpose. Williams v. Wood, 14 Wend. 126; Addington v. Allen, 11 Wend. 374.

Where the director of an insolvent bank represents to a third person that the bank is solvent and prosperous, and advises him to subscribe to the capital stock, which the latter does, giving a bond and mortgage to secure his subscription, such director will be liable for loss thereby sustained by the party so subscribing. Hubbard v. Briggs, 31 N. Y. 518; Scott v. Dixon, 1 Ell. & E. 1099.

But where a director of a corporation sees a card, issued by the officers in ordinary course of business, with the directors' names attached, he cannot be held liable for false representations contained in the card, where it is found as fact that he never circulated the cards, that he did not know the representations were untrue, and had no knowledge that they were true, but merely allowed his name to be used without considering the effect of so doing. Wakeman v. Dalley, 44 Barb. 498.

The action cannot be maintained, in the absence of proof, that the defendant believed or had reason to believe at the time he made them that the repre-

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The letter of Mr. Curtis invites information to be "discreetly used by myself."

5. The letter of April 7th, was by its terms exclusively limited to Mr. Curtis alone by its being inscribed "confidential."

The letter of April 7th was also "confidential," in consequence of its communications concerning the defendant's connection with the parties inquired of.

The conduct of Mr. Curtis in submitting the letter to the plaintiff's inspection has no bearing on the question. He, in strictness, violated the confidence placed in him.

6. The subsequent letter of Brown, Brothers & Co., of June 27th, has no bearing on the construction of the letter of April 7th.

To introduce a paper, by relation, into instruments under the Statute of Frauds, express reference is necessary.

Per Mr. Justice Nelson, 14 How. 456; Salmon Falls Mfg. Co. v. Goddard, and cases there cited.

7. The conversations in October and January following cannot be used in the interpretation of the letter of 7th April.

8. The offers of proof, tending to show the facts stated in the letter of April 7th false and suppressive, were wholly insufficient and inadmissible. The evidence seeks to contradict the effect of a writing by oral evidence, and to reverse the policy of the Statute, which shields all men from charges of fraud, without a writing, to be falsified.

It was the duty of the judge to direct the jury to bring in a verdict for the defendants.

Parks v. Ross, 11 How. 362.

Mr. Justice McLean delivered the opinion of the court:

This case is brought to us by a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The plaintiffs are merchants in Boston, and deal largely in wool, and prior to the 4th of 190*] April, 1851, sold occasionally to *two Corporations in the State of Connecticut, called the Thompsonville Company and the Tariffville Company, and received therefor their notes, indorsed by Orrin Thompson. And with the view of making further sales to them, having become doubtful of their pecuniary means and ability to make payment in future, the plaintiffs applied to Thomas B. Curtis, of Boston, the agent of defendant, to ascertain his opinion as to any possibility of loss by selling largely on credit to said Corporations or to Thompson; the plaintiffs knowing that the defendant was friendly to the Companies, and intimately acquainted with their pecuniary condition.

A letter was written to defendant, by his agent, Curtis; and an answer was received, as alleged in the declaration of the plaintiffs, which induced them to give large credits to the two Companies and Orrin Thompson, when at the time they were insolvent, which fact was known to the defendant.

The points in the case are stated in the bill of exceptions, and arise on the construction of the above letter and one of a subsequent date, and on facts proved and offered to be proved, which conduced to show, as plaintiffs insist, the fraudulent intent with which the letters were written.

The first letter from Curtis to Brown bears date of the 5th of April, 1851, and reads as follows: "Dear Sir—I have your note of yesterday, but have scarcely had a moment to peruse it this morning. My object at the moment is to ask your opinion as to any possibility of loss by selling largely to the Thompsonville Company or Orrin Thompson. Whatever that opinion may be, it will be discreetly used by myself."

The reply to this letter is marked "confidential," and dated "New York, 7th April, 1851. T. B. Curtis, Esquire. Dear Sir—With respect to Thompson & Co. and Orrin Thompson, I have to say, that our house done business with them for some twenty years or more; they have always met their engagements promptly, and we feel are men of strict integrity. They have unquestionably laid out too much money in the Tariffville Manufacturing Company and the Thompsonville Carpet Manufacturing Company, and my house has been for years in the habit of loaning them either paper or money to a considerable extent on security. On the failure of Austen and Spicer, they were unfortunately on their paper (received for sales of carpets) for $183,000; this threw, suddenly, so heavy a burden on Thompson & Co. that Messrs. Hicks & Co. and ourselves looked into their affairs, and feeling that they had an abundance to pay every one, and have a handsome sum left, if they continued their business, we jointly advanced the money to pay their indorsements as they came round, for

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sentations were false, or that he assumed to have, or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge. Marsh v. Falker, 40 N. Y. 562; Meyer v. Amidon, 45 N. Y. 169; S. C. 23 Hun, 553.

If the party honestly stated his own opinion, believing at the same time that he stated the truth, he is not liable in this form of action, although the representation turned out entirely untrue. Lord v. Goddard, 13 How. 211; Pasley v. Freeman, 3 Term. 51; S. C. 2 Smith, L. Cas. 55; Young v. Covell, 8 Johns. 23; Merchant's, etc. v. Sills, 3 Cent Law Jour. 772; see Shrewsbury v. Blount, 2 Man. & Gr. 475.

He has been guilty of no deceit, and the gist of the action is fraud. Cases last cited.

The defendant's liability depends upon the falsity of his statements and his knowledge thereof and their effect upon the business dealings of the plaintiff with the debtor. These are questions of fact for a jury. Von Bruck v. Peyser, 28 How. Pr. (N. Y.) 292.

It must appear that by the false assertion, as to *the circumstances of a third* person, the defendant intended to impose on the plaintiff, and that the plaintiff relied on his information. Scott v. Lara, Peak's Cas. 226; Addington v. Allen, 11 Wend. 374.

It must appear that the statements were untrue. Babcock v. Libbey, 82 N. Y. 144.

A tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly and immediately referable to the false representation. Therefore, if the tradesman gives an indiscreet and ill-judged credit, he cannot recover for any loss occasioned by it. Corbett v. Brown, 5 Carr. & P. 363; S. C. 8 Bing. 35; 1 Moore & Scott, 85. See Harrison v. Savage, 19 Ga. 310; Smither v. Calvert, 44 Ind. 242.

An action for deceit, in recommending a buyer to credit sustained in a case where a tradesman, selling out his business, wrote a letter, certifying that the purchaser would continue it with "undiminished means;" on the ground that the statement implied that the purchaser had, at the time of commencing the business, all resources necessary for it, to the same extent as the defendant had had. Von Bruck v. Peyser, 4 Robt. 514; former decision in S. C. 2 Robt. 468; 28 How. Pr. (N. Y.) 292.

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191*] which advances we have *security. In order, however, to relieve them from the necessity of borrowing, and needing more cash capital to carry on the business comfortably, both the Companies alluded to owing Messrs. Thompson & Co. each about $375,000, making together, $750,000, executed a mortgage to John H. Hicks, W. S. Wetmore, and James Brown, for $750,000, to secure the payment of those bonds, which are payable in six, eight, and ten years. A gentleman goes out to Europe this month to negotiate these bonds, which he feels confident of doing on favorable terms. The negotiation of these bonds, and the securities held, would pay off all the advances made by ourselves, Messrs. Hicks & Co. and of W. S. Wetmore, who also made them some advances. From Thompson's statement of the business of the factory, they are doing a good, nay, a very profitable business, and I feel that in making sales to them now, no more than the ordinary business risk would be run.

If the bonds are negotiated, which is confidently expected, they would be enabled to conduct their business with more facility and comfort than they have ever yet done, and as I will recommend brother William to take from $60 to $100,000 for himself and for me, whatever they are negotiated at, the confidence shown will probably help the negotiation. Messrs. Hicks will also take some of them. Since the failure, Thompson & Co. have laid their hands on Austen & Spicer's property, to the extent of $50,000, reducing the risk to $123,000, and out of this they will get a dividend. As Mr. Orrin Thompson considers himself fully worth $400,000, any loss that can now occur by Austen & Spicer does not hurt him much. All they want is the negotiation of the bonds, to make them move on with perfect comfort. (Signed) James Brown."

The next letter from Curtis to Brown is dated "Boston, 26th June, 1851. A friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Company. I replied that I believed you thought favorably of the concern. Now, I wish to know what your present feelings are in respect to that concern; there being several among my friends here who have heretofore sold them wool, and wish to continue to do so."

The answer to this letter was: "Dear Sir—We are in receipt of yours 26th inst; contents noted. We continue to have a favorable opinion of the concern you allude to. (Signed) Brown, Brothers & Co."

Mr. Curtis, being called as a witness, said he was agent for Brown, Brothers & Co., who 192*] carried on in the City of New *York an extensive banking business. He wrote his first letter at the request of Iasigi, and never showed the reply except to him and his friend Mr. Skinner, until after the failure of the Thompsons. When he wrote to Brown he did not let him know that the information requested was for any other person than himself. On the day his first letter was written, Iasigi said to him that he held a large amount of notes of certain factories in Connecticut, indorsed by Orrin Thompson, of New York; that by the recent failure *of Austen & Spicer they had lost money, and he was solicitous about the paper* he held. Witness supposed it amounted to about the sum of $40,000. He said Brown was the friend of Thompson, and witness was requested to ascertain his standing by writing to Brown.

As the answer was marked "confidential," the witness, when Iasigi first read the letter, declined handing it to him to show to his partner, but on his calling, it was shown to him also. Witness expressed a favorable opinion as to Iasigi's getting his money. Mr. Brown never authorized the witness to show his letter to anyone. After the failure of Thompson, Iasigi stated he had collected his debt, but that he again trusted them. The witness remarked, that on that letter you should not have trusted them. He asked to see the letter, and on reading it he said, if you had not stated this to be the same letter, I should not have believed it.

The witness stated, some of our clients prior to this had been in the habit of selling wool to Thompson & Co. There were five or six firms, importers of wool, who had credits with me. It was highly important to me and my principals that I should know the standing of this great concern, because large amounts of credits were being invested in wool, by houses which might or might not be jeoparded by selling to that concern; I mean invested by correspondents of Brown, Brothers & Co., who had credits for them.

Mr. Grant, a witness, stated that he, Iasigi, and several others who had sold wool to the two Companies and Thompson, had an interview with the defendant at his office in the City of New York, where a conversation respecting the letters was had, principally between Iasigi and Brown, who replied that the letter on the 7th of April was a guarded one, and as to the second letter, it was only a statement that "we continue to have a favorable opinion of the concern." He proceeded to say that the connection of Brown, Brothers & Co. with Mr. Thompson had been of long date; that they had a great number of transactions together, and that at the time the April letter was written, they intended to carry Mr. Thompson through; but that Thompson had deceived them. He repeated several times that *this was a guarded letter, and as it [*193 was written in entire good faith, and as they had lost much more than we had, subsequently to the writing of the letter, they did not see how there could be any responsibility resting on them.

As the company was about separating, Mr. Stewart Brown observed: "If you had called on us, gentlemen, and conversed with us, instead of writing, you would not have sold this wool. That the letter was a guarded one, was several times repeated. That they had great confidence in Thompson; that at the time the letter was written they had lost their confidence, but still meant to carry him through in good faith; but being unable to do so, and having lost their confidence, the letter was guarded." On being asked by witness, if, at the time the first letter was written, he had all the property of Orrin Thompson conveyed to him, he replied: "No, sir, not all his property, but his real estate." There was no objection at this time by anyone, that the letter was confidential. The Browns refused to acknowledge any responsibility.

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After this evidence had been given, the plaintiffs offered evidence, not objected to or excluded, except as hereinafter stated, tending to prove that certain statements in the letter of April 7th, 1851, material to show the property and credit of the two Companies, and of Orrin Thompson, and the safety and expediency of selling them goods on credit, and material to influence and determine the judgment of one who should read the letter, in regard to the safety and expediency of so selling goods on credit, were false at the time the letter was written, and were then known to the defendant to be false. And that the defendant, prior to the 7th of April, alone and jointly with one Hicks, had taken conveyances, in mortgage or absolutely, of all Orrin Thompson's property, real and personal (with some small exceptions), to the amount of $188,000, as security for the debt and liabilities of the house of Thompson & Co., to defendant's house and said Hicks, amounting to over $509,000. And also offered evidence to prove that defendant had an interest of a pecuniary kind to sustain the credit of said Thompsonville Company, said Tariffville Manufacturing Company, and Orrin Thompson, and to induce extensive sales of goods on credit to them.

And other evidence was offered, tending to show that the letter was written with a fraudulent intent, and that it was intended for other persons than Curtis. And the plaintiffs proved that they made the sales stated in the declaration, relying on and trusting to the statements in said letter.

But the evidence, as above offered, was rejected as immaterial and as insufficient, when 194*] taken in connection with the other *evidence above set forth to authorize the jury to find a verdict for the plaintiffs.

And the court thereupon ruled and held, that the plaintiffs had not maintained their action, and directed a verdict for the defendant. And a verdict was accordingly so rendered. To which rulings and direction the counsel for the plaintiffs excepted.

The 3d section of the Act of Massachusetts, to prevent frauds and perjuries in contracts and actions founded thereon, published in the Revised Statutes of 1836, provides that "No action shall be brought to charge any person, upon or by reason of any representation or assurance made concerning the character, conduct, credit, trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

As the letter was written in New York, a doubt has been suggested whether this Statute can apply to the case. The letter was intended to operate in Massachusetts, and consequently the law of that State applies to it. But it is not perceived that the Statute can have any other effect than to require the representation, on which the defendant is charged, to be in writing.

No one controverts the power and duty of the court to construe all written agreements or papers which are given in evidence. This is not the question involved in this case. No individual can be held responsible for a statement of facts, however injurious they may be to an individual or company. But when there is a misstatement of facts in regard to the pecuniary ability of an individual or company, and especially if this be done through interested motives or fraudulent intent, by reason of which a credit is given and the debt is lost, the facts which conduce to establish the liability must, as in this case, be outside of the writing. And if these facts may not be established by parol evidence, there can be no remedy in such cases, however gross the fraud or ruinous the consequences may be.

It is contended that the letter of the 7th of April, being marked confidential, could have been intended only for Curtis, the agent, and that he was not authorized to show it to the plaintiffs. In his testimony, Mr. Curtis says Brown never authorized him to show the letter. There may have been no express authority to show the letter, but the intention of the writer, in this respect, can be best ascertained by reference to the facts and circumstances under which it was written.

In his letter of April the 5th, Mr. Curtis requested to know "the opinion of the defendant as to any possibility of loss by selling largely to the Thompsonville Company or Orrin Thompson; *and he remarks, whatever [*195 that opinion may be, it will be discreetly used by myself."

Mr. Curtis states, when under examination as a witness, that he was then, and had been for several years, acting as the agent of the Browns, and that was his principal business. He said that he was not, at any time, a seller of wool to the factories of Orrin Thompson. This employment of the agent must have been known to his principal, and it appears in the proof that when the plaintiffs and others had an interview with the defendant in New York, he spoke of the letter being guarded, but made no objection that it had been written to his agent in confidence, and ought not to have been shown to the plaintiffs.

In view of these and other facts, it might have been submitted to the jury whether the defendant in marking his letter "confidential," intended it for the eye of his agent only. The terms of the letter, independently of the above facts, would scarcely authorize such an inference. The "opinion will be discreetly used by myself." This was notice to Brown that the opinion was to be used, and how could it be used by the agent, who made no sales of wool to Thompson on his own account, without imparting the opinion to others; but "the opinion will be discreetly used by myself." It shall not be made known by any other person than myself, and you may rely on my discretion. In view of the facts, the jury should consider whether the word "confidential" might be construed to mean, in confidence that you will use my opinion discreetly by yourself, as you propose, or whether it restricted the letter to the agent only.

This seems to have been the construction given to the letter by the agent. He suffered Iasigi to read it, but refused to give it into his hands to show to Skinner. Had the writer intended that no one should read the letter but Curtis, he would probably have said so. Such a restriction was not necessarily imposed by the terms of the letter, in view of the facts proved. Its detailed statement of facts in regard to the embarrassments of the two concerns and of Or-

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rin Thompson, and how they had been relieved by himself and others, and enabled to do a good, nay, "a profitable business," etc., would be a matter, in connection with other facts, for the jury to consider, and to determine whether the letter could have been written for the eye of the agent only, who at no time sold wool to Orrin Thompson.

In another letter, written to the defendant by Curtis, he says: "A friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Company. I replied that I believed you thought favorably of the concern. Now, I wish to know what your present feelings are in respect to that concern, there being several 196*] among *my friends who have heretofore sold them wool and wish to continue to do so." To this, Brown, Brothers & Co. reply: "We continue to have a favorable opinion of the concern you allude to."

This letter sheds some light on the first letter of Brown. It was on the same subject, and was a reiteration of what had been stated more particularly and at large in the first letter. In fact the words "we continue to have a favorable opinion of the concern you allude to," refers to an opinion before expressed.

As the court instructed the jury to find for the defendant, on the ground that the plaintiffs had not sustained their action; if the plaintiffs gave, or offered to give, any evidence which was fit to be considered by the jury, the judgment must be reversed. Any evidence conducing to prove that the statements of the defendant, in the letter of the 7th April, in regard to the condition of the Thompsonville Company and Orrin Thompson, and their ability to meet their engagements and in regard to the value of Thompson's property were false, was competent evidence as tending to prove the facts. And especially was the testimony of Grant admissible, who heard the defendant say, if the plaintiffs had called on them personally, they would not have sold their wool to the Company; also the statement that before the letter was written Brown admitted that he had lost confidence in Thompson, and therefore the letter of the 7th of April was guarded. These and all other facts which conduce to show that the defendant acted in bad faith in writing that letter, are proper to be considered by the jury.

By whatever motives the defendant may have been actuated, he is not to be held responsible, unless his letters did mislead, and were intended to mislead the plaintiffs. And it will be for the jury to say, on a thorough examination of the letters, and the facts and circumstances connected with them, whether they were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the Thompsonville Company and Orrin Thompson. If an impression, not only of their solvency, but of their success in business, so that by selling largely to them no more than the ordinary risks of business were incurred, was made and authorized, by the letters, while, at the same time, their true condition was known to the defendant, which did not authorize such a representation, and which was intended to deceive and mislead the plaintiffs, the defendant may be justly held responsible. But of this the jury are to judge, they being the triers of the facts outside of the letters, and which should be submitted to them for their consideration and decision.

We have necessarily referred to the leading facts stated in the bill of exceptions, in order to show that the Circuit Court erred in *withdrawing them from the jury; but [*197 we express no opinion on the merits of the case.

The judgment of the Circuit Court is reversed, and the cause is remanded for a venire de novo.

Mr. Justice Campbell, dissenting:

The importance of this cause renders it proper that the reasons for a dissent from the judgment should be placed on the record. The charge of the plaintiffs is, that in anticipation of large sales of merchandise to two Manufacturing Corporations of Connecticut, on a credit, and distrustful of their condition to govern and direct their conduct, they sought of the defendant, through his agent, an opinion and information of them and their indorser, Orrin Thompson, as to the risk they would encounter. That the defendant was intimate with their affairs, and knew they were untrustworthy, but well knowing the motives of the plaintiffs' inquiry, they wrote to their agent a letter for exhibition, containing false and fraudulent statements and representations, calculated and designed to increase the credit of the Corporations and Thompson, and to induce the plaintiffs and others, who, like them, should see the letter, to sell their property to them. These averments, describing the circumstances under which the information was obtained, and the knowledge of the defendant of the aims of the plaintiffs, are, in my opinion, material, and should be substantially proved.

In Pasley v. Freeman, 3 T. R. 51, Justice Ashurst, replying to the argument that, should the principle of that suit be supported, actions might be brought against anyone for telling a lie by the crediting of which another sustains damage, said: "No; for in order to make it actionable, it must be accompanied with the circumstances averred in the count, namely: that the defendant, intending to deceive and defraud *the plaintiff, did deceitfully encourage [*198 and persuade them to do the act, and for the purpose made the false affirmation, in consequence of which they did the act." And Lord Kenyon said two grounds of the accusations concur: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage."

The case of Pilmore v. Hood, 5 Bing. N. C. 97, was that of a defendant about to sell a public house to one who had agreed to purchase. He fraudulently misrepresented to him its receipts. The bargain having failed, the sale was made to another, who had heard these representations and acted upon them with the knowledge of the defendant. Lord Chief Justice Tyndal said that notice to the defendant was "an important ingredient in the case," and adopting the terms of Langridge v. Levy, 2 M. & W., 532, he says: "We do not decide whether the action would have been maintainable if the plaintiff had not known of and acted upon the

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false representation. Nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased."

In Gerhard v. Bates, 2 Ell. & Bl. 476, the misrepresentation was contained in the prospectus of a bubble Company, of which the defendant was a director. Lord Campbell said, "that had the plaintiff only averred that afterwards, having seen the prospectus, the plaintiff was induced to purchase the shares, objection might have been made that a connection did not sufficiently appear between the act of the defendant and the act of the plaintiff, from which the loss arose; but the second count goes on expressly to charge the defendant, that by means of the said false, fraudulent and deceitful pretenses and representations wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer, and plaintiff did then, and by reason thereof, actually become the purchaser and holder of the shares, and alleges the loss sustained to have been the direct consequence of the defendant's act. Thus the wrong and the loss are clearly concatenated as cause and effect."

The allegations, therefore, being essential to 199*] the action, the *question is, was there any evidence to go to the jury for their support?

I leave out of consideration, for the present, the statute law of Massachusetts. The charge of the declaration is, that the letter was written for exhibition to the plaintiffs and among dealers like the plaintiffs, and to deceive those who should see it. The proof of the plaintiffs is, that until after the failure of the Corporations, only two persons were permitted to see it, or heard of its contents from Mr. Curtis. One of these was Skinner. The proof in regard to the exhibition to him is: "Iasigi asked me (Curtis) to let him take the letter to his friend Skinner, with whom he always advised. I (Curtis) again said the letter was confidential, and that I could not suffer it to go from my office. He then said, will you let Skinner see it here, repeating that he always advised with Skinner on matters of importance, and that he wanted him to see it. Upon this solicitation I consented, and Skinner came with Iasigi and read the letter."

There is no evidence that Skinner ever had a transaction with the Corporations of Connecticut, or conducted a business which could bring him into any contact or connection. And surely this evidence can afford no support to the averment of a purpose to defraud or injure him, or others through him.

The charge in the declaration, by this evidence, loses its generality, and is reduced to the imputation of a mischievous and fraudulent design upon the plaintiffs alone. The only use, "the discreet use," of the opinion contained in the defendant's letter, consisted in communicating its contents to Iasigi himself, and to his confidential friend, at his solicitation, and that he might advise intelligently with him. It then becomes necessary to inquire of the circumstances under which that communication was made to him. It was not told to the defendant that the plaintiffs had asked for information of Mr. Curtis, nor that his letter was written at his request, nor was he advised, until several months afterwards, that any use had been made of the letter. I do not think it necessary to consider how much the power of the agent was limited by the mark "confidential," on the face of the letter. But I will suppose that it was nothing more than a repetition of the caution that it should be "discreetly used" by Mr. Curtis, and that the defendant is liable for the use he made.

The evidence on the record comes from the plaintiffs; and in reference to the circumstances of the exhibition from a single witness. The agent of the defendant was a near neighbor and friend of the plaintiffs, but had never had any intercourse of business with them, either for himself or for his principal.

Such being their relations, Iasigi, on the 5th April, came to *him as a friend and [*200 neighbor, and stated that "he had a large amount of notes of certain factories in Connecticut indorsed by Orrin Thompson; that there had been a failure recently, in New York (Austen & Spicer), by which he thought the factories, or Orrin Thompson, or all of them, would lose money; and that he felt anxious as to the fate of the paper he held." He did not state the amount he held exactly, but Curtis was led to believe it was about $40,000. He proceeded to say that Mr. James Brown was a friend of Orrin Thompson, and that he (Iasigi) had himself heavy dealings with him, and that he wished him (Curtis) to write to Mr. James Brown and ask him about the standing of Thompson and his property. Curtis accordingly wrote, but did not state that he wrote at Iasigi's request. Upon this statement the particular form of the inquiry is open to, and will be the subject of remark hereafter. The question to Mr. Brown, is: "What is your opinion as to any possibility of loss to the Thompsonville Company or Orrin Thompson?" The witness proceeds: "I was led to ask the information and to communicate the result to him in consequence of the friendly relations that had long existed between us, and further because I thought it would tend to relieve Mr. Iasigi's mind, and not with a view to future sales." He says further, "at these interviews about my letter, and Brown's reply, there was nothing said about any anticipated or prospective operations by Iasigi. Mr. Iasigi said the credits were due to him." The witness "never knew that he had sold his notes," but was asked if he would guarantee them.

This statement of the circumstances of the exhibition of the letter to Iasigi contains the whole case. No other letter of the defendant was seen by him, no other communication was made to him, nor was this letter after this produced to any other person before the failure of the Corporations. Now, the proof of the plaintiffs is that they held but a single note, of less than $800, running on time, at this date; the others had been sold in the winter previously, in the New York market, without indorsement or guaranty. They had a book debt then due,

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upon which a large payment was made within ten days after, all of which has been collected, and about which no solicitude was expressed. It likewise appears that Iasigi did contemplate further operations, for in January Thompson had taken samples of wool to arrive, and which did arrive, and was sold about six weeks from this interview.

Before closing this statement of the evidence it is proper to note the impression that the defendant's letter made upon those who read it, as an accrediting document.

Curtis, reading it with the object of deciding 201*] whether the *Corporations and Thompson would meet their negotiable notes for two or three months, was willing to guarantee the debt for the usual commission; but when told that credits on sales were given afterwards, he "expressed his surprise that Iasigi should have sold after reading that letter." Skinner, who probably knew the secret purpose of Iasigi, and interpreted the letter accordingly, was not "favorably impressed." Iasigi, in reply to the expression of surprise by Curtis, quoted above, asked to see the letter again, and after reading it, said: "If you did not say that this was the same letter I read in your office, I should say that I had never seen this letter before." And the Browns, when interrogated upon it after the failure of these parties, said that the letter was a guarded one, and did not warrant credits on sales to them. Having collected the facts important to the issue, the question arises, do they constitute a case to go to the jury upon this declaration? The evidence is, that the plaintiffs, anticipating consignments of wool and sales to these Connecticut Corporations, and desiring the defendant's information and opinion of them, through Iasigi, approached his neighbor and friend, Mr. Curtis, the confidential agent of the defendant, to engage him to procure this opinion and information from his principal in New York. He approaches Curtis with a statement of anxieties for debts, existing in the form of negotiable notes running on time.

These statements were certainly not accurate, and are, apparently, insincere; and it will be noticed that the motive alleged in the declaration, as prompting the plaintiffs, was not revealed, and if it existed, was disguised under the apprehensions that were expressed. The evidence shows the plaintiffs did not have notes of the amount spoken of, and that the book debt was then due. There is a discordance between this evidence and the inquiry proposed in the letter of Curtis. That inquiry discloses no apprehensions of loss upon existing debts, but refers to perils to arise on future transactions. If Iasigi suggested the form of the inquiry with a view to obtain information to guide his conduct, as the declaration avers, and concealed his aim, and by affecting an alarm he did not feel, covered that aim from Curtis, it has the appearance of circumvention. Curtis says he wrote his letter in consequence of his friendship for the plaintiffs, to calm their fears, and without an intimation of prospective operations. Curtis gave a pledge that he would use the letter of the defendant discreetly. Before the letter was placed in the hands of the plaintiffs, they were informed it was "confidential," and Iasigi read that upon the letter itself. Iasigi again confirms the impression of Curtis, that apprehensions of loss upon his notes were still moving him, by addressing queries as to the *probabilities of his getting his [*202 money, and importunes Curtis to exhibit the letter to his friend, that he might profit from his counsel. The declaration avers that this letter, exhibited under such circumstances, was written for exhibition to inquiring dealers, to encourage and persuade them to give credit to those Corporations, and was shown to the plaintiffs with that design. That when it was written and exhibited, the anticipated transactions from which loss has followed, were known to the defendant, and the object of the exhibition was to induce the plaintiffs to make them.

I find no support for these averments, but a direct and palpable contradiction of them. This conclusion upon the evidence renders a discussion of the Statute of Massachusetts (Rev. Stat. ch. 74, sec. 3), requiring that representations of the character, ability and conduct of another person should be in writing, to support an action, unnecessary. But the discussions upon a similar statute fortify the conclusions contained in this opinion. "The true construction of the Statute," says Lord Abinger, "is that the representation or assurance should concern or relate to the ability of the other person effectually to perform and satisfy the engagement, of a pecuniary nature, into which he has proposed to enter, and upon the faith of which he is to obtain money, credit or goods." 1 M. & W. 101, 122. "He who has money to lend or goods to sell on credit, and doubts the ability of the borrower or buyer," says Baron Gurney, "may exact his own terms; he may insist on having a representation or assurance in writing of the ability, from a third person; and if that be refused, he may keep his money and goods. If he thinks fit to trust without that, he has no right to resort to the responsibility of the person of whom he inquires." S. C. Baron Alderson says: "If we refer to the cases which had occurred before the legislative provision, I think it will be found that the decision in the class of cases commencing with Pasley v. Freeman, had raised a well founded complaint in the profession of having virtually repealed the Statute of Frauds, by which a guaranty was required to be in writing, and that the object Lord Tenterden had in view, was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle. He adds, "that fraud, in substance, amounts to an implied guaranty of the plaintiff's solvency."

Had Curtis given a guaranty to the plaintiffs of their debt, either for or without a commission, and accompanied the act with statements of the pecuniary condition of the debtors, and expressions of confidence in his solvency wholly unwarranted, it is clear that it would have imposed no responsibility for sales *not [*203 then spoken of or alluded to, which were not made for several weeks afterwards, which were not contemplated by one of the parties, and if by the other, were concealed in all the intercourse that then took place. The Statute was designed to reduce the liabilities, for the representations it describes to some definite and appreciable limit; that the representations should

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be evinced in a written document, and that those who were to derive a benefit from it, as a security, should be ascertained from its contents, and that the liability on the document should not be extended beyond the engagements to which it had reference.

The questions embraced in this case are exhibited in a short conversation detailed in the evidence of the plaintiffs. Curtis says: "After the failure of the Corporation in September, I had an interview with Mr. Iasigi. I met him in the street; he accosted me in a state of excitement; he said: 'Mr. Curtis, Thompson has failed, and the Thompsonville Company has failed.' I said: 'I am sorry, but you have got your money.' He said: 'Yes, I have got the money that was owing to me, but I have trusted them again.' I expressed surprise that he should have trusted them again."

It was not with a declared purpose of trusting them again that Iasigi sought information of Curtis; nor was the confidential letter of Mr. Brown to his agent read, with the avowal that future operations were to be affected by the impression it made; nor was the questionable act of its exhibition superinduced by any suggestions of the existence of pending negotiations.

The objects disclosed by Iasigi were wholly incompatible with, and exclusive of, the notion of any legal responsibility for the accuracy or sufficiency of the letter, or even for a willful misrepresentation.

He did not ask for information, proposing action, even in regard to the notes to which he spoke, nor did any alteration of his debt take place in consequence. He simply inquired of Curtis, that anxieties might be relieved and his apprehensions quieted.

The liabilities incurred in cases like that described in the declaration, are for a fraud productive of damage; of a damage directly consequential and in the contemplation of the parties, as a result of the act done, and not for consequences remote, contingent, and arising from acts unconnected with the objects disclosed or comprehended by them.

Mr. Justice Curtis, dissenting:

I do not agree with the majority of my brethren in this case. But, as I may be required to preside at the trial which has now been ordered, I am not willing to enter into a discussion of the evidence heretofore given, and which will doubtless be repeated on another trial. Without doing so, it is not practicable to exhibit the legal principles which, in my opinion, should govern this case. I therefore merely say I do not concur in the judgment.

MOSES WANZER and Jabez Harrison, App'ts,
v.
BENNETT R. and J. H. TRULY.

(See S. C. 17 How. 584–591.)

Equity—enjoining payment of purchase money—garnishment takes debt subject to defenses.

A recovered judgment against B, and in order to collect it attached by garnishment a debt due by C to B, on a note, and recovered judgment against C, as garnishee. The note was given for property sold by B to C, the title whereof failed after the last-named judgment, in part, other persons having brought suit against C, and subsequently recovered against C, a part of the property. The vendor, B, having died insolvent, held that C could maintain an action in equity to enjoin the judgment and proceedings by A, against him, he offering to release his claim on the property to A.

Account ordered in which C is to be entitled to the value of the property recovered of him, or the amount paid by him, on compromise, and the costs and expenses paid by him in the suit against him, to be credited on the judgment against him.

Argued Feb. 15, 1855. Decided March 8, 1855.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The bill in this case was filed in the Circuit Court of the United States for the Southern District of Mississippi, by the appellees, for an injunction to prevent the sale of certain slaves, which had been levied on to satisfy a certain judgment. A temporary injunction was granted, and on final decree was made perpetual. From this decree the defendants appealed to this court.

A further statement appears in the opinion of the court.

Mr. Coxe for the appellants, and Messrs. Robert J. Brent and Henry May for the appellees.

Mr. Justice Campbell delivered the opinion of the court:

The appellee (B. R. Truly) purchased of J. R. Herbert, in 1836, in Mississippi, five slaves, for whom he gave two notes, one of which, for $3,576, was payable in March, 1838, at a banking house in Brandon, with ten per cent interest till paid. Another note for the same sum has been collected. During the year 1837, the appellants recovered a judgment in the Circuit Court against Herbert, who had absconded in insolvent circumstances. In 1839, a process of garnishment was served upon the appellee before named, who acknowledged the existence of this note, and a judgment was rendered against him. An execution issued, a levy was made, a forthcoming bond was taken, *and [*585 a forfeiture of it returned; upon this bond, J. H. Truly was a surety. In 1840 an injunction was obtained by the appellees, upon the allegation (inter alia) that they had heard that the slaves, which form the consideration of the notes, were the property of certain minor children in Alabama, whose guardian had fraudulently removed them and sold them to Herbert. This bill was before this court and was dismissed. 5 Howard, S. C. 141.

While the suit was in this court, the minor children referred to, instituted suits in the Court of Chancery in Mississippi (by sequestrating the property) against the appellee or his assigns, and which resulted, during the progress of the present suit, in the recovery of two of the slaves, and nine tenths interest in a third, with the damages for their loss of service.

The original bill was filed in the present suit in anticipation of this result, and alleges the death of Herbert and his vendor (Nicholson) in Texas, insolvent; and that the appellees were willing to release their claim on the slaves

NOTE.—Vendee's damages for breach of contract for sale of chattels. See note to Shepherd v. Hampton, 4 L. ed. U. S. 369.

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as derived from them, and surrender the defense of the suits to the appellants, and call upon them to take their place. The fact of the recoveries subsequently is brought to the notice of the court through supplemental bills. The Circuit Court decreed a perpetual injunction in favor of the appellees. The averment of the outstanding paramount title in the wards of Nicholson, and which the appellees had only heard of from common report, which appeared in the former suit, was disposed of by this court as insufficient, for that the appellees then "retained possession of the property without a threat of molestation."

The rule of the courts of Mississippi as well as of this court is, that except in special cases, a vendee in possession cannot at law or in equity contest the payment of the purchase money stipulated in a contract of sale by an alleged defect of title, but reliance must be placed on the covenants it contains.

Gilpin v. Smith, 11 S. & M. 109; Dennis v. Heath, Ibid. 206; 2 Wheat. 13; 3 Pet. 310; 3 Porter, 127; 19 Johns. 77.

The disturbance of the possession by the orders and process of the Court of Chancery, the imminence of the danger from the title propounded in those suits, and the insolvency and death of the warrantors, were facts which authorized the Circuit Court to take equitable cognizance of the present complaint of the appellees, and to administer relief. The rule of the civil law, that the price of the sale of real property cannot be recovered by the vendor if the vendee has been disturbed in his possession by prior incumbrances or paramount titles, or has just grounds for apprehension on that account, Pothier de Vente, sec. 280, is the rule of chancery where there has been fraud, 586*] or where the *covenants of warranty are inadequate to the protection of the vendee by reason of the insolvency of the vendor.

In Bumpus v. Platner, 1 Johns. Ch. 213, Chancellor Kent said: "I consider an eviction at law an indispensable part of the claim to relief here, on the mere ground of a failure of consideration." And in Abbott v. Allen, 2 Johns. Ch. 519, he said: "If there be no fraud in the case, the purchaser must resort to his covenants if he apprehends a failure or a defect of title, and wishes relief before eviction."

But in the last case he suggests, "that existing incumbrances which appeared to admit of no dispute," or "where an adverse title is put forward," "or an adverse proceeding threatened," might support an injunction till the title was ascertained at law. And in Johnson v. Gere, 2 Johns. Ch. 547, he administered relief in accordance with these suggestions. A learned successor of this eminent jurist, with these cases before him, determined that when "the covenants have been actually broken, and the grantor is insolvent, a court of equity may restrain him from proceeding to collect the whole amount of the purchase money, and may offset the damages occasioned by the breach of the covenants of seisin or warranty, against such unpaid purchase money.

Woodruff v. Bunce, 9 Paige, 443.

And this conclusion is supported by well-considered adjudications in other courts of the States.

2 Dana; 276; 1 Dana, 303; 5 Leigh, 39, 607; 8 Ala. 920; 1 Black. 384; 10 Ala. Carver v. Miller.

The question arises whether the equity we have considered, of the vendee to protection from the insolvency of the vendor, has been modified or defeated by the pursuit of the attaching creditor in the Circuit Court. The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand of his creditor, by investing the creditor with a judicial power to collect and apply the amount due. The claim of the attaching creditor against the defendant is only extinguished by a satisfaction of his demand by the garnishee. The garnishee is entitled to make at law legal defenses, and his equities must be sought in a court of chancery.

17 Ala. 455; 5 Met. 263; 2 Wash. C. C. 488.

The Statutes of Mississippi do not assign any extraordinary effect to the judgment condemning the debt in the hands of the garnishee, nor do they enlarge the rights of the attaching creditor beyond those of any other assignee of a chose in action. The equity of the vendee to be indemnified from the purchase money in his hands, for a breach of the covenants of warranty by an insolvent vendor, originates in the contract, and inheres *to it so long [*587 as any part of it is executory. The equity of the attaching creditor does not arise in the contract, and is subsequent to its formation. In claiming the benefit of the fund, he renders no service to the vendee, and releases none of his rights against the vendor. He may fail in realizing hopes or anticipations by the defeat of his suit against the garnishee, but his judgment against his debtor remains in operation. Where a party contracts specifically for property, pays money, acquires a legal title without notice of an equity, a court of chancery will not disturb his legal position. But there is no principle upon which a court of chancery is required to imply that a proceeding by a defendant, through the intervention of his creditor, to subject a legal demand, unconnected with any equity—a demand which equity would not permit him to collect in his own name, in consequence of the failure of consideration—shall devest the garnishee of equitable claims and defenses.

The rule of law is accurately stated by Vice-Chancellor Wigram, who says: "That a creditor, under his judgment, might take in execution all that belongs to his debtor, and nothing more. He stands in the place of his debtor. He is a purchaser who, by the terms of his conveyance, takes, subject to any liability under which the debtor himself held the property."

Whitworth v. Gaugain, 3 Hare, 416; 1 Cr. & Phil. 325; Langton v. Horton, 1 Hare, 316; Hutch. Dig. Miss. Stat. 912, sec. 8.

The most restricted view of the doctrine of these cases is, that the equitable rights of the garnishee remain unaffected by the judgment, or the proceedings under the judgment, till the execution is executed, unless the garnishee is accessory to some act, or guilty of some omission or laches, by which their efficacy is impaired.

1 McN. & G. 437; 8 Ala. 867.

When the execution is executed, the claim of

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the attaching creditor upon the defendant in the suit (his original debtor) is satisfied. He has purchased thereby the issues of his garnishment process for an adequate consideration, and could not consequently be called to refund at any future time. This view of the rights of the vendee is sustained by Chancellor Walworth in Sanford v. McLean, 3 Paige, 117, where the effect of a judgment is stated, and where a purchaser under it is said to be subject to every equitable claim thereon which was prior in point of time to the judgment, of which he had notice at or before the sale of the property." In many of the States the policy has been adopted, of placing the claims of judgment creditors upon the same footing as purchasers, in reference to unrecorded conveyances, and of assigning to creditors' liens a higher rank than they occupy in the general system of equity jurisprudence; but in the absence of such a policy the rules we have quoted must determine their dignity.

588*] *The appellees cannot be charged with any laches, or conduct calculated to deceive or mislead the attaching creditor, but the only complaint of them is, that they insisted upon their title to relief prematurely and with too much pertinacity. Whatever effect may be visited upon such a course of conduct, we know of no rule that would authorize the forfeiture of their claim to relief. We concur, therefore, in the leading principle upon which the cause was determined in the Circuit Court. But we do not agree with the court in their allowance of a perpetual injunction, without requiring an account.

The contract of the appellee was for five slaves, for whom only one half the price has been paid. The whole of them were possessed for many years, when two and nine tenths of another were recovered, with damages for the detention of two.

The damages recovered were compromised and only a portion of them paid. No notice was given to the appellants, of the offers or acceptance of the compromise.

The appellants are complainants in equity, seeking to enforce a covenant of indemnity, and must receive relief upon the principles on which the court habitually extends it; that is, upon the principle of doing equity—upon a principle of compensation for the injury sustained. This is the rule stated in McGinnis v. Noble, 7 Watts & S. 454, and applied in a similar case to this, of Jones v. Lightfoot, 10 Ala. 17. The appellees, upon their eviction, are entitled to the value of the slaves they have lost at the date of the decrees, and the damages, costs and expenses actually paid upon the decrees of the Court of Chancery in Mississippi.

We direct the reversal of the decree of the Circuit Court, and remand the cause, with directions that these amounts be ascertained, and the judgment at law in the Circuit Court against the appellees and their sureties be credited with this sum, as of that date, and that the costs of this court be paid by the appellees.

Dissenting, Mr. Justice **Daniel**, Mr. Chief Justice **Taney**, and Mr. Justice **McLean**.

Mr. Justice **Daniel**, dissenting:

I dissent from the decision by the majority of the court in this case, and in expressing my disagreement I have felt no greater perplexity in reconciling that decision with every principle of justice, than in reconciling it with itself. For to my apprehension it clearly appears that if there ever was a decision which could be characterized as felo de se, it is precisely the decision made in this case.

This controversy had its commencement by a proceeding *familiarly known and prac- [*589 ticed in several of the States, and particularly in the south and southwest, usually denominated a foreign attachment. By this proceeding a person whose debtor may have absconded, or who has no visible property which can be reached directly by legal process, is authorized to attach in the hands of a third person who may be indebted to the debtor of the attaching party, an amount equal to the demand due to the latter. Under such proceeding the plaintiff in the attachment is placed in the precise position of his debtor with respect to the defendant, and can either legally or equitably recover of him nothing more than what was due from the defendant to the debtor of the plaintiff. In other words, the plaintiff stands affected and is bound by every legal and equitable right appertaining to the parties of whose transactions and relation to each other, he seeks to avail himself. Avoiding a detail of the facts and proceedings had in this cause, further than is necessary to its correct comprehension, those facts and proceedings are prominently and simply these.

That in the year 1836 the appellant, Bennett R. Truly, purchased five slaves of one John R. Herbert, and for the purchase money for those slaves executed two promissory notes of $3,575 each.

That Herbert, shortly after the sale and purchase of these slaves, removed to Texas, where he died insolvent. That Wanzer and Harrison, being creditors by judgment of this insolvent person, Herbert, sued out an attachment against Truly, and obtained a judgment thereon for the sum of $3,575, the amount of one of the notes given for the purchase of the slaves, the other note for the like amount having been paid.

That suits had been instituted by certain persons whose guardian, during their minority, had run off with those slaves, from the State of Alabama, and sold them to Herbert, of whom they were purchased by Truly, who was ignorant, when he purchased, of any defect in the title to them. That in the suits brought for these slaves, a recovery had taken place in behalf of the true owners, and that the slaves had been surrendered by Truly, who had also, by a compromise with the agent of the persons who had obtained a decree for the slaves, delivered to said agent four other slaves, in satisfaction of the hires of those slaves, and of the costs incurred by their true owners' prosecuting their title to them.

Upon the foregoing facts this court have by their decision affirmed that Herbert, having had no title to the slaves, could convey none to his vendee, and that the slaves sold by him having constituted the only consideration for the notes given by Truly, by the recovery of those slaves by title paramount, that consideration had failed or been taken away, and therefore there *remained no foundation for a claim up- [*590

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on Truly, either on behalf of Herbert or of any person occupying his precise position.

Had the decision of this court terminated here, or at a conclusion seemingly inevitable from the principles and terms of that decision, viz.: the absolute denial to Herbert, or to Wanzer and Harrison representing Herbert, of any description of right, under the contract with Truly, that decision would have been reconcilable with justice, and consistent with itself. But this court goes on to argue that, from the evidence in the record, it appears that Truly has not responded to any regular and specific rate or demands for the hire of the slaves, whilst they were in his possession or under his control, and therefore there should be an account taken in this cause, showing on the one hand the interest upon the claim asserted through Herbert, and on the other the amount of the hires of the slaves, regularly and specifically, computed, with the view (if indeed such view is comprehensible for any conceivable reason) that, should there turn out to be an excess of hires beyond the interest upon the claim asserted through Herbert, that excess may be applied to the benefit of Wanzer and Harrison.

But the error of this direction by the court is exposed by the following inquiries: Suppose not one cent of the hires of these slaves has been paid, to whom do those hires belong; to whom would Truly be accountable for them? He would be accountable, surely, to those to whom the subjects constituting the source of those hires belonged, and not to the purloiner of their property, nor to persons deducing title from such wrong-doers; nay, the payment to the latter of any portion of those hires would not exempt the payer from reclamation from the true owners.

Then let it be supposed that Truly may have compromised with the true owners the claim for hires, either by the payment of an amount less than their actual or estimated aggregate, or by the transfer of property in kind (slaves, for instance, as it appears were delivered to the true owners), will this court undertake to deny to those parties the right to compromise their own interests? It may have been that the delivery of the four slaves in satisfaction for the hires, was more satisfactory and more advantageous to the persons accepting them, than any other arrangement which could have been made. But should these rightful claimants have been willing to surrender any portion of their interests, or from motives wise or unwise, should have relinquished the whole of them, could such a proceeding have given validity to the fraudulent pretensions of Herbert, or of those who seek to profit by his dishonesty? The decision of this court having declared the contract with Herbert void for an entire want or failure of consideration; unless the maxim 591*] ex *nihilo nihil fit shall be reversed, and this court shall affirm that something can arise from nothing, it passes my powers to perceive how any right, legal or equitable, can spring from this contract with Herbert, thus declared to be void, and that alleged right, too, existing in one who, in legal intendment, is Herbert himself. If the contract with Herbert is valid, then the judgment upon the attachment should be enforced to its full extent; *if it was invalid, then in the same extent it* should be repudiated; but this court, while it condemns the contract itself, attempts to deduce from it and to enforce consequences which necessarily imply its validity, and which can result only from regarding it as valid. In this aspect of the decision, I can but regard it as injurious to the appellees, as irreconcilable with sound principles of logic or of law, as irreconcilable with itself. I forbear here any remark as to the periods at which the grounds of defense in the court below came into existence, or were tangible and practicable, or as to the manner in which they were relied on, in opposition against the appellee. These are matters entirely distinct from the essential merits of those grounds of defense, and any examination of them seems unnecessary, or rather to be excluded, by the decision here upon the character of the defense itself.

Decree of the Circuit Court reversed, with costs, and cause remanded to the Circuit Court, for further proceedings to be had therein in conformity to the opinion of this court, and as to law and justice shall appertain.

THE UNITED STATES, Pl'ff,
v.
LINDSEY NICKERSON, Jr.

(See S. C. 17 How. 204-212.)

Criminal law—perjury—indictment—former acquittal good plea in bar.

Where defendant was acquitted on a trial for perjury, because the trial court erroneously held that the act specially mentioned in the indictment did not require the oath charged in the indictment as to a certain fact; on being again indicted for perjury for false swearing to that fact, held, that the former acquittal was a bar to the second indictment.

The 7th sec. of the Act of July 29th, 1813, 3 Stat. at Large, 49, required an oath to the verity of the agreement, as well as to the truth of the certificate therein mentioned.

It was not necessary to aver in the indictment what Acts of Congress required the oath to be taken.

The court was bound to take judicial cognizance of all Acts respecting it.

Under averments in the former indictment, of the purpose, description and occasion of the oath, and that it was required by law, the government could rely on any Act of Congress requiring the oath, without referring to it.

The averments of the former indictment were sufficient to authorize proof of the offense.

Argued Feb. 23d, 1855. Decided Mar. 8th, 1855.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Massachusetts, Nickerson, the present defendant in error, was indicted in the Circuit Court of the United States for the District of Massachusetts, for false swearing under the third section of the Act of March 1st, 1823, which provides that "if any person shall swear, or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he shall, upon conviction thereof, suffer for willful and corrupt perjury."

Third Stat. at L. ch. 7, sec. 3, p. 771.

The indictment charges that defendant, as owner and agent of the shipping vessel called Silver Spring, and in order to obtain the allowance of bounty to certain fishing vessels,

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provided by the Act of July 29, 1813, did on the 10th day of January, 1854, produce to the collectors of customs of the port of Barnstable, a paper purporting to be, and did falsely swear that it was, the original agreement made with the fishermen employed on board said vessel, during the preceding fishing season, and that the defendant also, falsely swore that the officers and three fourths of the crew of said vessel were citizens of the United States, as required by the Act of March 1st, 1817. To this indictment the defendant pleaded a former acquittal on an indictment tried in the District Court, and the demurrer to that plea presents the issue upon the record. The first indictment, on which the defendant was acquitted, was framed under the Act of July 29, 1813, secs. 7 & 9.

At the trial in the District Court, the offense set forth was, making a false declaration under oath before the collector, that the paper produced and sworn to by the defendant was the original agreement.

The Judge held that this oath was not required by the Act of July 29, 1813, sec. 7. The United States Attorney then offered to prove that this was false swearing, touching the expenditure of public money under the Act of March 1, 1823, sec. 3, but the Judge held the evidence inadmissible, and the defendant was acquitted.

In the Circuit Court the defendant, Nickerson, joined in the demurrer to his plea of former acquittal, and the judges were divided in the opinion as to whether or not that plea was good in bar to the indictment.

A further statement of the case appears in the opinion of the court.

Mr. C. Cushing, Att'y-Gen. for the United States, after stating the facts, made the following points:

1. The false swearing alleged in the two indictments, is not one and the same perjury.

2. The defendant could not have been tried under the first indictment, for the crime created by the Act of 1823.

3. To constitute the statute offense, under the Act of 1823, there must be a false swearing in an oath duly administered, and required or authorized by law.

U. S. v. Bailey, 9 Pet. 238.

4. The first indictment charged no false swearing, except in an oath required by the Act of 1813.

If the District Judge erred in deciding that the oath set up in the first indictment was not required by the Act of 1813, the defendant cannot avail himself of that error, because it was a ruling in his favor and against the United States, which could not except, but were bound by it in that cause.

The defendant cannot avail himself of the plea of former acquittal, because he was acquitted of the offense only, set forth in the first indictment, and not of the offense set forth in the second indictment, which is another and different offense.

5. The two statute crimes are different and distinct, and require different averments, because the offense created under the Act of 1813 is declared to be willful and corrupt perjury; whereas, the offense created by the Act of 1823, is the crime of falsely swearing touching the expenditure of public money, etc., and the form, nature or import of the oath is not prescribed, as it is in the Act of 1813, nor is it declared or deemed to be willful and corrupt perjury by the Act of 1823; but upon conviction or swearing falsely touching the expenditure of public money, the party so convicted, "shall suffer as for willful and corrupt perjury;" and this prescribes the punishment, and does not define the offense to be perjury as defined at common law.

6. It is desirable that in the decision of this cause, the court should pass upon the questions incidentally raised, touching the legality of the oaths required by the Treasury Department, and by collectors, as prerequisites to obtain by owners and agents, the bounty allowed to fishing vessels.

Authorities incidentally may be referred to in The Boat Swallow, 1 Ware, 21; The Harriet, 1 Story, 251.

Mr. C. K. Lathrop, for the defendant:

First point. The evidence which is competent and essential to support the present indictment, might have been offered in proof and in support of the former indictment.

Regg v. Bird, Parke, Baron, 6 Br. Cr. Cas. 201; Act of 30th April, 1790, ch. 9, sec. 19, 1 U. S. Stat. at L. 17; 1 Chit. Crim. L. 276; 281; 1 Starkie, Crim. Pl. 301; Act of Congress, July 29, 1813, ch. 35, 3 U. S. Stat. at L. 49; Act of Congress, March 1, 1817, ch. 31, sec. 3, U. S. Stat. at L. 351; Act of Congress, March 1st, 1823, ch. 37, sec. 3, U. S. Stat. at L. 771; Act of Cong. March 3, 1852, ch. 65, sec. 13, 4 U. S. Stat. at L. 118; U. S. v. Nickerson, Law Rep. for Sept. 1854.

Second point. The present indictment contains sundry allegations which do not constitute, if true, the crime of perjury.

Coke, 3d Inst. 165; U. S. v. Bailey, 9 Pet. 238, opinion of Mr. Justice McLean, U. S. v. Taylor, Law Rep. for Sept. 1854, p. 271; 1 Chit. Cr. L. 295, 296.

Mr. Justice Curtis delivered the opinion of the court:

This case comes before us upon a certificate of the division of opinion by the judges of the Circuit Court of the United States for the District of Massachusetts.

At the March Term, 1854, of the District Court of the United States for the District of Massachusetts, Nickerson was indicted for the crime of perjury. The indictment charged that in order to obtain the allowance of bounty money, on account of the employment of a vessel in the cod fishery, of which vessel he was the agent, he made oath before the collector of the District of Barnstable, where the vessel was enrolled and licensed, that a certain paper, produced by him to the collector, was the original agreement made with the fishermen employed on board the vessel during the fishing season then last past; that three fourths of the crew so employed were citizens of the United States, or not subjects of any foreign prince or state; and that these statements were false, and known to the defendant to be so when he made the oath.

Upon this indictment Nickerson was tried and acquitted.

At the May Term, 1854, the Circuit Court for

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the District of Massachusetts, Nickerson was again indicted, and to this last indictment pleaded specially his former acquittal, and the plea was demurred to.

The question raised by this demurrer, and upon which the opinions of the judges were opposed, is whether the same evidence, which is competent and essential to support the indictment in the Circuit Court, might have been admitted in support of the former indictment in the District Court.

The demurrer admits that the defendant is the same person charged by the former indictment, and that the oath alleged in the former indictment to have been taken, is the same oath alleged in this indictment. It appears from a comparison of the two indictments that the same occasion of taking the oath is alleged in both; that the occasion being to obtain an allowance of money from the United States, as 209*] bounty, on account of the *employment of a vessel called The Silver Spring in the cod fishery during the season then last past.

Each indictment contains substantially the same allegation respecting the authority of the collector to administer the oath; that allegation being that the collector had competent power and authority to administer the same. Under the 19th section of the Crimes Act of April 30, 1790 (1 Stat. at L. 116), this averment would let in any legal evidence of the lawful power of the collector to administer the oath.

The false swearing alleged in each indictment is the same, and the only question is, whether the indictment in the District Court was so drawn as to preclude the United States from offering evidence to prove that the defendant knowingly and willfully swore falsely that the paper produced was the original agreement, and that three-fourths of the crew were citizens.

The argument is, that the former indictment, by its terms, limited the government to proof of false swearing in an oath required to be taken by the Act of July 29, 1813 (3 Stat. at L. 49); that this Act does not require either the verity of the agreement with the crew, or the citizenship of three-fourths of the crew, to be sworn to; and consequently, that neither of the perjuries charged could be proved under the former indictment.

The 7th section of the Act of 1813 is as follows: "That the owner or owners of every fishing vessel of twenty tons and upwards, his or their agent or lawful representative, shall, previous to receiving the allowance made by this Act, produce to the collector, who is authorized to pay the same, the original agreement or agreements which may have been made with the fishermen employed on board such vessel, as is hereinbefore required, and also a certificate to be by him or them subscribed, thereon mentioning the particular days on which such vessel sailed and returned on the several voyages or fares she may have made in the preceding fishing season, to the truth of which he or they shall swear or affirm before the collector aforesaid."

It is argued that this requires an oath to the truth of the certificate only, and not to the verity of the agreement.

This depends upon the meaning of the relative pronoun "which." Does it refer to and include both papers to be produced to the collector, or only one of them? It may refer only to the one last mentioned, or to both. Grammatically it is capable of either construction.

Considering the nature of the Act, the objects which Congress had in view, and the mischiefs to be guarded against, we are of opinion that it was intended to require an oath to the verity of both papers.

This section of the law is not penal; it is directory merely. *It requires certain acts [*210 to be done in order to obtain an allowance of public money. The nature of the Act, therefore, does not require a strict interpretation, rigidly confined to what is so clearly expressed as to admit of no doubt. It calls for such an interpretation as will guard the public Treasury from fraud, so far as the language employed by Congress, when fairly construed, is capable of doing so.

The inducement to the payment of these bounties was, the public policy of training a body of native seamen, by an industrious pursuit of the cod fishery during a fixed portion of the year. To accomplish this it was deemed important that the seamen should participate directly in the profits of the voyage, in the manner pointed out by the Act of June 19, 1813, 3 Stat. at L. 2. And accordingly the 8th section of the Act in question provides that no vessel shall be entitled to bounty unless an agreement should be made with the fishermen in conformity with that Act. The production of the agreement was, therefore, the production of a paper, as essential to the claim as the certificate of the times of the departure and return of the vessel; and the verity of the agreement is as essential to the justice and legality of the claim, and to the accomplishment of the ends designed by Congress, as the verity of the certificate. It is apparent, also, that the former, as well as the latter, may be false, and that the collector had no better means of knowledge of the truth or falsehood of the paper purporting to be the agreement, than he has of the truth or falsehood of the certificate. The mischiefs to be guarded against were, therefore, the same.

The case, therefore, is one where the law requires two documents to be produced to a public officer, to constitute a title to an allowance of public money. The verity of both is essential to the justice and legality of the claim. The officer has no means of testing the verity of either, except what is given by this law. Congress has considered it proper that an oath should be taken by the applicant. The question is, whether this security of an oath was intended to be confined to one of the documents. The language employed is capable of such a construction, but it is also capable of meaning that the security of an oath was to extend to both. In our judgment, the latter is to be deemed to have been intended by Congress; and we, therefore, hold that so much of the first indictment as charged that an oath as to the agreement was required by the Act of 1813, was correct in point of law. But this does not dispose of the whole question; because there can be no pretense that the Act of 1813, required an oath to the fact that three fourths of the crew were citizens. In point of fact, there was no requirement on the subject *of the citizenship of the crew when the [*211

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Act of 1813 was passed, nor until the Act of March 1, 1817, 3 Stat. at L. 351; and the argument on the part of the United States is, that as the former indictment was limited to an oath required to be taken by the Act of 1813, the defendant could not be tried thereon for false swearing as to the citizenship of the crew. But we are of opinion that the former indictment was not thus limited. The particular allegation supposed to have that effect, is as follows:

"Which said oath so taken by the said Nickerson, Jr., was required to be taken by the owner or agent of said fishing vessel, under and by virtue of an Act of Congress of the United States of America, approved July 29, 1813, and re-enacted February 9, 1816, and in a matter and proceeding then and there required by law, in order to obtain the allowance aforesaid for said fishing vessel; it being then and there material and required by the Act aforesaid, and by force of the statutes of the said United States therein provided, in order to obtain said allowance of money, that the owner of said fishing vessel, or his agent or representative, previous to receiving such allowance, should swear as aforesaid to the truth of the aforesaid declarations."

The pleader here not only refers to the Act of 1813, but also avers that the oath was taken, "and in a matter and proceeding then and there required by law, in order to obtain the allowance aforesaid for said fishing vessel." It is true, the whole allegation, if it is correctly copied in the record, is somewhat confused; but, according to any construction which we have been able to put upon it, it does not confine the requirement of the oath to the Act of 1813 only.

It was not necessary to aver in the indictment what Act or Acts of Congress required the oath to be taken. The averment that it was taken by the owner or agent to obtain an allowance of bounty, and the description of the oath which was taken, and of its occasion, were the only matters of fact necessary to be alleged to show the materiality of the oath, and that it was an oath required by law. The court was bound to take judicial notice of the requirements of all Acts of Congress respecting it. It was competent for the government, under these averments of facts, to rely on any Act of Congress which required the oath to be taken without referring to it.

This was not a question respecting the authority of the collector to administer the oath. That, as has already been observed, was correctly averred in both indictments, pursuant to the Act of 1790. And under that general averment of competent authority, any laws and any fact constituting that authority might have been shown. The question here 212*] was, whether such *an oath as is described in the indictment, being taken before a collector who had competent authority to administer it, for the purpose of obtaining an allowance of bounty money, was an oath which, if wilfully false, would subject the defendant to be punished as for perjury. And we do not think this question was so narrowed, by the passage above extracted from the former indictment, that evidence of an oath required or authorized by any other Act *besides* that of 1813 could not be given under that indictment; and we order it to be certified accordingly.

The court entered the following order; on consideration whereof, it is the opinion of this court that the special plea pleaded by the defendant is a good plea in bar to the indictment; whereupon, it is now here ordered and adjudged by this court that it be so certified to the said Circuit Court.

JOHN HENSHAW, Pl'ff,
v.
JOHN R. MILLER, Executor of Charles E. Miller, Deceased.

(See S. C. 17 How. 212-224.)

Action for false recommendation abates by defendant's death.

An action for fraudulently recommending to the plaintiff a person as worthy of confidence, and thereby inducing plaintiff to sell goods on credit to him, does not survive against defendant's executor, but, by defendant's death, abates.

Virginia Statutes, and decisions of that and other States, reviewed.

Submitted Feb. 23, 1855. Decided Mar. 8, 1855.

ON A certificate of division of opinion between the Judges of the Circuit Court of the United States for the Eastern District of Virginia.

The case is stated by the court.

Mr. Roscoe B. Heath, for the plaintiff, after stating the facts, made the following points:

If the loss or damage be merely pecuniary in its nature, and the remedy sought being pecuniary is entirely adequate, then the cause of action survives for or against the personal representative.

Statute 4 Edw. III. ch. 7; Hambly v. Trott, 1 Cowp. 375; Wheatley v. Lane, 1 Saund. 216 a; 1 Wms. Ex'rs, 511.

For the state of the law in Virginia on this point, see 1st vol. Rev. Code, 1819, p. 390, sec. 64; Suppl. 2 Rev. Code, 1819, p. 256, ch. 196; Monroe v. Webb's Ex'rs, 4 Munf. 73; Lee v. Cook's Ex'rs, Gilmer, 331; Code of 1850, p. 544, sec. 20.

The common law maxim, actio personalis moritur cum persona, was first confined by judicial interpretation to actions ex delicto where the action sounded merely in damages. It was afterwards still further restricted by the Stat. 4 Edw. III. ch. 7, de bonis asportatis.

This Statute has been construed to extend to "any injury to personal property whereby it has been rendered less beneficial to the executor, whatever the form of the action may be."

Note (1) Wheatley v. Lane, 1 Saund. 217; 1 Wms. on Ex'rs, 511.

That Statute is not in force in Virginia, but the enactment contained in sec. 64, 1 Rev. Code 1819, p. 390, has been construed in the same equitable manner, to effect justice by the courts of Virginia.

In Lee v. Cook's Ex'rs, Gilmer, 331, it was held that the sec. 64, ch. 104, 1 Rev. Code, 1819, is an extension of the 4th Edw. III. ch. 7, de bonis asportatis, and that trespass for the mesne profits of land recovered in ejectment against A, lies against his executor.

The course of legislation, as well as of judi-

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cial construction, has been constantly to narrow the application of this technical maxim, actio personalis, etc., and the Act of the Virginia Assembly, ch. 131, sec. 20, p. 544, Code 1850, cuts it up by the roots, as follows: "An action of trespass or trespass on the case, may be maintained by or against a personal representative, for the taking or carrying away any goods, or for the waste or destruction of, or damage to any estate of, by his decedent."

Code 1850, p. 544, sec. 20. This Act is founded upon, and is an extension of, the English Stat. 3 & 4 Wm. IV. ch. 42, sec. 2, which among other things enacts, "that an action of trespass or trespass on the case, as the case may be, may be maintained against the executor or administrator of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal."

The case of The United States v. Daniel, 6 How. 11, has no application; that being a question under the laws of North Carolina.

Messrs. Robert Stannard and James Lyons, for the defendant in error, after stating the facts:

The court is referred to Wheatley v. Lane, above, (A), note (1), to show that in England, not only at common law, but even under Stat. 4 Edw. III. ch. 7, such a case as the present would fall fully within the influence of an action: actio personalis moritur cum persona; for it is there laid down "that the Stat. of Edw. III. does not extend to injuries done to the person or to the freehold of the testator; therefore an executor or administrator shall not have an action of assault and battery, false imprisonment, slander, deceit, diverting a water-course, obstructing lights, cutting trees, and other actions of the like kind, for such causes of action shall die with the person." And in The United States v. Daniel, 6 How. 313, this court holds that "no action where the plea must be that the testator was not guilty, can lie at common law against the executor. Upon the face of the record the action arises ex delicto, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender."

Neither is there anything in the statute law of Virginia changing the rule of the common law in this respect. The only Statutes relating to this subject in force at the institution of this suit, will be found in the Revised Code of 1819, vol. 1, page 390, sec. 64, and the supplement to Revised Code, p. 258, ch. 196; and these Statutes continued in force until the revisal of 1849, when they were substituted in the present Code of Virginia (which took effect on the 1st of July, 1850) by the 20th sec. of ch. 130.

See Code of Va. p. 544, sec. 20.

Under the statute law of Virginia, then, as it stood at the institution of this suit, it is submitted that the case at bar falls fully within the influence of Lord Mansfield's judgment in Hambly v. Trott, Cowper, 372, acted on by this court in United States v. Daniel, above cited. It remains to inquire whether sec. 20 of ch. 130 of the Code of Virginia, p. 544, sec. 20, which took effect pending this suit, has made any change in the law affecting the question under consideration. It was compiled from the Virginia Acts of 1819 and 1827 above cited; and the Eng. Stat. of William III. & IV., ch. 42, sec. 2, see Eng. Stat. at L. Vol. XIII. p. 141, and was designed to extend the remedies given to and against executors, to cases of injury or damage to real as well as to personal estate, which former were not embraced either by 4 Edw. III. in England, or by the Virginia Statutes, which will appear from Harris v. Crenshaw, 3 Rand. 14, in which it was held that "an action of trespass quare clausum fregit is not converted into an action de bonis asportatis, by an allegation in the declaration that the trees cut were carried away, and therefore the rule actio personalis moritur cum persona applies to such an action." But it was never designed by the 20th sec. of Code of 1850, to abolish all distinction between personal torts and injuries and damage to property or an estate between actions ex delicto and ex contractu, or to provide that because in some sense a man may be injured or damaged in his estate or means of livelihood by means of an assault and battery, or by slanderous words spoken; therefore, actions of assault and battery, or actions of slander, shall survive for or against an executor or administrator.

The United States v. Daniel, 6 How. 13.

Mr. Justice Daniel delivered the opinion of the court:

This case is brought before this court upon a certificate of division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Virginia.

The facts of this case, and the question of law arising thereon, upon which the judges were divided, are shown in the following statement:

John Henshaw, the plaintiff in the Circuit Court, instituted in that court an action on the case against Charles E. Miller, to recover of him damages for fraudulently recommending to the plaintiff, by letter, one Porter Robinson as a person worthy of confidence, and thereby inducing the plaintiff to make sale on credit to the said Robinson of a considerable amount of merchandise, when the defendant knew that Robinson was unworthy of credit, and intended fraudulently to deceive the plaintiff, *who, in fact, had been deceived by the [*218 recommendation given by the defendant to Robinson; and upon the faith thereof had made sales to him, the whole amount whereof had been lost. In this case, after issue joined upon the plea of not guilty, and after several attempts at a trial of the cause, rendered fruitless by disagreement amongst the jury, the defendant departed this life, and on the motion of the plaintiff a writ of scire facias was awarded to him to revive the suit against John R. Miller, the executor of the original defendant.

Upon the return of the scire facias executed, the executor moved the court to quash the process. This motion was continued until the May Term of the court, 1853, when, upon the argument of the motion to quash the scire facias, the question occurred whether the action survived against the executor of the original defendant, or abated by the death of the latter; and opinions of the judges being opposed on this question, at the request of the counsel for

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the defendant it was ordered that the division be certified to the Supreme Court at its next session.

In considering the question presented by the certificate of division in the Circuit Court, we must adopt for our guidance the following principle, viz.: that this question is to be determined by the rule of the common law with respect to the revival of suits, except so far as that rule has been modified, either by restriction or enlargement, by the statutory provisions of the Virginia laws.

To the principle just mentioned we are bound to adhere, for the following causes:

By an Ordinance of the Virginia convention, passed on the 3d of July, 1776, it was declared: "That the common law of England, all Statutes or Acts of Parliament made in aid of the common law prior to the fourth year of the reign of James I., and which are of a general nature and not local to that kingdom, together with the several Acts of the General Assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be the rule of decision, and shall be in full force until the same shall be altered by the legislative power of this Colony."

At a subsequent period, viz.: on the 27th of December, 1792, the Legislature of Virginia, by an Act of that date, after reciting the ordinance above mentioned, declared and enacted as follows, viz.: "Sec. 2. That whereas the good people of this Commonwealth may be ensnared by an ignorance of Acts of Parliament, which have never been published in any collection of the laws, and it hath been thought advisable by the General Assembly during their 219*] present session, specially to enact *such of the said Statutes as to them appear worthy of adoption, and do not already make a part of the public code of the laws of Virginia." "Sec. 3d. Be it therefore enacted by the General Assembly of Virginia, that so much of the above-recited ordinance as relates to any Statute or Act of Parliament shall be, and the same is hereby repealed; and that no such Statute or Act of Parliament shall have any force or authority within this Commonwealth." These provisions are followed by savings with respect to rights arising under any of the above mentioned Statutes, and as to any crimes committed against them before this repeal, and also of the benefit of all writs, remedial or judicial, which might have been legally obtained or sued out of any court, or the clerk's office of any court, of the Commonwealth, prior to the commencement of the Statute.

These two enactments have been continued in force, and will be found to be re-enacted in the revisal of 1819, Vol. I., chapters 38, 40.

The Statutes, therefore, of 4 Ed. III. ch. 7, or of 3 and 4 Wm. IV., or any other English Statute as such, cannot govern this case, nor in anywise influence its decision, except so far as by parity the courts of Virginia may have applied the interpretation of those Statutes by the English courts to similar provisions, if such there be in the laws of Virginia.

The maxim of the common law is "actio personalis moritur cum persona," and as this maxim is recognized both in England and in Virginia, the interpretation of it in the former country becomes pertinent to its exposition or application here. In England it has been expounded to exclude all torts when the action is in form ex delicto, for the recovery of damages, and the plea not guilty. That in case of injury to the person, whether by assault, battery, false imprisonment, slander or otherwise, if either party who received or committed the injury die, no action can be supported either by or against the executors or other personal representatives.

1 Saund. 217, n. 1; 2 M. & S. 408.

And so express and strict have been the applications of this maxim of the common law by the English judges, as to have established the rule, that for a breach of promise to marry, although the action is in form ex contractu, yet the cause of action being in its nature personal, the executor of the party to whom the promise was made cannot sue.

And again, that for the breach of the implied promise of an attorney to investigate the title to a freehold estate, the executor of the purchaser cannot sue without stating that the testator had sustained some actual damage.

Vide 4 Moore, 532; 2 B. & B. 102, and 2 M. & S., above mentioned.

This has been ruled even under the alleged relaxation of the common law *maxim [*220 in virtue of the Statutes of 4 Ed. III. chs. 7 and 3, and 4 Wm. IV. ch. 42. By the English courts it has been also ruled, that although the statutes which have conferred upon executors the right to maintain actions in certain cases arising ex delicto, do not limit that right to instances of a literal asportation of the goods or assets, yet they confer the right of action upon the executor in instances solely of actual injury to personal property, whereby that property has been rendered less beneficial to the executor.

2 M. & S. 416.

Let us see how far the common law maxim has been modified in Virginia, either by express statutory language or by judicial construction.

By the 38th section of chapter 128, Vol. I. of the Revised Code of 1819, it is provided: "That where any personal action or suit in equity is now or shall be depending in any court of this Commonwealth, and either of the parties shall die before verdict rendered or final decree be had, such action or suit shall not abate, if the same were originally maintainable by or against an executor and administrator, but the plaintiff; or if he be dead, against his executor or administrator, or the sheriff, sergeant or other curator of the decedent's estate, shall have a scire facias against the defendant; or if he be dead, against his executor, administrator, sheriff, sergeant or other curator of his estate, to show cause generally why such action or suit shall not be proceeded in to a final judgment or decree."

This section of the Statute provides merely against the abatement of actions at law or of suits in equity by the death of parties, as a matter of course, but it gives no further description of actions or suits than by reference to such designation of them and their capacity for revival as may be deducible either from the common law or by some statutory regulation.

By the 64th section of chapter 104, Vol. I. p. 390, of the same Code, it is declared: "That actions of trespass may be maintained by or

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against executors or administrators, for any goods taken or carried away in the lifetime of the testator or intestate, and that the damages recovered shall be in the one case for the benefit of the estate, and in the other out of the assets."

This provision of the Virginia Statute, in so far as it authorizes an action against the personal representative as well as in his favor, is unquestionably an extension of the Statute of Edw. III. which confers the right of action upon the executor or administrator, but does not authorize an action against him. But, although the former Statute is certainly an extension of the latter, with respect to the parties for or against whom the right of action is given, it has been doubted, and upon very high authority upon the point, whether, with respect to 221*] the class of *subjects to which the right of action is authorized, the Statute of Virginia does not operate a material restriction upon the provision of the English Statute. The Statute of Edw. III. is thus entitled: "Executors shall have an action of trespass for a wrong done to the testator," and reciting "that in times past executors have not had actions for a trespass done to their testators, as of goods and chattels carried away in their life and so such trespasses have hitherto remained unpunished." It is enacted that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be, should have had if they were in life."

In the interpretation of this Statute, the courts in England have ruled, that the right conferred on the executor to maintain trespass for a wrong done to the testator, must, with reference to the language of the times when the Statute was passed, signify any wrong; and that the instance put, viz.: "as of the goods and chattels of the same testators carried away in their life," was put in the Statute only as an instance or illustration, and by way of limiting the right to injuries to personal property, and not as restrictive to the single or particular form of injury: and that the Statute must be construed to extend to every description of injury to personal property by which it has been rendered less beneficial to the executor, so that the executor may support trespass or trover, case for a false return to final process, and case or debt for an escape.

Ld. Raym. 973.

The provision of the Statute of Virginia by which the right of action by or against the personal representative as to torts is conferred, is introduced by no preamble or declaration by which any object or purpose beyond its literal terms may be implied. It is a simple section of the Statute concerning wills, intestacy and distribution, and clearly defines the single instance in which trespass may be maintained by the personal representative—the instance of "goods taken or carried away in the lifetime of the testator or intestate;" no other species of trespass or wrong is enumerated or alluded to.

1 Rev. Co. of 1819, secs. 64, 390.

In reference to this section, and in comparing it with the Statute 4 Edw. III., it has been remarked by Green, Justice, in the Supreme Court of Virginia, that in the construction of the latter Statute "it has been decided that the word 'trespass,' as it was then understood, embraced all cases of tort; that the word 'wrong' in the title is general, and that the words 'as of the goods,' etc., were inserted only by way of example, so as to confine the remedy to cases in which the wrong affected the goods and chattels." But our Statute, without any such title or general words as are found in the title and in the enacting clause of *the English Statute, gives the action [*222 of trespass for goods taken and carried away, and provides for that case only substantively, and not by way of example.

Thweatt's Administrator v. Jones' Administrator, 1 Rand. 351.

But this 64th section would seem to have received a more explicit and definitive interpretation by the decision of the Supreme Court of Virginia, in the case of Harris v. Crenshaw, reported in the 3d of Rand. 14. That was an action of trespass quare clausum fregit, in which there was a verdict and judgment in favor of the defendant who died, and whose representative was made a party by consent. The case was carried by appeal (as is the practice in Virginia, at law as well as in equity), to the Supreme Court by the plaintiff, upon exceptions taken to instructions from the judge at nisi prius. In delivering the opinion of the court, Tucker, President, says: 'This is nothing more than an ordinary action of trespass quare clausum fregit. The allegation that the trees were cut and carried away, is always inserted in the declaration when it is intended to be proved. It did not convert the action into an action of trespass de bonis asportatis, and take it out of the rule actio personalis, etc. If the defendant had died before verdict, the writ would have abated, and the plaintiff would have been deprived of damages if he had sustained any. But there being a verdict and judgment against him, by which he may be hereafter affected in some other controversy respecting the premises, he has a right to reverse that judgment if he can, and was entitled to a scire facias against the personal representative of the appellee." Then in commenting upon the exceptions to the instructions to the judge at nisi prius, the court proceeds thus: "The second instruction of the judge was therefore erroneous, and the judgment is to be reversed and the verdict set aside; and as by the death of the appellee the appeal abated here, and there can be no prosecution of the suit in the court below, it coming within the rule before stated (that is to say, the rule of the common law, actio personalis, etc.), it is to be abated here, and the proceedings certified to the court below."

By this decision of the Supreme Court of Virginia, the following positions must be taken as having been affirmed:

1st. That by the rule of the common law the right of action founded upon torts of any and every description terminated with the life of either participant in such tort. That this maxim or rule of the common law governed all causes of action arising ex delicto in Virginia, except so far as it might have been modified by statute.

2d. That the provision of the Statute of Virginia, authorizing actions for or against executors and administrators, for torts *done [*223

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or suffered by those whom they represent, limits those actions to instances which are essentially or rather directly cases of trespass de bonis asportatis, and cannot be made to embrace ordinary cases of trespass quare clausum fregit, or cases of tort generally, by attempting to connect with them as an incident the asportation of goods and chattels; much less can it be made to cover an indirect or consequential injury to the welfare or prosperity of a testator or intestate resulting from a fraud practiced upon him.

There is one case from the Supreme Court of Virginia, cited by plaintiff, and relied on to sustain the right of action in the executor. It is the case of Lee v. Cooke's Executor, reported in Gilmer, 331. This was an action for mesne profits of land which had been recovered in ejectment. After issue made up in the cause, the defendant died. At a subsequent term of the court the executors appeared by attorney, and the cause was continued. At the term next ensuing, the cause was directed to be struck off the docket, the court thinking that the action abated by the death of the defendant.

This decision was reversed by the Supreme Court, the latter tribunal being of the opinion that the case was within the equity of the 64th section of the Virginia Statute, chap. 104, 1 Rev. Co. 390, and that the action, so far at least as regarded the mesne profits, did not die with the testator. The case is very succinctly given in the report, and is accompanied with no argument showing explicitly the grounds on which it was contested. It may have been regarded by the Supreme Court as resting upon an implied obligation or assumption, to pay or account for profits, ascertained by the judgment in ejectment to belong to the plaintiff, and therefore as partaking essentially of the character of a contract. Or, if in any sense the right of action could be understood as arising from the asportation by the defendant, it must be by such an acceptation of the phrase as will apply it to the mesne profits specifically, as being personal property belonging to the plaintiff, and actually injured by the testator of the defendant in his lifetime. If more than this is sought to be deduced from the case of Lee v. Cooke's Executors, the attempt would bring the case in conflict with that of Harris v. Crenshaw, and with the opinion of Green, Justice, in the case of Thweatt's Administrator v. Jones' Administrator, both more recent in point of time, as well as more explicit in their interpretation alike of the English Statute and that of Virginia.

In cases analogous to the one before us, or which rather must be viewed as identical in their essential features, the principles hereinbefore deduced from the laws and decisions of Virginia have been directly affirmed. Thus in 224*] the case of Coker v. *Crozier, Ala, 369, it was ruled that in an action on the case for a fraud committed in the exchange of horses, upon the death of the defendant the suit could not be revived against his personal representative, the rule of the common law forbidding such revival, and there being no Statute of the State to authorize it.

The case of Read v. Hatch, 19 Pick. 47, bears a still stronger resemblance to the case before us than that just cited from the Supreme Court of Alabama. So exact, indeed, is this resemblance, that it might with justice be said of the case of Read v. Hatch, in comparison with this under our consideration, mutato nomine historia narratur de te. The former was an action for fraudulently recommending a trader as in good credit, by means whereof the plaintiff was induced to sell him goods on credit, and thereby sustained damage. This action was founded on the 7th section of the 93d chapter of the Revised Statutes of Massachusetts, which provides that actions of trespass and trespass on the case, for damage done to real or personal estate, shall survive. Pending the suit the defendant died, and the plaintiff moved to cite in his administrator. Shaw, Chief Justice, said. in pronouncing the judgment of the court: "The question whether the plaintiffs can cite in an administrator, and proceed with their action, depends on Revised Stats. ch. 93, sec. 7. It is contended that a false representation, by which one is induced to part with his property by a sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction. If this were the true construction, then every injury by which one should be subjected to pecuniary loss would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damage done to some specific personal estate of which one may be the owner. A mere fraud or cheat, by which one sustains a pecuniary loss, cannot be regarded as a damage to personal estate. The action is abated at common law, and not surviving by force of the Statute, must be deemed to stand abated."

Upon full consideration of the statutes of Virginia, and of the interpretation placed by the courts of that State upon those statutes, and of every analogy which can be applied from similar provisions elsewhere, we are of the opinion, that in the Circuit Court this action did not survive the death of the defendant, but abated upon the occurrence of that event; and we order it to be certified accordingly to the Circuit Court, in reply to the certificate of division.

THE UNITED STATES Ex relatione BEVERLY TUCKER, Pl'ff in Err.,

v.

A. G. SEAMAN, Superintendent of Public Printing.

(See S. C. 17 How. 225-231.)

Mandamus—when can issue to public officer.

The Circuit Court of the District of Columbia cannot issue the writ of mandamus to an officer of the government in Washington in a case where discretion and judgment are to be exercised by the officer.

It can be granted only where the act to be done is merely ministerial, and the relator is without any other adequate remedy.

Such court should not interfere, by this summary process, in controversies between officers, in their respective employments, whenever differences of opinion as to their respective rights arise.

If such differences cannot be adjusted by the authorities under which they are acting, an action at

NOTE.—Mandamus, when proper remedy and when not—see note, 30 L. ed. U. S. 160.

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law would be an adequate remedy for any injury sustained.

The rule applied to the distribution of public printing, by the Superintendent.

Argued Feb. 28, 1855. Decided Mar. 8, 1855.

IN ERROR to the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

This was an application in the Circuit Court for the District of Columbia for a mandamus against Seaman, to compel the delivery of a certain document to him, as Printer to the Senate, to be printed. The court refused the mandamus prayed for, whereupon the petitioner brought the case here on a writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. Samuel Chilton and Reverdy Johnson for plaintiff in error.

Mr. C. Cushing, Atty.-Gen., for the defendant in error.

1. The Circuit Court had no power to grant the mandamus asked for.

McIntire v. Wood, 7 Cr. 504; Smith v. Jackson, 1 Paine's C. C. 453, 445; M'Clung v. Silliman, 6 Wheat. 598; 1 Kent's Com. 322, 331; U. S. v. Worrall, 2 Dall. 384; U. S. v. Hudson, 7 Cr. 32; U. S. v. Coolidge, 1 Wheat. 415.

2. The duties devolved upon Seaman are not those of a mere ministerial character, and therefore the Circuit Court had no authority in relation to them. A decision on such questions is not reviewable, nor subject to the control of the Circuit Court.

Decatur v. Paulding, 14 Pet. 497; Brashear v. Mason, 6 How. 92; Goodrich v. Guthrie, 17 How. 284; McElrath v. McIntosh, 1 Law Rep. N. S. 390; Worthington v. Bicknell, 1 Bland, Ch. 186; Pascault v. The Commissioners of Baltimore, 1 Bland, Ch. 584; Bordley v. Lloyd, 1 Harr. & McH. 27; Runkle v. Winemiller, 4 Harr. & McH. 429; Ellicott v. The Levy Court, H. & J. 184; Williamson v. Carman, 1 G. & J. 184.

Mr. Chief Justice Taney delivered the opinion of the court:

The defendant in error, at the times hereinafter mentioned, was, and still is, Superintendent of Public Printing of the two houses of Congress; and the relator Printer to the Senate, and O. A. P. Nicholson Printer to the House of Representatives.

By the Act of August 26, 1852, it is made the duty of the Superintendent to receive from the Secretary of the Senate, and the clerk of the House of Representatives, all matter ordered by Congress to be printed, and to deliver it to the public printer or printers. And the 12th section provides, that when any document shall be ordered to be printed by both houses of Congress, the entire printing of such documents shall be done by the Printer of that house which first ordered the printing.

On the 31st of January, 1854, the Commissioner of Patents communicated to the Senate that portion of his annual report for 1853 which relates to arts and manufactures, which that body on the same day ordered to be printed. And on the following day, it was communicated to the House of Representatives, who passed a similar order. This communication was delivered by the Superintendent to the relator.

On the 20th of March, 1854, the Commissioner communicated to both houses the agricultural portion of his report, which each house on the same day ordered to be printed—the order of the House of Representatives being, it is admitted, first made.

The relator claimed that the report of the Commissioner of Patents was but one document, within the meaning of the Act of Congress above referred to, and that by virtue of the order of the Senate of the 31st of January, 1854, he was entitled to *the printing of [*230 the agricultural portion of the report, although the printing of this part was first ordered by the House of Representatives. The Superintendent, however, refused to deliver it, and the relator thereupon applied to the Circuit Court for the District of Columbia for a mandamus, to compel the delivery. That court was of opinion that it had not jurisdiction of the case, and refused the mandamus; and this writ of error is brought by the relator.

The power of the Circuit Court of this district to issue writs of Mandamus to an officer of the government in Washington, has frequently been the subject of discussion in this court. It was before the court in Kendall v. U. S. 12 Pet. 524; in Decatur v. Paulding, 14 Pet. 497; in Brashear v. Mason, 6 How. 92; and again in Goodrich v. Guthrie, at the present term. The rule to be gathered from all of these cases is too well settled to need further discussion. It cannot issue in a case where discretion and judgment are to be exercised by the officer, and it can be granted only where the act required to be done is merely ministerial, and the relator without any other adequate remedy.

Now, it is evident that this case is not one in which the Superintendent had nothing to do but obey the order of a superior authority. He had inquiries to make before he could execute the authority he possessed. He must examine evidence; that is to say, he must ascertain in which house the order to print was first passed. He may, it is true, generally obtain this from the journals of the two houses, but yet he must examine them and compare the dates of the orders; and in this particular case it may even have been necessary to take oral testimony before he could determine the fact of priority, as the order was passed in each house on the same day. And after he had made up his mind upon this fact, it was still necessary to examine into the usages and practice of Congress in marking a communication in their proceedings as a document, and to make up his mind whether separate communications upon the same subject, or on different subjects from the same office, when made at different times, were according to the usages and practice of Congress, described as one document, or different documents, in printing and publishing their proceedings. He was obliged, therefore, to examine evidence, and form his judgment before he acted, and whenever that is to be done, is not a case for mandamus.

Nor is there any reason of public policy or individual right which requires that this remedy should be extended beyond its legitimate bounds, in order to embrace cases of this de-

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scription; for it would embarrass the operations 231*] of the Legislative and Executive *Departments of the government, if the court of this district was authorized to interfere, by this summary process, in controversies between officers, in their respective employments, whenever differences of opinion as to their respective rights may arise. If these differences cannot be adjusted by the authorities under which they are acting, an ordinary action at law would be an adequate remedy for any injury sustained.

It seems to be supposed that the case of Kendall v. U. S. justified this application; but it is altogether unlike it. The award of the Solicitor of the Treasury, in that case, was an official act; he was the officer appointed by Act of Congress to settle that account, and determine the amount of credit to which Stokes was entitled, if to any; and all that the Postmaster-General was required to do was to enter it in the books of the Department when reported to him by the Solicitor of the Treasury. He was merely to record it. His duty under that Act of Congress was like that of a clerk of a court, who is required to record its proceedings; or of an officer appointed by law to record deeds, which a party has a right by law to place on record; or of the Register of the Treasury of the United States to record accounts transmitted to him by the proper accounting officers to be recorded. The duty in such cases is merely ministerial; as much so as that of a sheriff or marshal to execute the process of a court.

This was the point decided in Kendall v. U. S., and the subsequent cases have all been decided upon the same principles. They are in no degree in conflict with it; on the contrary, they have followed it.

But the case before us, for the reasons above stated, is unlike that of Kendall v. U. S. and the Circuit Court were right in refusing the mandamus. The judgment must therefore be affirmed.

Affirmed with costs.

ALEXANDER DENNISTOUN, John Dennistoun, Wm. Craig Mylne, and William Wood, Partners under the style of A. Dennistoun & Co., Plffs. in Er.,

v.

ROGER STEWART.

(See S. C. 17 How. 606-608.)

Protest—slight error in copy of note will not vitiate.

A protest of a bill of exchange was indorsed on a copy of a bill agreeing in every particular with the original bill except that "And E. Byrne" was written "Chas Byrne." Held that the variance in the copy of the bill could not mislead, and was immaterial, and the protest was good.

Slight mistakes, or variances, of letters, or even words, when the substance is retained, cannot and ought not to vitiate the protest.

Argued Mar. 1, 1855. Decided Mar. 8, 1855.

IN ERROR to the Circuit Court of the United States for the Southern District of Alabama.

This suit was brought in the Circuit Court of the United States for the Southern District of Alabama, by the plaintiffs in error, on a certain bill of exchange.

The trial below having resulted in a verdict and judgment for the defendant, the plaintiffs brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Mr. P. Phillips, for the plaintiffs in error:

Misdescriptions of notes and bills in notices of protest which do not and could not mislead the party, will not exonerate him from responsibility. The language of this court in the case of Mills v. Bank of U. S. 11 Wh. 436, is: "The objection of misdescription may be disposed of in a few words. It cannot for a moment be maintained that any variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of a particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility.

See, also, Bayley on Bills, 253; Smith v. Whiting, 12 Mass. 6; Mormon v. Bank of Alabama, 6 Port. 353; Reedy v. Seixas, 2 Johns. Cas. 337; Bank of Rochester v. Gould, 9 Wend. 279; Croker v. Gestchell, 23 Ohio, 399; Tobey v. Lennig, 14 Pa. St. 485.

The relative materiality of the protest and the notice, is shown by the fact that the omission to state the former in the declaration, cannot be taken advantage of under a general demurrer; while omitting to state demand and refusal is bad after verdict.

1. Dane's Abr. Bills Exch. ch. 20, art. 11, secs. 9, 3; 3 Johns. 202; Doug. 679, 683, 684; Murray v. Clayborn, 2 Bibb. 301.

Mr. Justice Grier delivered the opinion of the court:

The plaintiffs declared against the defendant as drawer of a bill of exchange by the name and style of James Reid & Co., of which the following is a copy:

"Mobile, Sept. 9, 1850.

No. £4,417 14s 11d. st'g.

Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of ourselves, in London, £4,417 14s. 11d. st'g. value received, *and charge the [*607 same to account of 1,058 bales cotton per 'Windsor Castle.'

Your obedient servants,
Pr. pro James Reid & Co.,
Wm. Moult, Jr.

To Hy. Gore Booth, Esq., Liverpool.

Acceptance across the face of the bill.

Seventh October, 1850. Accepted for two thousand five hundred and seventy-one pounds eighteen shillings and seven pence, being balance unaccepted for acpt. 1,058 bf. cotton, pr. Windsor Castle, payable at Glyn & Co.

Pr. pro. Henry Gore Booth,
And. E. Byrne.

Due 9 Decem.

Indorsed:

Pay Messrs. A. Dennistoun & Co., or order.
Pr. pro James Reid & Co.,
Wm. Moult, Jr."

After reading this bill with its indorsements, the plaintiff offered in evidence a regular pro-

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test, indorsed on a copy of a bill agreeing in every particular with the above, except that for "And. E. Byrne" was written "Chas. Byrne."

The defendant objected to the reading of the protest in evidence, because it did not describe the bill of exchange produced by the plaintiffs, but a different bill. The court sustained this objection and excluded the protest from the jury, which is the subject of the first bill of exceptions.

A protest is necessary by the custom of merchants in case of a foreign bill, in order to charge the drawer. It is defined to be in form "a solemn declaration written by the notary under a fair copy of the bill, stating that the payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is therefore protested."

A copy of the bill, it is said, should be prefixed to all protests, with the indorsements transcribed verbatim. 1 Pardess. 444; Chit. Bills, 458.

However stringent the law concerning mercantile paper, with regard to protest, demand and notice may appear, it is nevertheless founded on reason and the necessities of trade. It exacts nothing harsh, unjust or unreasonable. A protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before the trial, and consequently may be amended according to the truth, if any mistake has been made.

608*] *The copy of the bill is connected with the instrument certifying the formal demand by the public officer as the easiest and best mode of identifying it with the original. Mercantile paper is generally brief, and without the verbiage which extends and enlarges more formal legal instruments. Hence, it is much easier to give a literal copy of such bills, than to attempt to identify them by any abbreviation or description. The amount, the date, the parties and the conditions of the bill, form the substance of every such instrument. Slight mistakes, or variances of letters, or even words, when the substance is retained, cannot and ought not to vitiate the protest. A lost bill may be protested, when the notary has been furnished with a sufficient description, as to date, amount, parties, etc., to identify it.

In indictments for forgery it is not sufficient to state the "substance and effect" of the instrument; it must be laid according to the "tenor" or exact letter; but the law merchant demands no such stringency of construction. The sharp criticism indulged when the life of a prisoner is in jeopardy cannot be allowed for the purpose of eluding the payment of just debts.

It is unnecessary that a copy of the protest should be included in the notice of the drawer and indorsers. The object of notice is to inform the party to whom it is sent that payment has been refused by the maker, and that he is held liable. Hence, such a description of the note as will give sufficient information to identify it, is all that is necessary. What was said by Mr. Justice Story in delivering the opinion of this court in Mills v. The Bank of the United States, with regard to variances and mistakes in notices, will equally apply to protests: "It cannot be, for a moment, maintained that every variance, however immaterial, is fatal. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility."

In the case before us the protest had an accurate copy of every material fact which could identify the bill—the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorsers; in fine, everything to identify the bill. The only variance is a mistake in copying or deciphering the abbreviations and flourishes with which the christian name of the acceptor's agent is enveloped. The abbreviation of "And." has been mistaken for Chas., and the middle letter "E." omitted. The omission of the middle letter would not vitiate a declaration or indictment. Nor could the mistake mislead any person as to the identity of the instrument described.

*We are of opinion, therefore, that [*609 the objection made to this protest, "that it does not describe the bill of exchange produced, but a different bill," is not true in fact, and should have been overruled by the court.

This renders it unnecessary for us to notice the offer of testimony to prove the identity, which was overruled by the court.

The judgment of the Circuit Court is reversed, and venire de novo awarded.

The judgment of the Circuit Court reversed, with costs, and cause remanded to the said Circuit Court, with directions to award a venire facias de novo.

JACK T. GRIFFIN and Wife, Plaintiffs in Error,

v.

JAMES Y. REYNOLDS.

(See S. C. 17 How. 609-612.)

Action on covenant of warranty—evidence—damages—wife of grantor not liable on covenant—misjoinder.

In an action for breach of covenant of warranty in deed, a judgment and execution, in a suit in ejectment for the land, commenced a few days after the date of the deed, against plaintiff's grantor, and which resulted in a judgment against him, which was followed by a writ of possession which was returned executed, is evidence to establish the existence of an outstanding paramount title at the date of the deed; although the plaintiff here was called by the plaintiff in the ejectment suit as a witness.

A copy of a deed of trust from the records of the Probate Court of Alabama, where it had been recorded, was improperly admitted, no evidence to account for the original being given, there being no law in Alabama authorizing the use of copies.

The measure of damages is the loss actually sustained by the eviction from the land for which the title has failed, not exceeding the consideration paid, interest, and expenses of suit.

The deed in which the warranty was contained

NOTE.—Obligation of married woman as surety or guarantor for her husband or others. Rights as creditor of her husband. See note to Bien v. Heath, 12 L. ed. U. S. 416.

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was proper evidence, it having been duly acknowledged, and the Act which authorizes the acknowledgment having provided that it shall be admitted in evidence in courts, without further proof.

The wife of the grantor in the deed containing the covenant, is improperly joined. She could not, in Alabama, incur responsibilities for the title.

But the objection of misjoinder is taken here for the first time, and the difficulty may be obviated by a nolle prosequi in the court below.

Argued Mar. 1, 1855. Decided Mar. 8, 1855.

IN ERROR to the District Court of the United States for the Northern District of Mississippi.

This was an action of covenant, brought in the District Court for the Northern District of Mississippi, by the defendant in error, for a breach of warranty of title. The first trial below resulted in a verdict for the defendant.

At the second trial below, the plaintiff obtained a verdict and judgment for $6,387.55; whereupon the defendant brought the case here on a writ of error. A further statement of the case appears in the opinion of the court.

Messrs. **Reverdy Johnson, Reverdy Johnson, Jr., S. Adams** and **James Phelan** for the plaintiff in error:

1. The transcript of the deed from Oliver to James McCown, trustee for the Muggins Co., was improperly admitted in evidence.

Hinde v. Vattier, 5 Pet. 398; Owings v. Hull, 9 Pet. 607; Summerville v. Stephenson, 3 Stewart (Ala.) 271; Thompson v. Ives, 11 Ala. 239.

2. The record in the case of Stoddard and Murphy v. Giffin, was improperly admitted in this case, as it was in evidence that Reynolds had in that case testified to a material point; and as the charge leaves it to the jury to settle the question of law as to the materiality or immateriality of the matter testified to, the court should have charged the jury that the plaintiff should show that his testimony was not to a material point; the presumption of law being that it was material.

Case v. Reeve, 14 Johns. 79.

Messrs. **A. H. Lawrence** and **Reuben Davis** for defendant in error.

Mr. Justice **Campbell** delivered the opinion of the court:

The defendant recovered a judgment in the District Court for damages sustained by the breach of a covenant of warranty of title to land in Alabama, contained in a conveyance of the plaintiffs to him.

To establish the existence of an outstanding paramount title at the date of the conveyance, the defendant relied upon a judgment and execution in a suit of ejectment, commenced in Alabama for the land a few days after the date of the deed, to which the plaintiff (Griffin) was a defendant, and which resulted in a judgment against him, that was followed by a writ of possession, which is returned "executed." It appears from evidence that the defendant was called by the plaintiff in the ejectment suit as a witness, though it is not clear to what fact in issue. Objection was made that the record of the suit could not be used under these circumstances. The District Court admitted the record, but referred it to the jury to determine whether his testimony was material, and if so, to disregard the evidence.

This ruling is assigned as error. There are authorities to the point that a record of a verdict and judgment cannot be used in favor of one who has contributed, by his evidence, to their recovery, 18 Johns. 351; 4 Day, 431; 2 Hill. & Cow. notes, 5; and one of the reasons assigned for confining the use of judgments to the parties and privies to them is, that a stranger may have produced them by his testimony. But the court is of opinion that this exception to the general rule, defining the parties by whom the evidence may be used, would introduce an inconvenient collateral inquiry, and that no practical evil will result from maintaining the general rule unimpaired; and that it is important that the rules of evidence should be broad and well defined.

The record in the present suit should have been admitted without any reservation.

Blakemore v. Glamorganshire Canal Co. 2 C. M. & R. 133.

There was some doubt upon the trial whether the issue of the defendant could be sustained by this evidence, and therefore he attempted to prove the existence of a paramount title *in the lessors of the plaintiff in [*611 the ejectment suit. For this purpose he proved that the land had belonged to one Oliver, who in 1838 conveyed it to trustees to secure certain liabilities described in this deed, and that under this deed the property had been recovered; that the plaintiff's title came from Oliver, by sheriff's deeds, dated in 1841, and was inferior to that of the trustees. To prove the deed of trust, he introduced a copy from the records of the Probate Court in Alabama, where it had been recorded, but gave no evidence to account for the original.

At the date of the copy there was no law in Alabama which authorized the use of copies in place of and without accounting for the original; and in relation to deeds of trust, the Registry Acts of the State merely required their registration for the purpose of giving notice, but did not assign any value to the record as evidence in courts, nor has any Statute of Mississippi enlarged the operation of the Statute of Alabama in that State.

Branford v. Dawson, 2 Ala. 203; 5 Ala. 297; 13 Ala. 370.

We think that this copy should not have been admitted.

The deed from the plaintiff to the defendant, in which the warranty is contained, is an original and absolute deed, duly acknowledged and recorded; and the Act which authorizes the acknowledgment also provides that it shall be admitted as evidence in courts without further proof.

Clay's Dig. 161, sec. 1; Robertson v. Kennedy. 1 Stew. 245.

We think that under the decisions of this court, this deed was properly admitted.

Owings v. Hull, 9 Pet. 607.

The court was requested by the plaintiffs "to instruct the jury that this is an action for damages, and that the plaintiff can only recover the value of the part lost, if a part only was lost at the time of the eviction, in proportion to the amount he paid," which charge was refused; and the jury was instructed "that if the plaintiff had not lost all the land conveyed to him by the defendant, then the jury might

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allow him the average value of the part lost, in proportion to the price paid for the whole. The charge given by the court is erroneous. The measure of damages is the loss actually sustained by the eviction from the land for which the title has failed, and that damages would not usually be ascertained by taking the average value, though the recovery could not exceed the consideration paid, interest and expenses of suit. The joinder of the wife with the husband in this action is also assigned for error. The statutes of Alabama authorize the wife to bar her claim to dower by such a conveyance as this, but do not enlarge her power to enter into personal engagements or to incur responsibilities for the title.

George v. Gooldsby, 23 Ala. 327; Hughes v. Williamson, 21 Ala. 296.

612*] *There is a misjoinder of parties. But this objection is taken here, for the first time, and the difficulty may be obviated by a nolle prosequi in the District Court, which is allowable under the decisions of this court.

Minor v. Bank of Alexandria, 1 Pet. 46; U. S. v. Leffler, 11 Pet. 86; Amis v. Smith, 16 Pet. 303.

Judgment reversed and cause remanded.

WILLIAM JUDSON, Appt.,
v.
WILLIAM W. CORCORAN.

(See S. C. 17 How. 612-615.)

Equity—successive assignees—superiority between two innocent assignees.

In January, 1845, W. assigned to J. an interest in a claim against Mexico. Subsequently the whole claim was assigned to C. (without knowledge of J's assignment) by several assignments from W. and his assigns. C. prosecuted the claim to a final award, and was adjudged by the Board of Commissioners appointed to decide on such claims, to be the legal owner of the amount awarded. J. held his assignment two years and a half without giving any notice of it, nor did he set up any claim till after the award was adjudged to C., and then he sued C. in equity for the interest assigned to him. Held; ordinarily the first assignee has the best right. An equity successively assigned in a chose in action to two innocent persons, their equities are equal. Here C. having drawn to his equity a legal title to the fund, the law must prevail. J. cannot set that legal title aside and have a decree in his favor.

Argued Feb. 27, 1855. Decided Mar. 8, 1855.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The bill in this case was filed in the Circuit Court of the United States for the District of Columbia, by the appellant, to enjoin the collection of a certain award. The court below having entered a decree dismissing the bill with costs, the complainant brought the case here on appeal.

A further statement appears in the opinion of the court.

Messrs. R. S. Coxe and A. H. Lawrence, for appellant:

The question presented on this record is a single one. Is Judson, the appellant, by virtue of the prior assignment to him, entitled to the fund, or has Corcoran, claiming under subsequent conveyances, a superior equity? On general principles, priority of title must settle the right; prior in tempore prior in jure; such is emphatically the principle of equity.

1 Story, Eq. Jur. sec. 64, D, and the authorities there cited.

The claim being susceptible of assignment, it is submitted on behalf of the appellant, that it passed by the simple and single assignment from Williams to Judson, in Jan. 1845. Nearly six months afterwards, Williams makes another conveyance of part of the same claim to Warner, and in October, 1846, the residue to Hart. Upon general principles, the first must prevail.

Muir v. Schenck, 3 Hill, 228; Taylor v. Bates, 5 Cow. 376; Bradley v. Root, 5 Paige, 632; Bank of Mobile, 9 Ala. 645; Jordan v. Black, 2 Murphy, 30; Van Epps v. Van Deusen, 4 Paige, 64; Polk v. Gallant, 2 Dev. & B. Eq. 395.

"Nothing is plainer than that the assignee can take only such interest as his assignor has to transfer, and will be bound by the equities binding on the latter."

1 White & Tudor's Eq. Cas. 236, and the numerous authorities there cited.

Messrs. Joseph Bradley and J. M. Carlisle, for appellee:

1. If the equities are equal and there is no legal title or right to immediate legal title, in the defendant, the court will interfere, under the circumstances, to give effect to that equity which is prior in time.

2. If the equities are unequal (and there is no legal title, or right to immediate legal title, in the defendant), the preference is constantly given to the superior equity.

3. Where the equities are equal and the defendant has either acquired a legal title, or is in a condition to call for it left alone, a court will not interfere.

"In equali jure, melior est conditio possidentis," 1 Story, Eq. Jur. sec. 64, C. 54, D. 64, E; 2 Sug. Vend. pp. 507, 508.

Applying these principles, it is submitted that the equities are not equal; but that the superior equity is in the appellee, Corcoran.

It is submitted that appellee's assignment did not take effect in equity, because he did not do all that could have been done, and ought reasonably to have been done, to perfect the assignment and to prevent a subsequent assignment to a bona fide purchaser, exercising reasonable diligence.

Cases cited in 2 White & Tudor's Eq. Cas. 209-214; Notes to Ryall & R. 1 Ves. & S. C. 1 Atk.; 1 Sugd. Vend. Perk. ed. 1851, p. 12; 1 Story, Eq. Jur. sec. 421, B; 2 Story, Eq. Jur. sec. 1035, A, 1047.

But if the equities were simply equal, we have the legal title joined with our equal equity, and that is conclusive.

Mr. Justice Catron delivered the opinion of the court:

Judson brought this suit in equity to recover $6,000 from William W. Corcoran, in whose favor a decree had been made for about $15,000, by the Board of Commissioners acting according to the 15th article of our Treaty with Mexico of 1848.

Corcoran claimed as assignee, under Bradford B. Williams *and Joseph H. Lord, [*613 who were owners of the cargo of the ship Henry Thompson, and which was unlawfully seized and confiscated by the authorities of Mexico.

The claim having been presented to the

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mixed commission under the convention between the United States and Mexico, of April, 1839, the American members of that Board made a report in favor of the claim; but the Mexican commissioners not concurring in the opinion of their colleagues, the case was referred to the umpire, and was returned by him without a decision. It therefore constituted one of that class of cases embraced in the 5th article of the unratified convention of the 20th November, 1843, and which is referred to and incorporated into the 15th article of the Treaty of Peace of Guadaloupe Hidalgo; and having been modified in some of its provisions, the ratifications were exchanged on 30th May, 1848.

On the 3d March, 1849, an Act of Congress was passed to carry some of the provisions of this Treaty into effect. Among other things, it provided for the establishment of a Board of Commissioners, "whose duty it shall be to receive and examine all claims of citizens of the United States upon the Republic of Mexico, which are provided for by the Treaty, and to decide thereon according to the provisions of the Treaty."

On the 11th of June, 1845, Bradford B. Williams assigned one half of his interest in the claim in dispute to E. H. Warner. August 15, 1845, Warner assigned the same interest to William B. Hart. October 15, 1846, Williams assigned to Hart the residue of his interest. October 3, 1846, Joseph H. Lord assigned to Hart all his interest in the claim. June 18, 1847, Hart assigned the whole claim to William W. Corcoran.

"By these several assignments (says the late Board), the whole became vested in the said William W. Corcoran, and the award was therefore made in his favor."

On the 1st day of January, 1845, Bradford B. Williams had assigned to William Judson, the complainant, an interest of $6,000 of the amount of the suspended claim pronounced valid by our Commissioners in 1842, with interest from the date of the assignment.

From January, 1845, to June, 1847, about two years and a half, Judson held his assignment, without filing any notice of its existence at the Department of State, so that others might have notice of his interest, nor did he set up any pretension until the assignee, Corcoran, had prosecuted the claim to a final award, and was adjudged by the Board of Commissioners to be the legal owner of the amount awarded, and as legal owner Corcoran is sued.

In regard to the preliminary questions raised 614*] at the bar, it *may be remarked that we have no doubt the District Court had authority to hear and determine the equities of the parties, notwithstanding the judgment in Corcoran's favor by the Board of Commissioners. The question that an award like the present is not conclusive among adverse claimants was settled in the case of Comegys v. Vasse, 1 Pet. 193, in 1828, and has not since been open.

And as respects the validity of assignments of claims like the one here presented, no question can be raised at this day, as such assignments have been recognized by the various Boards of Commissioners and the courts of justice for many years. The case of Comegys v. Vasse also adjudged this point.

The contest here depends on the merits. Judson had the earliest assignment of part of the amount declared to be due to Williams, by the two United States Commissioners, in 1842, to the extent of $6,000, and the claim assigned being a right depending on an equity against the government of Mexico, and assuming that both sets of assignments are alike fair, and originally stood on the same bona fide footing, the rule of necessity is, that the assignor having parted with his interest by the first assignment the second assignee could take nothing; and as he represents his assignor, is bound by the equities imposed on the latter, 1 White & Tudor's Eq. Cas. 236; and hence has arisen the maxim in such cases, that he who is first in time is best in right. But this general rule has exceptions, and the case before us was obviously decided in the court below on an exception to the general rule.

Judson took his assignment in January, 1845, which he first produced in May, 1851, when this bill was filed. In the meantime Corcoran had got his assignment, and immediately gave written notice of it to the Department of State, and August 17th, 1847, received an answer from the Secretary, recognizing the fact of notice having been received, and that it was filed with the documents of the postponed claim of Williams and Lord, appertaining to the unfinished award.

Corcoran's assignment was fair, and accepted on his part without knowledge of Judson's; nor is the contrary alleged in the bill. And assuming Judson's to be fair also, and that no negligence could be imputed to him, then the case is one where an equity was successively assigned in a chose in action to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery. Here, Corcoran has drawn to his equity a legal title to the fund, which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect.

Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail.

*There are other objections to the [*615 case made by the appellant, growing out of negligence on his part in not presenting his assignment and claim of property to the State Department, so as to notify others of the fact. The assignment was held up and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effects on Corcoran, were priority accorded to it by our decree. It is certainly true, as a general rule, as above stated, that a purchaser of a chose in action, or of an equitable title, must abide by the case of the person from whom he buys, and will only be entitled to the remedies of the seller; and yet, there may be cases in which a purchaser, by sustaining the character of a bona fide assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund (as in this instance), would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy.

The cases of Dearle v. Hall, and Loveridge v. Cooper, 3 Russell, 1, 60, established the doc-

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trine to the foregoing effect in England; they were followed in the case of Mangles v. Dixon, McNaughton & Gordon, 437. And the same principle of protecting subsequent bona fide purchasers of choses in action, etc., against latent outstanding equities, of which they had no notice, was maintained in this court in the case of Bayley v. Greenleaf, 7 Wheat. 46. That was an outstanding vendor's lien, set up to defeat a deed made to trustees for the benefit of the vendee's creditors. The court held it to be a secret trust; and although to be preferred to any other subsequent equity unconnected with a legal advantage, or equitable advantage, which gives a superior claim to the legal title, still it must be postponed to a subsequent equal equity connected with such advantage.

The rule was distinctly asserted by Chancellor Kent, in 1817, in Murray v. Lylburn, 2 Johns. Ch. 442, before the question was settled in England, and before this court discussed it, which was in 1822. And the same principle was applied by the Court of Appeals of Virginia, in the case of Moore v. Holcombe, 3 Leigh, 597, in 1832.

Second. There is no satisfactory evidence, as we apprehend, to establish the fact that a sufficient consideration was paid by Judson to Williams for the assignment, on which the bill is founded, to authorize Judson to set it up, and thereby to postpone Corcoran, who paid a full price, as did those under whom he claims; yet as these objections depend on facts peculiar to this cause, we deem it useless to critically investigate them, as the decree below dismissing the bill was clearly proper, on the first and merely legal ground.

616*] *It is ordered that the decree be affirmed.

THE SCHOONER CATHARINE, her tackle, etc., Starks W. Lewis et al., Owners and Claimants, Appellants,

v.

NOAH DICKINSON et al., Libelants.

(See S. C. 17 How. 170–178.)

Measure of damages of vessel sunk by collision, is cost of raising and repairing her—deducting what she sold for, or her value in her disabled condition, from her sound value, is not the rule of damages—rule of sailing where two schooners are about to meet—want of proper lookout at night, is negligence.

Collision. Where sunken vessel has been raised and repaired, the measure of damages is the actual cost of raising and repairing her, so as to make her equal to the value before collision.

Where the vessel is abandoned, the damage must be ascertained by witnesses competent to speak as to the practicability of raising and repairing her, and the expense thereof. This expense of raising and repairing her is the measure of damages.

Deducting what the vessel in her disabled state was sold for, or her estimated value in such condition, from her sound value, is not the rule of damage.

Where two schooners are about to meet, it is the duty of the one close-hauled (the other having the wind free), to keep on her course; luffing into the wind is improper, unless justified by special circumstances.

The want of a proper lookout, at night, in the other, was negligence.

Both vessels being in fault, the rule established to divide the loss.

Argued Feb. 7, 1855. Decided Mar. 10, 1855.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. Charles Donohue for the appellants.

Mr. David Dudley Field, for appellees, cited St. John v. Payne, 10 How. 581.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal in admiralty from a decree of the Circuit Court of the United States for the Southern District of New York.

The libel charges, that on the night of the 21st April, 1852, the schooner San Louis laden with a cargo of stone, was sailing down the coast below the Bay of New York, bound for Philadelphia, and while off Squam Beach, on the Jersey shore, the schooner Catharine, coming up the coast, bound for the port of New York, then and there with great force and violence ran into and upon her, breaking through her side so that she soon filled with water and sunk. That The Catharine had a fair wind and ample sea room, while The San Louis was beating against the wind, and was inside of The Catharine and standing off the shore. That The Catharine had no watch or person on the lookout at the time of the collision; and that it was occasioned by the improper and unskillful management of the persons on board engaged in navigating her. That she luffed, and struck The San Louis about midships with head on.

The answer of the respondents, owners of The Catharine, admit The San Louis was sailing down the coast at the time and place mentioned; and that The Catharine was coming up the same, bound for the port of New York; but deny that she ran into The San Louis; but charge that she ran across and afoul of the bows of The Catharine, which occasioned the collision; that the wind was in a quarter that enabled The San Louis to keep her course full down the coast without keeping off shore; they insist that The Catharine had the usual watch set before and at the time of the collision; and they deny that it was occasioned by reason of the unskillfulness or mismanagement of those on board of her, but was the result of want of care and mismanagement in navigating The San Louis. They deny that *The Catharine luffed, as charged [*174 in the libel; but charged that the San Louis luffed and came across the bows of The Catharine.

The District Court rendered a decree for the libelants, and referred the question of damage to a commissioner. The decree was affirmed in

NOTE.—Measure of damages in collision. See note to Smith v. Condry, 11 L. ed. U. S. 35; and note to The Amiable Nancy, 4 L. ed. U. S. 456.

Collision. Rights of steam and sailing vessels with reference to each other and in passing and meeting. See note to St. John v. Paine, 13 L. ed. U. S. 537.

Rules for avoiding collision, see notes, 14 L. ed. U. S. 68; 25 L. ed. U. S. 168; 35 L. ed. U. S. 453; 41 L. ed. U. S. 1053.

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the Circuit Court. The proofs before the commissioner to ascertain the amount of the damages consisted principally of testimony as to the value of The San Louis previous to the collision; and as to her estimated value in her sunken and disabled condition in the water on the beach; the difference constituting the measure of damages allowed. She was sold by one of the owners, a few days after the accident, while lying on the beach, for $140; and which, upon the weight of the proofs as produced, was her then estimated worth. Her cargo of stone was afterwards taken out and the vessel raised and brought to the port of New York and repaired. The expense of raising and repairing her seems not to have been a subject of inquiry.

The commissioner reported damages to the amount of $6,200, which report was confirmed.

1. As to the damages.

The principle that appears to have governed in the examination of the witnesses in respect to this branch of the case, as well as the commissioner in arriving at the amount of damage reported to the court, we think, upon consideration, is not maintainable. That principle seems to have been, to ascertain from the opinion of witnesses, experts as they are called, though it is not clear they were of that character, the value of the vessel in her sunken and disabled condition as she lay on the beach after the disaster, and to deduct that sum from the sound value before it occurred, the difference being the measure of the damage; in other words, that the inquiry must be confined to the condition of the vessel at the time of the collision, and in her then state; that the owner had a right to abandon her as a total loss, and look to the wrong-doer for compensation, as then estimated. Acting upon this view, the libelants sold the vessel, in her disabled state, for what they could get, and claimed, and have received, the sound value, less this amount.

It is true, that where a vessel has been run down and abandoned, never having been raised and repaired, but left to decay upon the beach, evidence of the nature and character of that given in this case must necessarily be admissible. That is, the damages sustained must be ascertained by the testimony of witnesses experienced in matters of this kind, who are competent to speak as to the practicability of raising and repairing the vessel, and of the expense attendant thereupon, this expense constituting the principal ingredient of the dam-
175*] age proper to be *allowed; but they should be witnesses whose occupations and experience enabled them to express opinions of the feasibility of raising the vessel, and to make estimates of the probable expense of the same; and also, of the expense of the necessary repairs, upon which the court might rely with some confidence in making up its judgment. Loose, general opinions on the subject, entitled to very little more respect in the ascertainment of facts than the conjectures of witnesses, are of themselves undeserving of consideration.

But where the vessel has been raised and repaired, or is undergoing repairs, as in the case of The San Louis, there is no necessity for resorting even to the opinion and estimates of experts, as to the probable expenses, for as to these, the reasonable expenses incurred in raising and repairing her are matters of fact that may be ascertained from the parties concerned in the work. The libelants, instead of examination of witnesses as to their opinion of the amount of the damage from an inspection of the vessel as she lay upon the beach, should have inquired into the actual cost of raising and repairing her, so as to have made her equal to the value before the collision. This would have been the proper mode by which to arrive at an indemnity to the extent of the loss sustained, which is the true measure of damages in these cases. 13 How. 101, 110.

We think, therefore, that the rule adopted in ascertaining the measure of damages in this case was erroneous.

The next question in the case is more difficult.

The New Jersey coast below Sandy Hook bears southwesterly and northeasterly, along which these vessels were sailing. The wind was southwesterly, with a pretty strong breeze; The San Louis close-hauled, passing down the coast, and The Catharine with the wind free passing up it, making for the Hook. There had been a fall of rain during the evening, but between eight and nine o'clock, when the collision happened, the weather had partially cleared up. The night was cloudy, but some stars were visible. The San Louis was sailing at the rate of six knots the hour; and as The Catharine had the wind free, her speed must at least have been equal if not greater.

The master of the schooner Goodspeed, which vessel was in company with The San Louis from Jersey City, states that a schooner (which it is admitted was The Catharine), passed him a little after eight o'clock, some quarter of a mile to the windward, heading to the westward of her course to the Hook, which was in shore; that at this time The San Louis was from three quarters to a mile astern of him, a little to windward. The Catharine had a light; The San Louis had not.

Messick, the lookout on The San Louis, states that he saw *The Catharine half [*176 a mile ahead; he supposes about half a point on their lee bow, "I suppose," he says, "when I first saw The Catharine she was heading to the northward. I sung out to the mate at the helm to luff; he did so, and brought the San Louis into the wind: that The Catharine then luffed also, and ran into us abaft the chains."

Now, if the master of The Goodspeed is not mistaken, and he is an indifferent witness, it is difficult readily to assent to the statement of Messick as to the relative position of the two vessels; for if The Catharine passed The Goodspeed half a mile to the windward, and The San Louis was astern, nearly in the track of the latter, it is not very probable that in the short distance she had to pass in her course before meeting The San Louis, she had so far diverged to the leeward as to overcome this half mile, and to have crossed her track. The vessels must have met at least within half a mile from the point where The Catharine passed The Goodspeed. The master of The Goodspeed says The Catharine was not only half a mile to the windward, but that she was heading to the west of her course to the Hook.

According to the settled rules of navigation,

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it was the duty of The San Louis, when she first saw The Catharine, which had the wind free, she being close-hauled, to have kept on her course; the maneuver of luffing into the wind, as soon as she saw that vessel, was improper and subjects her to the charge of unskillful navigation, unless justified by special circumstances existing at the time. Here the circumstances tend rather to aggravate than justify the error, as the improper maneuver may have led to the collision, and probably did, if The Catharine at the time was to the windward.

Williams, the mate of The San Louis, who was at the wheel, differs materially in his testimony from Messick. He states, when he first saw The Catharine, "he spoke to the man at the bow; he said, keep your course, and you will go clear. I did keep my course; asked the man at the bow if he could see her; he said that he could; he told me to keep my course; I did not alter my course; steered as close to the wind as I could; did not see much more of The Catharine till she struck us." He further states, that when about three rods from The Catharine, she luffed and was coming into them; that he then put his wheel down.

If this account of the management of The San Louis could be confidently relied on, there would be no great difficulty in charging the other vessel with the fault of the collision. But it is admitted that Messick was the proper person, under the circumstances, to give the orders to the mate at the wheel. Williams himself assumes this in his testimony; and Mes-177*] sick is *very particular as to the orders given. On his cross-examination he says: "I saw The Catharine across one point of the bow-sprit, inside the stays; right away then I gave the mate the order to luff: he did it right away. She minded her helm readily."

The difference is very material; for whether fault or not is to be imputed to The San Louis, depends upon the fact whether she is chargeable with the maneuver testified to by the lookout. We think, under the circumstances in which he was placed, his account of the transaction is entitled to the most weight. Having given the order, and seen that it was obeyed, and being at the time in charge of the navigation of the vessel, he cannot well be mistaken. Even the contradiction between the two witnesses is calculated to cast a doubt over the proper management of the vessel in the emergency.

The order to luff, itself, was a clear violation of the duty of The San Louis; but, in this instance, if the master of The Goodspeed is not mistaken, it probably produced the disaster. As to The Catharine, we are not satisfied that she had a proper lookout on the vessel at the time of the collision. The excuse given is, that all hands, a short time previously, had been called to reef the sails, and some evidence is given to prove that this is customary on vessels of this description. However this may be in the daytime, we think that such custom or usage cannot be permitted as an excuse for dispensing with a proper lookout while navigating in the night, especially on waters frequented by other vessels. Under such circumstances, a competent lookout stationed upon a quarter of the vessel affording the best opportunity to see at a distance those meeting her, is indispensable to safe navigation, and the neglect is chargeable as a fault in the navigation.

Our opinion, therefore is, that the decree below was erroneous, and should be reversed.

Upon this view of the case, it becomes necessary to settle the rule of damages in a case where both vessels are in fault.

The question, we believe, has never until now come distinctly before this court for decision. The rule that prevails in the District and Circuit Courts, we understand, has been to divide the loss. 9 Law Rep. 30.

This seems to be the well-settled rule in the English admiralty.

Abb. Ship. The Celt, 3 Hagg. 328; The Washington, 5 Jur. 1067; The Monarch, 1 W. Rob. 21; DeVaux v. Salvador, 4 Ad. & E. 431; Petersfield v. The Judith Randolph; The Oratava, 5 Mo. Law Mag. 45; The DeCock, 5 Mo. Law Mag. 303; The Friends, 1 W. Rob. 485.

Under the circumstances usually attending these disasters, we *think the rule de- [*178 viding the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in the navigation.

Reversed, with costs, and remanded to Circuit Court.

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*CHARLES MINTURN, Appt., [*477

v.

LAFAYETTE MAYNARD, Gilbert A. Grant, Thomas G. Wells, Lucien Skinner, Fred Billings, Charles J. Brenham, Isaac T. Mott, J. De La Montagne, E. M. Neal, and Thomas L. Chapman.

(See S. C. 17 How. 477, 478.)

Admiralty—jurisdiction, in action for balance of account by agent against owner of vessel.

1 The respondents were sued in admiralty by process in personam. The libel was for balance due libelant, agent of respondents, owners of a steamboat, for money used to pay bills for supplies, repairs and advertising of the steamboat, and for commissions.

2 Held, the court below had no jurisdiction. There is nothing in the nature of a maritime contract in the case, but only a demand for balance of accounts for which the action of assumpsit in a common law court is the proper remedy.

3 The local law of California, which authorizes attachment of vessels for supplies or repairs, does not extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge or security of the vessel.

Argued Mar. 2, 1855. Decided Mar. 10, 1855.

APPEAL from the District Court of the United States for the Northern District of California.

The case is stated by the court.

Messrs. H. P. Hepburn and R. J. Brent, for appellant:

The accounts filed and the facts admitted, show a claim for services essentially maritime. The District Court had jurisdiction under the Act of September 28, 1850. Stat. at L. 522.

NOTE.—Admiralty jurisdiction of contracts—see note, 66 L.R.A. 103.

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Such a jurisdiction in personam is clearly maintainable.

The General Smith, 45 Wh. 443; 3 How. 573; 7 Pet. 324; 10 Wh. 428; 11 Wh. 175; 5 How. 441.

Mr. F. B. Cutting, for appellees:

The libel does not set forth a cause of action, "civil or maritime," within the jurisdiction of the court below. See Act extending the judicial system of the United States to California, 9 Stat. at L. 521.

The steamer Gold Hunter was in her home port, and was not liable by general maritime law for repairs or supplies at the suit of materialmen.

The General Smith, 4 Wheat. 438.

The local law of California which authorizes attachment to issue against steamers, vessels and boats, for supplies furnished for their use at the request of their respective owners, masters, agents or consignees, does not extend to the commission and general disbursements of an agent or broker employed by the owners to pay the bills.

Laws of Cal. 576; Godeffroy v. Caldwell, 2 Cal. 489; McGuire v. Canal Boat, Kentucky, 20 Ohio, 62.

The demand stated in the libel is not the subject matter of admiralty cognizance. The contract or engagement of the appellant was personally with the part owners; his services were not in their nature maritime; and the excess of his expenditures did not create any cause of action within the jurisdiction of the court below.

Ramsay v. Allegre, 12 Wh. 611; Cutler v. Rae, 7 How. 729; McDermott v. Owens, 1 Wall. Jr. 370; Phillips v. Scattergood, Gilpin, 3; Abb. Sh. 106.

The pleadings involve the stating and settlement of accounts between the agent and the owners, and without which the balance cannot be ascertained; the court below had no jurisdiction of such a case even though the items involved had related purely to maritime affairs.

Davis v. Childs, Davies, 71-82; The Steamboat Orleans v. Phœbus, 11 Pet. 175, 183; The Apollo, 1 Hagg. Adm. 306.

Mr. Justice Grier delivered the opinion of the court:

The respondents were sued in admiralty, by process in personam. The libel charges that they are owners of the steamboat Gold Hunter; that they had appointed the libelant their general agent or broker; and exhibits a bill, showing a balance of accounts due libelant for money paid, laid out and expended for the use of respondents in paying for supplies, repairs and advertising of the steamboat, and numerous other charges, together with commissions on disbursements, etc. etc.

The court below very properly dismissed the libel for want of jurisdiction. There is nothing in the nature of a maritime contract in the case. The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of assumpsit, in a common law court, is the proper remedy. That the money advanced and paid for respondents was in whole or in part to pay bills due by a steamboat for repairs or supplies, will not make the transaction maritime, or give the libelant a remedy in admiralty. Nor does the local law of California, which authorizes an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge or security of the vessel.

The case is too plain for argument.

The judgment of the Court of Admiralty, dismissing the libel for want of jurisdiction, is affirmed with costs.

Judgment affirmed with costs.

THE UNITED STATES, Appellants,
v.
ARCHIBALD A. RITCHIE.

(See S. C. 17 How. 525-541.)

Mexican land claim—practice in—constitutionality of law—Indian, under Mexican laws, competent to hold real property—mission lands.

Proceedings before the Board of Commissioners to settle private land claims in California may be removed to the District Court in conformity with the provisions of the Act of 1852, without complying with the provisions of the 9th section of the Act of 1851. This section is repealed by the 12th section of the Act of 1852.

The filing of the transcript by the Board, according to the Act, has the effect of notice of the review by the District Court. Besides, the court may provide for notice by its rules.

The suit in the District Court is an original proceeding—not an appeal. That Court hears the case de novo, upon the evidence taken, and further evidence, is produced.

The law prescribing the transfer to and rehearing by the District Court is not unconstitutional. Act of August 31, 1852.

The grantee of a Mexican land claim, an Indian, was, under the laws of Mexico, a citizen of that government, competent to take, hold and convey real property.

It is no objection that the tract in question belonged to the mission lands.

Mr. Justice DANIEL did not sit in this cause.

Argued Feb. 13, 1855. Decided Mar. 10, 1855.

APPEAL from the District Court of the United States for the Northern District of California.

The case is stated by the court.

Mr. C. Cushing, Attorney-General, for the appellant.

[Mr. Cushing's brief cannot be found on file or in the records.—Ed.]

Mr. George M. Bibb, for the appellee:

This court had, before the Act of 1851, held in the cases of Huidekoper's Lessee v. Douglass, 3 Cr. 1, and Fletcher v. Peck, 6 Cr. 87, that a grant from a state to an individual is a contract, and ought to be construed according to those well-established principles which regulate contracts generally.

It had, also, in relation to claims to land in the Territories of Louisiana and the Floridas, derived from the foreign governments before the jurisdiction was acquired by the United States, held principles to be found in these cases, to wit: Soulard v. U. S. and Smith v. U. S. 4 Pet. 511; U. S. v. Arredondo, 6 Pet. 714; U. S. v. Percheman, 7 Pet. 88; Delassus v. U. S. 9 Pet. 133; Chouteau's Heirs v. U. S. 9 Pet. 145; Soulard's Heirs v. U. S. 10 Pet.

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100; Smith v. U. S. 10 Pet. 326; Strother v. Lucas, 12 Pet. 410; U. S. v. Low, 16 Pet. 162; U. S. v. Clarke, 16 Pet. 231.

All these are applicable in deciding upon private claims in California under the Act of 1851.

All contracts are to be governed by the law of the place where they are to be performed. This rule is adopted for the purpose of carrying into effect the intention and understanding of the parties.

Strother v. Lucas, 12 Pet. 436; 9 Wh. 588; 12 Wh. 167, 601; 5 Wh. 309; 6 Pet. 715, 771; 8 Pet. 372; 10 Pet. 331, 712; 9 Pet. 145, 734.

The Attorney-General alleges the grant to Solano to have been collusive and fraudulent.

What is fraud?

Lord Coke defines it to be a secret assent determined in the hearts of two or more, to the defrauding and prejudice of another.

Co. Litt. 357.

See, also, Chesterfield v. Janssen, 2 Ves. Jr. 125; Conrad v. Nicoll, 4 Pet. 295, 310; 6 Pet. 716.

In 1842, this grant was made by the Governor of California to Solano; then the United States had no right to this land, or to the jurisdiction of California. What other party was to be injured by the grant to Solano?

There are no pleadings wherein any fraud has been charged upon any person; nor in which Ritchie has been charged with notice of a fraud; nor to which Ritchie has been called to answer that he is a bona fide purchaser for a valuable consideration, without notice.

This imputation of fraud is for the first time suggested in this court in the brief for the appellants.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the District Court for the Northern District of California.

The proceedings were originally commenced before the Board of Commissioners to settle private land claims in California, under the Act of Congress of March 3, 1851. 9 Stat. at L. 631.

A petition was filed before that Board by Ritchie against the United States, setting forth a claim to a tract of land known by the name of "Suisun," situate in the jurisdiction of Sonoma, County of Solano, comprising four square Mexican leagues (nearly 18,000 acres), praying that the title might be confirmed. The title claimed is derived from a grant by Juan B. Alvarado, Governor of California, to Francisco Solano, dated 28th Jan. 1842.

The Commissioners, after hearing the proofs in the case, on the 3d January, 1853, ordered that the title be confirmed to the claimants.

On the 19th May, 1853, a transcript of the proceedings before the Board, with their decision, was filed with the clerk of the United States District Court for the Northern District of California; and on the 20th September, 1853, notice of an appeal from the decision of the District Court was filed with the clerk by the Attorney-General of the United States.

Further testimony was taken in the case, *and heard before the court; and at a special term, held at the City of San Francisco, on the* 8th of November, 1853, the decision of the Board of Commissioners was confirmed.

The case is now before us on an appeal from the decree of the District Court.

Objections have been taken on the part of the appellee to the jurisdiction of the District Court to hear and determine the case; and also to the regularity of the appeal from the Board of Commissioners—assuming the court had jurisdiction—which it will be necessary first to notice.

By the 8th section of the Act already referred to, it was made *the duty of the [*532 Commissioners, within thirty days after their decision, to certify the same, with the reasons on which it was founded, to the District Attorney of the United States of the district in which the decision was rendered. And by the 9th section it is provided that in all cases of rejection or confirmation of any claim by the Board, it should be lawful for the claimant or district attorney, on behalf of the United States, to present a petition to the District Court praying for a review of the decision; and that the petition, if presented by the claimant, should set forth the nature of the claim, etc., together with a transcript of the report of the Board, and of the documentary and other evidence on which it was founded. And the petition, if presented by the District Attorney, shall be accompanied by a transcript of the Board, etc., and shall set forth the grounds upon which the claim is alleged to be invalid; and a copy of the petition shall be served upon the opposite party; and the party upon whom the service shall be made shall be bound to answer the same within the time prescribed by the Judge of the District Court, etc. And by the 10th section, it is made the duty of the District Court to proceed and render judgment upon the pleadings and evidence in the cause, and upon such further evidence as may be taken by order of the said court; and shall, on the application of the party against whom the judgment is rendered, grant an appeal to the Supreme Court of the United States. And by the 12th section, to entitle either party to a review of the Board of Commissioners, notice of the intention to file a petition in the District Court shall be entered on the journal of the Board within sixty days after the decision of the claim has been notified to the parties; and the petition shall be filed in the District Court within six months after the decision has been rendered.

The mode above prescribed for removing the case from the Board of Commissioners to the District Court was subsequently changed by the 12th sec. of the Act of Congress passed 31st August, 1852 (sess. 1851-2, p. 99).

This section provides that, in every case in which the Board of Commissioners shall render a final decision, it shall be their duty to have two certified transcripts of their proceedings and decision, and of the papers and evidence on which the same were founded, made out; one of which transcripts shall be filed with the clerk of the proper District Court, and the other transmitted to the Attorney-General of the United States; and the filing of such transcript with the clerk shall, ipso facto, operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against the private claimant, it

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shall be his duty to file a notice with the clerk of the court within six months thereafter, of his intention to prosecute the 533*] *appeal, and if the decision shall be against the United States, it shall be the duty of the Attorney-General, within six months after receiving the said transcript, to cause notice to be filed with the clerk aforesaid, that the appeal will be prosecuted by the United States. And on the failure of either party to file such notice with the clerk, the appeal shall be regarded as dismissed.

The removal of the proceedings before the Board of Commissioners, in this case, to the District Court, took place in conformity with the provisions of the Act of 1852, and, it is urged by the counsel for the appellee that it is defective for not complying with the requirement of the 9th section of the Act of 1851, in respect to the petition to the District Court therein provided for. But we are of opinion that the 12th section of the Act of 1852 virtually repeals this section, and thereby dispenses with the petition and answer, as preliminary steps to the hearing in the District Court. They clearly are not essential to the removal of the cause, or perfecting of what is called the appeal, as the 12th section of the Act of 1852 makes the filing of the transcript returned by the Commissioners operate, ipso facto, as an appeal in favor of the party against whom the decision had been rendered.

The filing of the petition and answer in the District Court, prescribed by the 9th section, presenting, in the form of pleadings, the issue to be tried, would have been more in conformity with the practice of the courts; but, looking to the nature and character of the questions to be heard and determined in these proceedings before the court, the pleadings cannot be of any very great importance, especially as these questions have already been the subject of examination by both parties before the Board of Commissioners. The question of practice in the particular case is rather a matter of form than of substance.

It is objected, further, that the 12th section of the Act of 1852 makes no provision for notice to the party in whose favor the decision has been rendered by the Commissioners, of the appeal to the District Court, and that a hearing may be had there, and the decision reversed in his absence. But he has notice of the appeal, as the filing of the transcript by the Board, according to the Act, has that effect; and then ordinary diligence will enable the party to be heard on the appeal. Besides, the court has the power, doubtless, to regulate the time of the hearing, and provide for reasonable notice by its rulers, so as to prevent surprise.

It is also objected that the law prescribing an appeal to the District Court from the decision of the Board of Commissioners is unconstitutional; as this Board, as organized, is not a court under the Constitution, and cannot, therefore, be invested with any of the judicial powers conferred upon the general government. 534*] *Am. Ins. Co. v. Canter, 1 Pet. 511; Brenner v. Porter, 8 How. 235; U. S. v. Fereira, *13 How. 40.*

But the answer to the objection is, that the suit in the District Court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the Board of Commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The District Court is not confined to a mere re-examination of the case as heard and decided by the Board of Commissioners, but hears the case de novo, upon the papers and testimony which had been used before the board, they being made evidence in the District Court; and also upon such further evidence as either party may see fit to produce.

In this respect, the proceeding is somewhat analogous to that before the District Court under the Act of Congress, 26th May, 1824, secs. 1, 3, (4 Stat. at L. 52–53), concerning French and Spanish grants in the State of Missouri, which had been previously heard before a Board of Commissioners for confirmation. In these cases, the evidence before the Board was received on the hearing in the District Court.

This brings us to the merits of the case.

It appears, from the evidence in the case, that Francisco Solano, from whom the appellee derives title, was in the possession and cultivation of the land in question as early as 1832 or 1833; and that, on the 16th January, 1837, he applied for a provisional grant of the same, from M. G. Vallejo, the military commander of the northern frontier of Upper California, and director of colonization. The proceedings are as follows:

"To the Commandant-General:

Francisco Solano, principal chief of the unconverted Indians, and born captain of the 'Suisun' in due form, before your honor, represents: That, being a free man, and owning a sufficient number of cattle and horses to establish a rancho, he solicits from the strict justice and goodness of your honor that you be pleased to grant him the land of the 'Suisun,' together with its known appurtenances, which are a little more or less than four square leagues, from the 'Portzuela to the Salina de Sucha.' Said land belongs to him, by hereditary right from his ancestors, and he is actually in possession of it; but wishes to revalidate his rights in accordance with the existing laws of our republic, and of the colonization recently decreed by the supreme government.

He, therefore, prays that your honor be pleased to grant him *the land which [*535 he asks for, and to procure for him, from the proper sources, the titles which may be necessary for his security, and that you will also admit this on common paper, there being none of the corresponding stamp in this place.

(Signed) Francisco Solano.

Sonoma, January 16, 1837."

"Sonoma, January 18, 1837.

"The undersigned grants, temporarily and provisionally, to Francisco Solano, chief of the tribes of this frontier and captain of the Suisun, the lands of that name, as belonging to him by natural right and actual possession. Said land is comprehended between the 'Portzuela and the Salina de Sucha.' The party interested will ask from the governmental of the State the usual titles, in order to make valid his rights in conformity with the new order of colonization.

(Signed) M. G. Vallejo"

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He continued in the possession and occupation down to 1842, when an application was made by his attorney, Vallejo, to Juan B. Alvarado, Constitutional Governor of the Department of California, for a title in form to the tract, as follows:

"[Seal.] To his Excellency, the Governor:

The undersigned, a resident of Sonoma, respectfully appears before your Excellency, and representation makes, that, in virtue of the rights which belong to him, as shown in the annexed petition and marginal decree, he is in actual possession of the land known by the name of 'Suisun,' together with its dependencies; and in order to secure and legalize said ownership, he humbly petitions that your Excellency, in consideration of the document referred to, may be pleased to grant him the corresponding title of concession, perpetual and hereditary, of the aforesaid land, in order that, in no time, may the petitioner or his heirs be molested in the pacific enjoyment of his property.

Wherefore, your petitioner prays that your Excellency will deign to grant him the favor which he asks for, he swearing that he is actuated by no malice, and such other oath as is required, etc., etc.

As attorney of the petitioner,

(Signed) Juan Antonio Vallejo.

Monterey, January 15, 1852."

"Monterey, January 28, 1842.

In consideration of the petition at the beginning of this expediente, the report of the commandant-general, and the merits and services of the Indian called Francisco Solano, 536*] rendered *on the frontier of Sonoma, I declare him to be the owner in fee of the place called 'Suisun,' in extent four square leagues, and with the boundaries shown in the corresponding map. The corresponding patent will be made out, and this expediente directed to the most excellent departmental junta for its approbation.

Juan B. Alvarado, Constitutional Governor of the Department of the Californias, thus ordered, decreed and signed. Of which I certify."

And on the 21st January, 1842, the title in form was granted, as follows:

"[Seal.] Juan B. Alvarado, Constitutional Governor of the Department of the Californias:

Whereas, the aboriginal Francisco Solano, for his own personal benefit and that of his family, has asked for the land known by the name of 'Suisun' of which place he is a native, and chief of the tribes of the frontiers of Sonoma, and being worthy of reward for the quietness which he caused to be maintained by that unchristianized people; the proper proceedings and examinations having previously been made, as required by the laws and regulations; using the powers conferred on me in the name of the Mexican nation, I have granted to him the above-mentioned land, adjudicating to him the ownership of it. By these presents, being subject to the approbation of the most excellent departmental junta, and the following conditions, to wit:

1st. That he may inclose it, without prejudice to the crossings, roads, and servitudes, and *enjoy it freely and exclusively, making* such use and cultivation of it as he may see fit; but within one year he shall build a house, and it shall be inhabited.

2d. He shall ask the magistrate of the place to give him juridical possession of it, in virtue of this order, by whom the boundaries shall be marked out; and he shall place in them, besides the landmarks, some fruit or forest trees of some utility.

3d. The land herein mentioned is to the extent of four 'sitios de granada mayor' (four square leagues), with the limits as shown on the map accompanying the respective expediente. The magistrate who gives the possession will have it measured according to ordinance, leaving the excess that may result to the nation, for its convenient uses.

4th. If he shall contravene these conditions, he shall lose his right to the land, and it may be denounced by another.

In consequence, I order that these presents be held firm and valid, that a register be taken of it in the proper book, and that *it [*537 be given to the party interested, for his voucher and other purposes.

Given this twenty-first day of January, one thousand eight hundred and forty-two, at Monterey.

(Signed) Juan B. Alvarado,

(Signed) Manuel Jimeno,

Secretary."

On the 3d October, 1845, the grant was approved by the Departmental Assembly, as follows:

"Most Excellent Sir:

The committee on vacant lands has ordered the expediente, formed at the instance of the Indian (Indigena), Francisco Solano, for the place known by the name of 'Suisun,' and being satisfied that the proceedings had in the said expediente were sufficient for the purpose, that the superior government should have granted the said place, offers to the deliberation of your Excellency the following proposition:

The grant made by the superior government of the department by a title legally issued, with the date 28th January, 1842, in favor of the Indian (Indigena), Francisco Solano, of the place known by the name of 'Suisun,' and situated in the jurisdiction of Sonoma, in accordance with the law 18th August, 1824, and article 5 of the regulations of November, 1828, is approved.

Hall of the committee, in the City of Los Angelos, September 29, 1845

(Signed) Francisco de la Guerra.

(Signed) Marceso Bartela."

"Angelos, October 3d. 1845.

In session of this day the proposition of the foregoing report was approved by the Most Excellent Departmental Assembly, ordering the original expediente to be returned to his Excellency, the Governor, for suitable purposes.

(Signed) Pio Pico, President.

(Signed) Augustin Olono, Secretary.

On the same day, the proper copy was issued to the party interested."

The tract was duly surveyed, the boundaries fixed and the grantee put in judicial possession, in conformity with the conditions of the grant, and which possession corresponded with the

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provisional possession previously ceded to him in 1837.

On the 10th of May, 1842, Solano sold and conveyed the premises to Mariano Guadaloupe Vallejo, in full property, for the consideration of one thousand Mexican dollars; and on the 29th May, 1850, Vallejo sold and conveyed the same to A. A. Ritchie, the appellee, for the consideration of $50,000.

538*] *No question is made as to the genuineness and good faith of the original grant to the Indian, Solano, nor but that it was made by the competent authority of the government to dispose of the public lands.

The only objections taken to its validity, and upon which it is denied that it had the effect and operation to separate the lands granted from the public domain are: 1. That Solano, being an Indian, was not competent, according to the laws of Mexico concerning the disposition of the public lands at the time of the grant, to take and hold real property; and hence, that the grant by the Governor, and approved by the Departmental Assembly, was inoperative and void; and, 2. That, if it should be held that Solano was competent to take and hold real property, still, the grant is void, on the ground that the tract known by the name of "Suisun" belonged to the mission lands in California, which the public authorities of that department had no power to grant.

1. In answer to the first objection we are referred to the plan of Iguala, adopted by the revoluntionary government of Mexico, 24th of February, 1821, a short time previous to the subversion of the Spanish power in that country, in which it declared that "all the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues;" and that "the person and property of every citizen will be respected and protected by the government." We are also referred to the Treaty of Cordova, 24th August, 1821, between the Spanish viceroy and the revolutionary party, by which the independence of the country was for the time established; and to the Declaration of Independence issued 28th September, 1821, all re-affirming the principles of the plan of Iguala.

Two decrees of the first Mexican Congress are also referred to; one adopted 24th February, 1832, and the other 9th April, 1823.

The first: "The sovereign Congress declares the equality of civil rights to all the free inhabitants of the empire, whatever may be their origin in the four quarters of the earth." The other re-affirms the three guarantees of the plan of Iguala: 1. Independence. 2. The Catholic religion; and 3. Union of all Mexicans of whatever race.

There is, also, another Act of the Mexican Congress of the 17th September, 1822, carrying into practical effect this fundamental principle of the new government, as follows: "The sovereign Mexican constitutent Congress, with a view to give due effect to the 12th article of 539*] the plan of Iguala, as being one *of those which form the social basis of the edifice of our independence, has determined to decree and does decree.

"Art. 1. That in every register and public or private document, on entering the name of citizens of this empire, classification of them with regard to their origin shall be omitted.

"Art 2. That although by virtue of the preceding article, there shall be no distinction of class on the parochial books, that which is at present observed will be continued in the regulations for the graduation of the civil and ecclesiastical taxes, until these shall be arranged in some other method more just and proper."

In consistency with this fundamental principle of the Mexican government, as declared in the several Acts above referred to, namely: the citizenship of all the inhabitants, without distinction of blood or race, is the 9th article of the decree of 18th August, 1824, on colonization, which provides, that in the distribution of the lands, Mexican citizens are to be preferred, and between them no distinction shall be made except such only as is due to special merit and services rendered to the country, or in equality of circumstances, residence in the place to which the lands to be distributed are pertinent; and the 16th article provides, that "the government, conformably to the principles established in this law, shall proceed to the colonization of the Territories of the republic."

Upper California, in which the lands in question are situate, was one of these Territories. And the first regulation made for colonizing the territories, which was 21st November, 1828, provided "that the governors of the Territories are authorized, in compliance with the laws of the General Congress of 18th August, 1824, and under the conditions hereafter specified, to grant the vacant lands in their respective Territories to such contractors (empresarios), families or single persons, whether Mexicans or foreigners, who may ask for them for the purpose of cultivating or inhabiting them."

The Indian race having participated largely in the struggle resulting in the overthrow of the Spanish power, and in the erection of an independent government, it was natural, that in laying the foundations of the new government, the previous political and social distinctions in favor of the European or Spanish blood should be abolished, and equality of rights and privileges established. Hence the article to this effect in the plan of Iguala, and the decree of the first Congress declaring the equality of civil rights, whatever may be their race or country. These solemn declarations of the political power of the government had the effect, necessarily, to invest the Indians with the privileges of citizenship as effectually as had the *Declaration of Independence of [*540 the United States, of 1776, to invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies. 3 Pet. pp. 99, 121.

The improvement of the Indians, under the influence of the missionary establishments in New Spain, which had been specially encouraged and protected by the mother country, had, doubtless, qualified them in a measure for the enjoyment of the benefits of the new institutions. In some parts of the country very considerable advancement had been made in civilizing and christianizing the race. From their degraded condition, however, and ignor-

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ance generally, the privileges extended to them in the administration of the government must have been limited; and they still, doubtless, required its fostering care and protection.

But as a race, we think it impossible to deny that, under the Constitution and laws of the country, no distinction was made as to the rights of citizenship, and the privileges belonging to it, between this and the European or Spanish blood. Equality between them, as we have seen, has been repeatedly affirmed in the most solemn acts of the government.

Solano, the grantee in this case, was a civilized Indian, was a principal chief of his race on the frontiers of California, held a captain's commission in the Mexican army, and is spoken of by the witnesses as a brave and meritorious officer.

Our conclusion is, that he was one of the citizens of the Mexican government at the time of the grant to him, and that, as such, he was competent to take, hold and convey real property, the same, as any other citizen of the Republic.

2. As to the objection that the tract in question belonged to the mission lands, which the public authorities in California had no power to grant, there appears to be no foundation for this objection.

As early as 17th August, 1833, the Mexican Congress decreed that "the government will proceed to secularize the missions of Upper and Lower California;" and various regulations are prescribed for carrying this policy into effect.

Again, 26th November, the same year, it is declared that "the government is empowered to adopt all measures which shall secure the colonization and render effective the secularization of the missions in Upper and Lower California, being authorized to use in the most convenient manner the property devoted to pious uses, in the said Territories, for that purpose."

Again, by a decree of 14th April, 1834, it is declared that "all the missions of the Republic will be secularized.

Under these laws, the authorities empowered 541*] to grant the *public lands have dealt with these mission establishments the same as with any other portions of the public domain; the clergy, who previously had the charge and control of them, being confined simply to the ecclesiastical and spiritual direction and government of the missions.

We could refer, had we time, to a body of authority on this part of the case, in addition to that above mentioned; but we deem it unnecessary, and shall close by affirming the decree of the District Court.

It is conceded that the lands in question do not belong to the class called Pueblo lands, in respect to which we do not intend to express any opinion, either as to the power of the authorities to grant or the Indians to convey.

Mr. Justice Campbell:

I concur in the judgment of the court upon the facts disclosed in the record.

I am unable to find evidence to show that the lands in dispute were attached to the mission of San Francisco Solano. The single sentence *in the deposition of Vallejo, "that in 1835, according to the rules of secularization, the grantee had acquired the rights of possession,"* is too vague, and includes too little of a reference to facts to rest any argument that the grant to Solano was of mission lands, contrary to the laws of Mexico. I therefore am not willing to pass any judgment upon the subject of the mission lands of California. Nor do I consider the sufficiency of the conveyance from Solano to Vallejo a question before us. The conveyance to Solano was recognized before a public officer, and has been followed by possession. For the purposes of this case this is sufficient. This was decided in Percheman's case, 7 Pet. 51-98. The court say there, that the questions upon the validity of mesne conveyances have no interest to the United States, and they cannot be investigated or decided.

Decree of The District Court affirmed.

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*JOHN CHARLES FREMONT, Appt., [*542
v.
THE UNITED STATES.

(See S. C. 17 How. 542-576.)

Mexican land claim—laws of conquered or ceded territories—forfeiture by omission—impossible conditions cannot forfeit individual property.

Mexican land claim.

The laws of these territories, under which titles were claimed, were never treated by the court as foreign laws, to be decided as a question of fact. The court is bound judicially to notice them, as much as the laws of a state of the Union.

The power of the Governor of California to make the grant is unquestioned.

The grant vested in the grantee a present and immediate interest. The grant, after reciting that the necessary requirements had been complied with, proceeds to grant the tract, declaring the same by that instrument to be the grantee's property in fee, subject to the approbation of the Departmental Assembly and the conditions annexed to the grant.

The consideration, patriotic services, although not a money consideration, is the acknowledgment of a just and equitable claim, and when made on that consideration the title in equity ought to be firm and valid.

The objections that the description is so vague and uncertain that nothing passed by the grant, and that the grantee had no vested interest until the land was surveyed, cannot be maintained. As between the grantee and the government, he had a vested interest in the quantity of land mentioned in the grant.

Such a grant for a certain quantity of land by the government, to be afterward surveyed and laid off within a certain territory, vests in the grantee a present and immediate interest. The general gift becomes a particular gift when the survey is made.

A subsequent definite grant signed by the Governor, under the 8th article of the Regulations of 1828, is not required to give him a vested interest, but to show that the estate, conveyed by the original grant upon certain conditions, is no longer subject to them.

The omission to take possession, to have the land surveyed, and to build a house on it within the time limited in the condition, subjects the land to be denounced by another, but the conditions do not declare the land forfeited to the state upon the failure of the grantee to perform them.

The Governor having dispensed with the plan or sketch of boundaries to be presented with the petition according to the regulations for granting lands, it must be presumed that the power he exercised was lawful, and the want of a plan did not invalidate the grant.

The land being a wilderness, bordered by dangerous neighbors, the disorders of the times made it impossible to take possession and obtain a survey, and impracticable to obtain the approval of the Departmental Assembly.

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The omission or inability of the public authorities to perform their duty, cannot, upon any sound principle of law or equity, forfeit the property of the individual to the state.

The condition which prohibits the grantee from selling or mortgaging the property, or subjecting it to taxes or incumbrances, etc., is in violation of Mexican laws, and could not be legally annexed to the grant. But if valid by the law of Mexico, it is not by any law of the United States, to which power the country was subjected at the time of the purchase.

That the subsequent grantee was not a citizen of Mexico, is no objection, for the reason last stated.

The discovery of a mine on the land did not destroy the title.

The right of the Mexican government to control the survey passed to the United States, and the survey must now be made under their authority.

(Mr. Justice DANIEL did not sit in this cause.)

Argued Feb. 19, 22, 1855. Decided Mar. 10, 1855.

APPEAL from the District Court of the United States for the Northern District of California.

On February 23, 1844, Juan B. Alvarado made his petition in writing to the then Governor of California, Don Manuel Micheltorrena, for a grant of 10 square leagues of land therein described.

After various official proceedings, the Governor entered a decree directing the title to issue, with certain conditions subsequent, named therein. Some of these conditions were not strictly complied with, on account, as it is alleged, of the hostility of the Indians and certain civil disorders.

On Feb. 10, 1847, said Alvarado sold and conveyed the land by deed duly executed, to Fremont, the present claimant.

The documents on which the claim is based are as follows:

1. A petition by Juan B. Alvarado to the Governor, dated February 23, 1844, soliciting the Governor, according to the colonization laws, to grant to Alvarado ten sitios de ganado mayor, north of the River San Joaquin, within the limits of the Snow Mountain, in the same direction, the River Chanchillas on the east, that of the Merced on the west, and the before-mentioned San Joaquin.

2. Direction by Governor Micheltorrena, for the Secretary of State to report, and that he may require such other reports as he may deem expedient. Dated February 27, 1844.

3. Order by Manuel Jimeno, Secretary, referring the petition to the first alcalde of San Jose, to report thereon.

4. Report by Antonio M. Pico, of San Jose, to the Secretary of State, dated Feb. 29, 1844, that the land solicited in the petition of Alvarado is entirely vacant; that it does not belong to any individual or town or corporation, and that he believes for these reasons as well as that the petitioner being meritorious for his patriotic services and commendable circumstances; there is no impediment to granting him the said land in fee.

5. Report by Manuel Jimeno, Secretary to the Governor, dated Feb. 29, 1844, that it is ascertained that the land may be granted to the petitioner, who may be favorably considered for the services which he has rendered to the Department.

6. Order of Governor Micheltorrena, dated Feb. 29, 1844, that the title be issued, expressing that the petitioner is meritorious for patriotic services, and consequently worthy of preference.

7. The following:

Monterey, 29th February, 1844.

Having considered the petition which is the beginning of this record of proceeding (expediente), the preceeding reports and the patriotic services of the petitioner, with everything worthy of consideration in the premises, in conformity with the laws and regulations upon the subject, I declare Don Juan Babtista Alvarado the owner in fee of the tract of land known by the name of the "Mariposas" within the boundaries of the Snow Mountain (Sierra Nevada), the rivers called the Chanchillas, the Merced, and the San Joaquin. Let the proper patent be issued, let it be registered in the respective book, and let this record of proceedings be transmitted to the most excellent, the Departmental Assembly, for its approval.

(Signed) Manuel Micheltorrena.

Manuel Micheltorrena, Brigadier-General of the Mexican army, Adjutant-General of the staff of the same, Governor and Commander-General and Inspector of the Department of California:

Whereas, Don Juan B. Alvarado, Colonel of the Auxiliary Militia of this Department, is worthy for his patriotic services to be preferred in his pretension for his personal benefit, and for that of his family, for the tract of land known by the name of the "Mariposas" to the extent of ten square leagues ("sitios de ganado mayor") within the limits of the Snow Mountain (Sierra Nevada), and the rivers known by the name of the Chanchillas, of the Merced, and San Joaquin; the necessary requirements according to the laws and regulations having been previously complied with, by virtue of the authority in me vested in the name of the Mexican nation, I have granted to him the aforesaid tract of land, declaring the same, by these presents, his property in fee, subject to the approbation of the most excellent the Department Assembly and to the following conditions:

1st. He shall not sell, alienate nor mortgage the same, nor subject it to taxes, entail, or any other incumbrance.

2d. He may inclose it without obstructing the crossings, the roads, or the right of way. He shall enjoy the same freely and without hindrance, destining it to such use or cultivation as it may most suit him; but he shall build a house within one year, and it shall be inhabited.

3d. He shall solicit from the proper magistrate judicial possession of the same by virtue of this patent, by which the boundaries shall be marked out, on the limits of which he (the grantee) shall place proper landmarks.

4th. The tract of land granted is ten square leagues (ten sitios de ganado mayor), as aforementioned. The magistrate who may give the possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper purposes.

5th. Should he violate these conditions he will lose his right to the land, and it will be subject to be denounced (petitioned for) by another.

Therefore, I command that these presents, being held firm and binding, and that the same

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shall be registered in the proper book, and delivered to the party interested for his security and other purposes.

Given in Monterey this 29th day of the month of February, in the year 1844.

(Signed) Manuel Micheltorrena.
(Countersigned) Manuel Jimeno, Secretary.

This patent is registered in the proper book, on the reverse of folio 6.

(Signed) Jimeno.

On December 27, 1852, the Board of Commissioners, acting under Act of 1851, signed their final decree confirming the claim to the extent of ten square leagues, as described in the grant and map filed in the office of the Surveyor-General.

On December 7, 1853, the District Court decreed that the decision of the Commissioners be reversed, and that the claim be held invalid and rejected; whereupon the claimant appealed to this court.

Messrs. Crittenden, W. C. Jones, Geo. M. Bibb, and R. A. Lockwood, for the appellant.

A proceeding in the nature of an appeal does not lie to the District Court from a tribunal composed like the land commission in California. This on the general principles of jurisprudence and because it is forbidden by the Constitution of the United States.

American Ins. Co. v. Canter, 1 Pet. 511; Benner v. Porter, 9 How. 235; U. S. v. Ferreira, 13 How. 40; R. I. v. Mass. 12 Pet. 719; Kempe's Lessee v. Kennedy, 5 Cr. 173, Ex parte Watkins, 3 Pet. 203; Story's Cons, secs. 1621, 1626, 1640.

The case is here for the correction of the error of the District Court in not dismissing the appeal.

9 How. 349, 571; 11 How. 459; 3 Dall. 582; 16 How. 105; 10 Pet. 449.

The title granted in this case was final, and no further title was to issue from the government. Herein it differs from most of the Louisiana and Florida grants, which contemplated the issue of a further title after the location.

8 How. 303, 314.

The quantity is specifically ascertained by the grant, and that alone is sufficient without any precise local boundaries, and confers the right to select the specified quantity within the limits prescribed by the grant.

8 How. 334, 289; 9 How. 364; 1 Clarke's Land Laws, 201, 333; 2 Clarke's Land Laws, 197; 7 Stat. at L. 378, 394, 399.

This being a full title, severed the ten leagues from the public domain without any survey.

8 Pet. 467.

Especially as the land was infested by savages.

10 Pet. 304; 8 Pet. 479.

The right of the grantee to elect where he would locate the ten leagues within the specified limits, is clearly proved. Such a right has been recognised by Congress and by this court.

2 Stat. at L. 865, 875; 8 How. 312, 334; 10 Pet. 324.

There is no time limited for making the survey or obtaining judicial possession. Even a mere concession in Louisiana or Florida did not require a survey before the change of government.

U. S. v. Percheman, 7 Pet. 54; U. S. v. Sibbald, 10 Pet. 320; 5 Pub. Laws, 706.

The fact that the land contains mineral does not affect the question of title to the land, the right to the minerals being a distinct question between the owner of the land and the sovereign, to be determined by law.

The conditions annexed to the grant are all subsequent, and there could be no forfeiture for breach till judicially decreed. The title vested without performance, subject to be devested.

8 Pet. 440; 12 Pet. 476; 14 Pet. 348; 1 Cal. 416-426; 10 Barr. 357.

The following are examples of grants and concessions confirmed where there had been no location or survey, though more indefinite than the grants in this case as to locality.

3 Pub. Laws, 715, No. 4; 733, No. 18; 796, No. 83; 400, No. 158; 3 Pub. Laws, part 2, 155, No. 334.

The Acts and deeds above recited of the Mexican authorities vested a legal, valid title, independent of the approbation of the Departmental Assembly.

The condition is not warranted by the law, and hence was not obligatory. The provision contained in section 2 of the Regulations of 1828 refers only to grants to empresarios, for colonization.

Non-performance of the condition did not make the grant void, but only opened the land to denouncement, i. e., to an information by a third person, who, finding the land vacant, might wish to possess it, and on which a judicial inquiry would be had.

Due diligence was used both by Alvarado and Fremont to fulfill the condition.

If the grant had been defeasible under the former government, through the dissent to it of the Assembly and of the supreme government, that mode of defeasance is now cut off, by the non-existence of the Assembly; and if formerly defeasible by denouncement for non-performance of the condition, that also is cut off by the terms of the treaty of purchase.

There was no law or regulation in force, that required the concession to be approved by the Departmental Assembly.

This grant was in consideration of public services, and not subject to any condition.

U. S. v. Arredondo's case, 6 Pet. 716, and authorities cited; Menard v. Massey, 8 How. 293; Jones' Senate doc. 13, 2d Sess. 31st Cong. pp. 4, 26; 2 Febrero Mexicano, 190, 191, secs. 19-21; Gamboa's Mining Ordinances of New Spain, Index Subl. Vocc. and Vol. I, 29; Vol. II. 76; Ib. 103, et seq.; opinion of the Commission in case of Cervantes, rec. of that case, pp. 33, 39, and authorities cited; case of Garcia v. Bon, cited in opinion of Com. Hall. Rec. pp. 28, 29, I Conejo, diccionario derecho real.

Glenn v. U. S. 13 How. 250; De Vilemonte's case, 13 How. 266; Boisdore's case, 11 How. 115; Sibbald's case, 12 Pet. 488; Cases of Tacubaya, 1 Observador Judicial, 7; Instructions to Micheltorrena, print ed. in supplemental brief.

The Act of Congress does not impose the question of location and boundaries on either the commission or the courts; thus differing from the Acts which opened the federal courts to the adjudication of claims in Florida, Missouri, and Louisiana.

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1 Curtis, Com. 448, 449; 10 Pet. 334, 335, 13 Pet. 133; 15 Pet. 182; 16 Pet. 162-166; Cong. Globe, 2d Sess. 31st Cong. p. 375, (Gwin's Rem.); Appendix to Ib. pp. 56, 58; Ib. p. 134; Capt. Halleck's Rep. Sen. Doc. 1st Sess. 31st Cong. No. 18.

Mr. C. Cushing, Atty.-Gen. for the appellee,

Mr. Chief Justice Taney delivered the opinion of the court:

The court have considered this case with much attention. It is not only important to the claimant and the public, but it is understood that many claims to land in California depend upon the same principles, and will, in effect, be decided by the judgment of the court in this case.

A preliminary question has been raised as to the jurisdiction of the District Court from which the appeal has been taken; but the same question has been already examined and decided in the case of The United States v. Ritchie, and it is unnecessary to discuss it further. We think it very clear that the District Court had jurisdiction, and proceed to examine the validity of the claim upon this appeal.

The 8th section of the Act of March, 3, 1851, 553*] "to ascertain *and settle the private land claims in the State of California," directs, "that each and every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the Commissioners (to be appointed under that Act), when sitting as a board together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the Commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the District Attorney of the United States in and for the district in which such decision shall be rendered."

And the 11th section provides, that the Commissioners therein provided for, and the District and Supreme Court, in deciding on any claim brought before them under the provisions of that Act shall be governed by the Treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, as far as they are applicable.

The decisions of the Supreme Court mentioned in this section evidently refer to decisions heretofore given in relation to titles in Louisiana and Florida, which were derived from the French or Spanish authorities, previous to the cession to the United States. And as these decisions must govern the case under consideration, as far as they are applicable, it is proper to state the principles upon which they were made, before we proceed to examine it. In doing this, however, we do not propose to refer separately to each of the numerous decisions which may be found in the reports; nor is it necessary. They will be found to have been uniformly decided upon certain fixed principles of law, applicable to those grants, which cannot always be applied with justice and equity to a case like the one before us. The laws of Congress, giving the jurisdiction, were different in one respect, and the condition of the countries, as well as the laws and usages of the nation making the grants, were also different.

It will be seen from the quotation we have made, that the 8th section embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination and to be passed upon by the court. The object of this provision appears to be to place the titles to land in California upon a stable foundation, and to give the parties who possess them an *opportunity of placing [*554 them on the records of the country, in a manner and form that will prevent future controversy.

In this respect it differs from the Act of 1824, under which the claims in Louisiana and Florida were decided. The jurisdiction of the court in these cases was confined to inchoate equitable titles, which required some other act of the government to vest in the party the legal title or full ownership. If he claimed to have obtained from either of the former governments a full and perfect title, he was left to assert it in the ordinary forms of law upon the documents under which he claimed. The court had no power to sanction or confirm it when proceeding under the Act of 1824, or the subsequent laws extending its provisions.

And the language of the court, in passing judgment upon the claims in Louisiana or Florida, must always be understood as applying to cases in which the government still held the ownership of the land, and where the right of the party to demand a conveyance, upon principles of equity and good faith, must be shown by him before he could claim it from the United States.

The mode and form of granting lands in these provinces, and the character and stability of the provincial governments, must also be considered before we can determine how far the principles established in the decisions of those cases are applicable to the grants by the Mexican authorities, after the country was separated from Spain.

Grants of land in Louisiana and Florida were usually made in the following manner: the party who desired to form a settlement upon any unoccupied land presented his petition to the officer who had authority to grant, stating the quantity of land he desired, the place where it was situated, and the purposes to which it was to be applied. Upon the receipt of the petition, the Governor, or other officer who had this power to grant, issued, what is usually called a concession to the party, authorizing him to have the land surveyed by the official surveyor of the province. And it was the duty of this officer to ascertain whether the land asked for was vacant, or the grant of it would prejudice the rights of other parties; and if the surveyor found it to be vacant, and that the grant would not interfere with the rights of others, he returned a plat, or figurative plan, as it was called, and the party thereupon received a grant in absolute ownership.

These grants were almost uniformly made

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upon condition of settlement, or some other improvement, by which the interest of the colony, it was supposed, would be promoted. But until the survey was made, no interest, legal or 555*] equitable, passed in *the land. The original concession granted on his petition was a naked authority or permission, and nothing more. But when he had incurred the expense and trouble of the survey, under the assurances contained in the concession, he had a just and equitable claim to the land thus marked out by lines, subject to the conditions upon which he had originally asked for the grant. But the examination of the surveyor, the actual survey, and the return of the plat, were conditions precedent, and he had no equity against the government, and no just claim to a grant until they were performed; for he had paid nothing, and done nothing, which gave him a claim upon the conscience and good faith of the government. There were some cases, indeed, in which they were absolute grants of title with conditions subsequent annexed to them. The case of Arredondo, reported in 6 Pet. and of which we shall speak hereafter, was one of this description. But the great mass of cases which come before this court, and which have been supposed to bear on this case, were of the character above mentioned.

It necessarily happened, from this mode of granting, that many concessions were obtained which the parties never afterwards acted on. A person who had contemplated a settlement, or planting a colony, or making some other improvement in a particular place, sometimes changed his mind, or found some other situation more suitable, or found himself unable to comply with the conditions which, in his petition, he had proposed to perform.

But these concessions or permissions were never recalled, and remained in the possession of the party, although he had abandoned all thoughts of acting upon them. And when the United States obtained the sovereignty of these countries, and the energy, enterprise and industry of our citizens were rapidly filling it, and lands which were of no value under the Spanish government would be ample fortunes under the United States, many persons, who for years had held these concessions without attempting to avail themselves of the authority they gave him, came forward and claimed the right to do so under the government of the Union.

A few cases, which appear to have been relied on in the argument in behalf of the United States, will show the character of most of them and the principles upon which they were decided in this court. In the case of Boisdoré, 11 How. 94, he had obtained the authority or concession on which he relied in the year 1783, He had never caused a survey to be made during the existence of the Spanish government, although twenty years had elapsed before its 556*] cession to this country. *Nor was any step taken by him to obtain a title from the United States, nor any claim legally brought forward, for seventeen years after the territorry had been ceded to the United States. And nothing like any serious attempt had been made to fulfill the conditions upon which he had obtained the concession.

So, too, in the case of Glenn v. U. S. 13 How. 250 (usually called The Clamorgan case), the grant was obtained in 1796, and no possession taken, and no survey had, nor any of the stipulations into which he had entered complied with, while the Spanish government lasted. Nor, indeed, was any claim made to it for several years after the cession to the United States; nor until the country in which it was situated was filling up with an industrious population and the land becoming of great value.

So, again, in the case of De Villemont v. U. S. 13 How. 266, the concession or authority was made in 1895, and there was an express provision in the concession, that unless the establishment he proposed in his petition was made on the land in three years, the concession should be null. Yet he did nothing during the continuance of the Spanish government, although it lasted eight years afterwards; and the excuse from Indian hostility could hardly avail him, because no difficulty of that kind is suggested in his petition; and from the character of the improvements he promised to make, it would seem that one of the objects of this large grant was to form an establishment which would be useful in repelling Indian hostilities from the neighboring Spanish settlements.

This brief statement of the facts in these cases, shows that the parties had acquired no right, legal or equitable, to these lands under the Spanish government. The instruments under which they claimed were evidently not intended as donations of the land, as a matter of favor to the individual, or as a reward of services rendered to the public. They were intended to promote the settlement of the territories, and to advance its prosperity. But up to the time when Spain ceded them, the parties had done nothing to accomplish the object, or to carry out the policy of the government. They had evidently no claim, therefore, upon the justice or conscience of the Spanish government. It had not granted them the land, and they had done nothing which in equity bound that government to make them a title. And when Spain ceded the territories to the United States, it held these lands as public domain as fully and amply as if those concessions or authorities had never been given; and the United States received the title in the same full and ample manner—neither the legal nor equitable right to them, as public domain, had been impaired *by any act of the Span- [*557 ish authority—nor had any right been conveyed to or vested in the claimants.

It is proper to remark, that the laws of these territories, under which titles were claimed, were never treated by the court as foreign laws to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a state of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages. They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the received construction of a statute, and the powers exercised under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources—such as the records of official acts—and the practice

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of the different tribunals and public authorities. And it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge. But it has always been held that it is for the court to decide what weight is to be given to information obtained from any of these sources. It exercises the same discretion and power in this respect which it exercises when it refers to the different reported decisions of state courts, and compares them together, in order to make up an opinion as to the unwritten law of the state or the construction given to one of its statutes.

With these principles which have been adjudicated by this court to guide us, we proceed to examine the validity of the grant to Alvarado, which is now in controversy.

There can be no question as to the power of the Governor of California to make the grant. And it appears to have been made according to the regular forms and usages of the Mexican law. It has conditions attached to it; but these are conditions subsequent. And the first point to be decided is, whether the grant vested in Alvarado any present and immediate interest; and if it did, then second whether anything done or omitted to be done by him during the existence of the Mexican government in California, forfeited the interest he had acquired and revested it in the government. For if, at the time the sovereignty of the country passed to the United States, any interest, legal or equitable, remained vested in Alvarado or his assigns, the United States are bound in good faith to uphold and protect it.

Now, the grant in question is not like the Louisiana and Florida concessions—a mere permission to make a survey in a particular place, and return a plat of the land he desires, with 558*] *a promise from the government that he shall have a title to it when these things are done. But the grant, after reciting that Alvarado was worthy for his patriotic services to be preferred in his pretension for his personal benefit, and that of his family, for the tract of land known by the name of Mariposas, to the extent of ten square leagues, within certain limits mentioned in the grant; and that the necessary requirements, according to the provisions of the laws and regulations, had been previously complied with, proceeds, in the name of the Mexican nation, to grant him the aforesaid tract, declaring the same, by that instrument to be his property in fee, subject to the approbation of the Departmental Assembly, and the conditions annexed to the grant.

The words of the grant are positive and plain. They purport to convey to him a present and immediate interest. And the grant was not made merely to carry out the colonization policy of the government, but in consideration of the previous public and patriotic services of the grantee. This inducement is carefully put forth in the title papers. And although this cannot be regarded as a money consideration, making the transaction a purchase from the government, yet it is the acknowledgment of a just and equitable claim; and when the grant was made on that consideration, the title in a court of equity ought to be as firm and valid as if it had been purchased with money on the same conditions.

It is argued that the description is so vague and uncertain that nothing passed by the grant; and that he had no vested interest until the land was surveyed, and the part intended to be granted severed by lines or known boundaries from the public domain. But this objection cannot be maintained. It is true, that if any other person within the limits where the quantity granted to Alvarado was to be located, had afterwards obtained a grant from the government by specific boundaries, before Alvarado had made his survey, that title of the latter grantee could not be impaired by any subsequent survey of Alvarado. As between the individual claimants from the government, the title of the party who had obtained a grant for the specific land would be the superior and better one. For, by the general grant to Alvarado, the government did not bind itself to make no other grant within the territory described, until after he had made his survey. But, as between him and the government, he had a vested interest in the quantity of land mentioned in the grant. The right to so much land, to be afterwards laid off by official authority, in the territory described, passed from the government to him by the execution of the instrument granting it.

*This principle of law was maintained [*559 by the decisions of this court, in the case of Rutherford v. Greene's Heirs, reported in 2 Wheat. 196. The State of North Carolina, in 1780, passed an Act reserving a certain tract of country to be appropriated to its officers and soldiers; and in 1782, after granting 640 acres in the territory reserved to each family that had previously settled on it, and appointing commissioners to lay off, in one or more tracts, the land allotted to the officers and soldiers, proceeded to enact that 25,000 acres of land should be allotted for and given to Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army to be laid off to the aforesaid commissioners, as a mark of the high sense the State entertained of the extraordinary services of that brave and gallant officer.

In pursuance of this law, the Commissioners allotted 25,000 acres of land to General Greene, and caused the tract to be surveyed and returned to the proper office. The manner in which the title originated under which Rutherford claimed, is not very clearly stated in the case. The decision turned altogether on the validity of the title of General Greene, and the date at which it commenced. And the court said that the general gift of 25,000 acres lying in the territory reserved, became, by the survey, a particular gift of the 25,000 acres contained in the survey. And after examining the title very fully, the court in conclusion say: "It is clearly and unanimously the opinion of the court, that the Act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the boundaries allotted to the officers and soldiers, and that the survey made in pursuance of that Act, and returned March 3d, 1783, gave precision to that title, and attached it to the land surveyed."

There was a further objection taken to the title of General Greene, upon the ground that, by the Constitution of North Carolina, there should be a seal of the State to be kept by the

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Governor and affixed to all grants. And it was objected, that this grant by the Legislature had not the formality required by the Constitution to pass the estate. But in answer to this, the court said that this provision was intended for the completion and authentication of an instrument attesting a title previously created by law. That it was merely the evidence of prior legal appropriation, and not the act of the original appropriation itself.

The principles decided in this case appear to the court to be conclusive as to the legal effect of the grant to Alvarado. It recognizes as a general principle of justice and municipal law, that such a grant for a certain quantity of land by the government, to be afterwards surveyed 560*] and laid off within a certain *territory, vests in the grantee a present and immediate interest. In the language of the court, the general gift becomes a particular gift when the survey is made; and when this doctrine has been asserted in this court, upon the general principles which courts of justice apply to such grants from the public to an individual, good faith requires that the same doctrine should be applied to grants made by the Mexican government, where a controversy arises between the United States and the Mexican grantee.

The fact that the grant to General Greene was made by an Act of Assembly, did not influence the decision; nor did the court allude to it as affecting the question. It is the grant of the State, whether made by a special law of the Legislature, or by the public officer authorized to make it.

Another objection has been made, upon the ground that the 8th article of the Regulations of 1828 requires what is called a definite grant, signed by the Governor, to serve as to title to the party interested, wherein it must be stated that the said grant is made in exact conformity with the provisions of the laws, in virtue whereof possession shall be given; and it is argued that no title passed until this definite grant was obtained. But this document is manifestly intended as the evidence that the conditions annexed to the grant have all been complied with. It is not required in order to give him a vested interest, but to show that the estate, conveyed by the original grant upon certain conditions, is no longer subject to them; and that he has become definitely the owner, without any conditions annexed to the continuance of his estate. It is like the patent required by the laws of North Carolina after the original grant to General Greene, which the court said was for the completion and authentication of an instrument attesting a title previously created by law; and like the case of General Greene, Alvarado had a vested interest without it.

Regarding the grant to Alvarado, therefore, as having given him a vested interest in the quantity of land therein specified, we proceed to inquire whether there was any breach of the conditions annexed to it, during the continuance of the Mexican authorities, which forfeited his right and revested the title in the government.

The main objection on this ground is the omission to take possession, to have the land surveyed, and to build a house on it, within the time limited *in the conditions. It is a sufficient answer to this objection to say, that* negligence in respect to these conditions and others annexed to the grant does not, of itself, always forfeit his right. It subjects the land to be denounced by another, but the conditions do not declare the land *forfeited to [*561 the State, upon the failure of the grantee to perform them.

The chief object of these grants was to colonize and settle the vacant lands. The grants were usually made for that purpose, without any other consideration, and without any claim of the grantee on the bounty or justice of the government. But the public had no interest in forfeiting them, even in these cases, unless some other person desired, and was ready to occupy them, and thus carry out the policy of extending its settlements. They seem to have been intended to stimulate the grantee to prompt action in settling and colonizing the land, by making it open to appropriation by others, in case of his failure to perform them. But as between him and the government, there is nothing in the language of the conditions, taking them all together, nor in their evident object and policy, which would justify the court in declaring the land forfeited to the government, where no other person sought to appropriate them, and their performance had not been unreasonably delayed; nor do we find anything in the practice and usages of the Mexican tribunals, as far as we can ascertain them, that would lead to a contrary conclusion.

Upon this view of the subject, we proceed to inquire whether there has been any unreasonable delay, or want of effort, on the part of Alvarado to fulfill the conditions. For if this was the case, it might justly be presumed, as in the Louisiana and Florida concessions, that the party had abandoned his claim before the Mexican power ceased to exist, and was now endeavoring to resume it, from the enhanced value under the government of the United States.

The petition of Alvarado to the Governor is dated February 23, 1844; and after passing through the regular official forms required by the Mexican law, the grant was made on the 29th of the same month. According to the regulations for granting lands, it was necessary that a plan or sketch of its lines and boundaries should be presented with the petition; but in the construction of these regulations, the Governors appear to have exercised a discretionary power to dispense with it under certain circumstances. It was not required in the present instance. The reason assigned for it in the petition was, the difficulty of preparing it, the land lying in a wilderness country, on the confines of the wild Indians. This reason was deemed by the Governor sufficient, and the grant issued without it; and in deciding upon the validity of a Mexican grant, the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution. It is the duty of the court to protect rights obtained under them, *which would have been regarded as [*562 vested and valid by the Mexican authorities. And as the Governor deemed himself authorized, under the circumstances, to dispense with the usual plan, and his decision in this respect was

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sanctioned by the other officers intrusted with the execution of the law, it must be presumed that the power he exercised was lawful, and that the want of a plan did not invalidate the grant. The fact that the country where the land was situated was such a wilderness, and bordered by such dangerous neighbors that no plan could then be prepared, is proved by these document; and that fact, officially admitted, is worthy of consideration, when we come to the inquiry whether there was unreasonable delay in taking possession. For, by dispensing with the plan or draft on that account, which was a condition precedent, it may justly be inferred that the conditions subsequent were not expected by the Governor to be performed, nor their performance intended to be exacted, until the state of the country would permit it to be done with some degree of safety.

Now, it is well known that Mexico and California, as a part of it, had, for some years before, been in a disturbed and unsettled state, constantly threatened with insurrectionary and revolutionary movements; and in this state of things, the uncivilized Indians had become more turbulent, and were dangerous to the frontier settlements, which were not strong enough to resist them. It is in proof that this state of things existed in the Mariposas valley when this grant was made; that it was unsafe to remain there without a military force; and that this continued to be the case until the Mexican government was overthrown by the American arms. In the very year of the grant, a civil war broke out in the province, which ended by the expulsion of the Mexican troops; and Colonel Fremont entered California at the head of an American force in 1846, and the country was entirely subdued, and under the military government of the United States in the beginning of 1847, and continued to be so held until it was finally ceded to the United States under the treaty of Guadaloupe Hidalgo. In February, 1847, while California was thus occupied by the American forces, Alvarado conveyed to Colonel Fremont.

Now, it is very clear, from the evidence, that during the continuance of the Mexican power it was impossible to have made a survey, or to have built a house on the land, and occupied it for the purposes for which it was granted. The difficulties which induced the Governor to dispense with a plan when he made the grant, increased instead of diminishing. We have stated them very briefly in this opinion, but they are abundantly and in more detail proved by the 563*] testimony in the *record. Nobody proposed to settle on it, or denounced the grant for a breach of the conditions. And at the time when the Mexican authorities were displaced by the American arms, the right which Alvarado had obtained by the original grant remained vested in him, according to the laws and usages of the Mexican government, and remained so vested when the dominion and control of the government passed from Mexico to the United States. The same causes which made it impossible to take possession of the premises and obtain a survey, made it equally impracticable to obtain the approval of the Departmental Assembly. The confusion and disorder of the times prevented it from holding regular meetings. It is doubtful whether it met more than once after this grant was made; and its proceedings, from the state of the country, were necessarily hurried, and the Assembly too much engrossed by the public dangers to attend to the details of private interests. It does not appear that the Governor ever communicated this grant to the Assembly. At all events, they never acted on it. And the omission or inability of the public authorities to perform their duty, cannot, upon any sound principle of law or equity, forfeit the property of the individual to the State. It undoubtedly disabled him from obtaining what is called a definitive title, showing that all the conditions had been performed; but it could not devest him of the right of property he had already acquired by the original grant, and revest it in the State.

And certainly no delay is chargeable to Alvarado or Fremont after California was subjected to the American arms. The civil and municipal officers, who continued to exercise their functions afterwards, did so under the authority of the American government. The alcalde had no right to survey the land or deliver judicial possession, except by the permission of the American authorities. He could do nothing that would in any degree affect the rights of the United States to the public property; and the United States could not justly claim the forfeiture of the land for a breach of these conditions, without showing that there were officers in California, under the military government, who were authorized by a law of Congress to make this survey, and deliver judicial possession to the grantee. It is certain that no such authority existed after the overthrow of the Mexican government. Indeed, if it had existed, the principles decided in the case of Arredondo, 6 Pet. 745, 746, would furnish a satisfactory answer to the objection.

Two other objections on the part of the United States to the confirmation of this title remain to be noticed. The first condition annexed to the grant prohibits the grantee from selling, alienating or mortgaging the property, or subjecting it to taxes, *entail, or any [*564 other incumbrances. And by the laws of Mexico, the grantee could not, it is said, sell or convey the land to anyone but a Mexican citizen, and that Fremont was not a Mexican citizen at the time of the conveyance under which he claims.

In relation to the first objection, it is evident, from the disturbed state and frequent revolutions in the province, that there was some irregularity in the conditions annexed to grants, and that conditions appropriate to one description of grant, from clerical oversight or some other cause, were sometimes annexed to others.

This is manifestly the case in the present instance; for this condition is in violation of the Mexican laws, and could not, therefore, be legally annexed to this grant. For by the decree of the Mexican Congress of August 7, 1823, all property which had been at any time entailed, ceased to be so from the 20th September, 1820, and was declared to be and continued absolutely free; and no one in future was permitted to entail it. And the prohibition in the 13th article of the regulations of 1824, to transfer property in mortmain, necessarily implies that it might be aliened and transferred in any other manner.

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But if this condition was valid by the laws of Mexico, and if any conveyance made by Alvarado would have forfeited the land under the Mexican government as a breach of this condition, or if it would have been forfeited by a conveyance to an alien, it does not by any means follow that the same penalty would be incurred by the conveyance to Fremont.

California was at that time in possession of the American forces, and held by the United States as a conquered country, subject to the authority of the American government. The Mexican municipal laws, which were then administered, were administered under the authority of the United States, and might be repealed or abrogated at their pleasure; and any Mexican law inconsistent with the rights of the United States or its public policy, or with the rights of its citizens, were annulled by the conquest. Now, there is no principle of public law which prohibits a citizen of a conquering country from purchasing property, real or personal, in the territory thus acquired and held; nor is there anything in the principles of our government, in its policy or its laws, which forbids it. The Mexican government, if it had regained the power, and it had been its policy to prevent the alienation of real estate, might have treated the sale by Alvarado as a violation of its laws; but it becomes a very different question when the American government is called on to execute the Mexican law. And it can hardly be maintained that an American 565*] citizen, who makes a *contract or purchases property under such circumstances, can be punished in a court of the United States with the penalty of forfeiture, when there is no law of Congress to inflict it. The purchase was perfectly consistent with the rights and duties of Colonel Fremont, as an American officer and an American citizen; and the country in which he made the purchase was, at the time, subject to the authority and dominion of the United States.

Still less can the fact that he was not a citizen of Mexico, impair the validity of the conveyance. Every American citizen who was then in California had at least equal rights with the Mexicans; and any law of the Mexican nation which had subjected them to disabilities, or denied to them equal privileges, were necessarily abrogated without a formal repeal.

In relation to that part of the argument which disputes his right, upon the ground that his grant embraces mines of gold or silver, it is sufficient to say, that under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. The only question before the court is the validity of the title. And whether there be any mines on this land, and if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court by the Act of 1851.

Some difficulty has been suggested as to the form of the survey. The law directs that a survey shall be made, and a plat returned. of all claims affirmed by the Commissioners And as the lines of this land have not been fixed by public authority, their proper location may be a matter of some difficulty. Under the Mexican government, the survey was to be made or approved by the officer of the government and the party was not at liberty to give what form he pleased to the grant. This precaution was necessary in order to prevent the party from giving it such a form as would be inconvenient to the adjoining public domain and impair its value. The right which the Mexican government reserved to control this survey passed, with all other public rights, to the United States; and the survey must now be made under the authority of the United States, and in the form and divisions prescribed by law for surveys in California, embracing the entire grant in one tract.

Upon the whole, it is the opinion of the court that the claim of the petitioner is valid, and ought to be confirmed. The decree of the District Court must therefore be reversed, and the case remanded, with directions to the District Court to enter a decree conformably to this opinion.

*Mr. Justice Catron, dissenting: [*566

On the 23d of February, 1844, Juan B. Alvarado petitioned the Governor, Micheltorrena, for ten leagues of land, alleging that the tract which he then owned was not sufficient to support his stock of cattle, and which he was desirous to increase. He at the same time proposed to contribute to the spreading of the agriculture and industry of the country. And he further declared, that because of the good intentions of the Governor in favor of the improvements of the country, the petitioner hoped for a favorable consideration of his demand.

The Governor referred the petition to the alcalde of San José, who reported that the land was vacant, that the petitioner was meritorious, and that there was no objection to making the grant. In this report, Jimeno, the government secretary, concurred.

The Governor declared the petitioner meritorious for his patriotic services, and therefore worthy of a preference; and accordingly, on the 29th of February, 1844, proceeded to grant to Alvarado, for his personal benefit and that of his family, the tract of land known by the name of Mariposas, to the extent of ten square leagues, within the limits of the Snow Mountain (Sierra Nevada), and the rivers known by the names of the Chanchilles, of the Merced, and the San Joaquin, "the necessary requirements, according to the provisions of the laws and regulations having been previously complied with, subject to the approbation of the Departmental Assembly, and the following conditions"—that is to say:

First. "He shall not sell, alienate nor mortgage the same, nor subject it to taxes, entail, or other incumbrance."

Second. "He may inclose it without obstructing the roads or the right of way. He shall enjoy the same freely, without hindrance, destining it to such use or cultivation as may best suit him; but he shall build a house within a year, and it shall be inhabited."

Third. "He shall solicit from the proper magistrate the judicial possession of the same, by virtue of this grant, by whom the boundaries shall be marked out, on the limits of which he (the grantee) shall place the proper landmarks."

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Fourth. "The tract of land granted is ten sitios de ganado mayor (ten square leagues), as before mentioned. The magistrate who may give the possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper use."

Fifth. "Should he violate these conditions, he will lose his right to the land, and it will be subject of being denounced (pretended for) by another."

567*] *"Therefore, I command that these presents being held firm and binding, that the same be registered in the proper book, and delivered to the party interested, for his security, and other purposes."

The foregoing conditions, in effect, are imposed by the Colonization Law of 1824, and the regulations made in pursuance thereof, by the Chief Executive of Mexico, in 1828; both of which were equally binding upon the territorial governors, when they exercised the granting power.

The concession, according to these laws, could only be made for agricultural purposes and for raising cattle. Colonization was the great object of the Law of 1824; and to this end alone was its execution prescribed and arranged by the Regulations of 1828.

Much stress has been laid on the fact that, in the concession to Alvarado, patriotic services are referred to as a reason why a preference was given to the grantee in obtaining the land; that preference was founded on the 8th section of the Act of 1824, which provides, "that in the distribution of lands, Mexican citizens are to be attended to in preference, and no distinction shall be made among these, except such only as is due to private merit and services rendered to the country." Private merit or public services could form no part of the consideration for grants made for the purposes of grazing and cultivating; nor had the Governor of a territory power to grant for any other purpose. The 11th section of the Act of 1824 reserved the power to the Supreme Executive to alienate lands in the territories in favor of civil or military officers of the federation. This grant, therefore, stands on the footing of others, and is subject to the same conditions. Alvarado's petition, and the Governor's concession founded on it, must be taken together; they are a necessary part of the contract between the applicant and the government, under the Colonization Law of 1824, and the Regulations of 1828, which, with inconsiderable exceptions, remained in full force when this concession was applied for and issued.

The government of the United States received the legal title to the public lands in California by treaty, and incumbered under the laws of nations with all the equitable rights of private property therein, that they were subject to in the hands of Mexico at the time of their transfer; and the question here is, what interest, in the land claimed, Alvarado or his assignee had, when the Treaty was made. The consideration for the grant was a performance of its leading conditions on the part of the grantee; the principal condition being, the inhabitation of the land, in the manner and within the time prescribed. As to the terms of this condition, the Regulations of 1828 declare, that the party soliciting *for lands, shall de- [*568 scribe, as distinctly as possible, by means of a map, the land asked for; and a record shall be kept of the petitions presented and grants made, with the maps of the lands granted; and the Governor was required, by the 11th rule of the Regulations, to designate to the colonist the time within which he was bound to cultivate or occupy the land; "it being understood that if he does not comply, the grant of the land shall remain void;" and by the 12th rule, the grantee was required to prove before the municipal authority that he had cultivated or occupied, so that a record should be made of the fact thus established, "in order that he might consolidate and secure his right of ownership, and have power to dispose freely of the land." Accordingly, certain conditions were inserted in the grant as part of it, by the second of which, the colonist was bound to build and inhabit a house on the land granted, within one year. This was, therefore, the time allowed from the date of grant for the fulfillment of the important condition on which an equitable claim to it arose.

In this case the land was granted to Alvarado in February, 1844, and three years after he conveyed to Colonel Fremont, the petitioner. No possession had been taken by Alvarado before that time, nor any further act done to acquire a title, than the first step of obtaining the concession; and if this step gave him an equity to have a perfect title from the Mexican government, then his equity is the same as against the United States.

In the first place, the 11th rule above cited declares that no right accrues to the colonist unless he occupies the land; and in the next place the Act of Congress of March 3d, 1851, by the authority of which we are acting, declares (sec. 11) that the Board of Commissioners and courts, deciding on California land claims, shall be governed by the decisions of the Supreme Court of the United States, so far as they are applicable.

By these decisions it has been settled for many years that a Spanish concession, containing a condition of inhabitation and cultivation, the performance of which is the consideration to be paid for an ultimate perfect title, is void, unless the condition was performed within the time prescribed by the ordinances of Spain. It was so held in the case of The United States v. Wiggins, 14 Pet. 350, and the opinion then given was followed in the cases of Buyck, 15 Pet. 222, and of Delespine, 15 Pet. 319. But the rule was more distinctly laid down in the case of The United States v. Boisdorè, 11 How. 96. There the court said: "The grantee might have his land surveyed, or he might decline; he might establish himself on the land, or decline; these acts rested wholly in his discretion. But if he failed to take possession, and establish himself, he had no claim to title; his concession or *first decree in such case [*569 had no operation. So the Supreme Court of Louisiana held in Lafayette v. Blanc, 3 La. Ann. 60, and in our judgment properly. There, the grantee never having had actual possession under his concession, the court decided that he could set up no claim to the land, at law or in equity. This case followed Hooter v. Tippett, 17 La. 109. We take it to be undoubtedly

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true, that if no actual possession was taken under a gratuitous concession, given for the purpose of cultivation, or raising cattle, during the existence of the Spanish government, no equity was imposed on our government to give any consideration or effect to such concession or requête."

The case of Glenn v. United States, 13 How. 250, maintains the same doctrine. It was there declared that a promise of performance (that is, to inhabit and cultivate) on the part of Clamorgan, the grantee, was the sole ground on which the Spanish commandant made the concession; that actual performance, by cultivating the land, was the consideration on which a complete title could issue; and that so far from complying, Clamorgan never took a single step after his concession was made, and in 1809 conveyed for the paltry sum of $1,500; and under these circumstances (says the court) we are called on to decide in his favor, according to the principles of justice; this being the rule prescribed to us by the Act of 1824, and the Spanish Regulations. The court, then, declares that the claim had no justice in it, and to allow it would be to sanction an attempt at an extravagant speculation merely; referring to Boisdoré's case, as having established the principle that occupation was indispensable, and the real consideration of grants for purposes of inhabitation or cultivation.

But it is insisted here that no possession was taken of the land, nor a survey of it made, because of the danger from hostile Indians in its neighborhood. If this were a valid excuse, then on the Indian borders grants would carry no substantial conditions with them. The point is settled in the cases of Kingsley, 12 Pet. 484, and of De Villemont, 13 How. 267, that where the hostility of Indians was alleged as an excuse for not occupying the land, and it appeared that the hostility existed when the grant was made, and was merely continued, that then the grantee could not be permitted to set up such an excuse.

Alvarado manifestly took the grant at his own risk, and if he did not intend to perform the condition of inhabitation, or could not do it, he must bear the consequences. To hold otherwise would be to subvert the manifest design of the colonization laws of Mexico, by reserving indefinitely, to single individuals, 570*] *large bodies of uncultivated and unoccupied lands, in the instance before us, amounting to 50,000 arpents.

It is, I think, impossible to exempt this claim from the settled doctrine, that occupation is a consideration indispensable to its validity. It is thus laid down in various instances, and especially in the cases above cited, of Boisdoré, of Glenn, and of De Villemont; nor can this claim be sustained, unless they are overruled, and the Act of Congress, declaring that this court is bound by them, disregarded. The District Judge, who rejected this claim in California, held that he could not do so, and in my opinion, held properly. I give the conclusion of his opinion as it is found in the record:

"But in the case at bar, the time for making a settlement is limited to one year. So far as appears, Alvarado never even saw the tract he assumed to convey to Fremont, nor was any settlement effected by the latter until a year after the ratification of the Treaty. It cannot be urged in this, as in other cases, that the grant was not made complete by the assent of the Assembly, owing to accident or the neglect of the Governor, for Alvarado himself says it could not be submitted to them without the diseno, or plan, which, on account of the hostilities of the Indians, he was unable to furnish, and yet the danger from that source existed at the time of his application, for he assigns it to the Governor as a reason why the diseno did not accompany the petition.

It is urged that the political disturbances of the country contributed to prevent the settlement; but I think it clear, from the evidence, that the principal, if not the only reason why it was not effected by Alvarado or Fremont until after the Treaty, was the danger from the savages, and that this danger existed to substantially the same degree before and after the grant.

Upon the whole, after a most careful consideration of this case, and with every desire to give the claimant the full benefit of every favorable consideration to which he is entitled, I have been unable to resist the conclusion that the cases of Glenn, of De Villemont, and of Boisedoré, lay down for me rules of decision applicable to this case, and from which I am not at liberty to depart."

2d. The next question is, whether a concession, which is in fact a floating land warrant, seeking a location on any part of a large region of country containing nine hundred square miles, can be confirmed by this court, acting as it does, of necessity, in a judicial capacity. The assumption thus to locate the ten leagues asserts power in the claimant to have the land surveyed at his discretion, either in a body or in single tracts, so that they adjoin each other at any point of the respective surveys. In the *latter form he did have them surveyed, [*571 and in this form of location, the grant was declared valid by the Board of Commissioners.

I understand the Mexican laws as not to allow any such undefined floating claims. It is impossible to recognize them under the Act of 1824, the object of which was to colonize particular tracts of land.

By that Act the petitioner was bound to describe the land asked for "as distinctly as possible by means of a map," according to which it was granted; and next, he was required to solicit from the proper magistrate (usually the alcalde of the next pueblo) judicial possession of the land described; and this magistrate was required to survey and designate the boundaries, on the limits of which the party interested was bound to place proper landmarks. Now, that Alvarado had no separate interest to any specific tract of land, was admitted on the argument; but it was insisted that he was, and his assignee is, a tenant in common with the government, in all the country situate in a region called Mariposas, lying within the limits of the Sierra Nevada, and the rivers known by the names of Chanchilles, of the Merced, and the San Joaquin. In any part of this large scope of country it is assumed the Mexican magistrate and surveyor could have laid off the ten leagues, and that the Surveyor-General of California can do the same now.

This claim, standing on the concession alone,

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lost its binding operation in one year, and became void if the land was not designated within that time, unless the time was enlarged, or new conditions prescribed by the Governor. So I understand the 11th rule of the Regulations of 1828.

To hold that the Mexican government designed to leave in force for an indefinite length of time large undefined concessions, that might be surveyed at the election of the claimant at any time and at any place, to the hindrance of colonization and to the destruction of other interests, is an idea too extravagant to be seriously entertained; so far from it, the Mexican colonization laws contained more positive provisions, to the end of granting distinct and known tracts of land to colonists, than did any Spanish laws that have at any time been brought to the consideration of this court.

It is proper to remark that, by the Mexican laws, an assignee could not be put into possession of land by force of the first decree of concession. Alvarado alone could apply for judicial possession. By the 11th rule, a possession could be transferred when it was duly proved and recorded; but the alcalde could not recognize an assignee as a colonist, because by the third rule the Governor was bound to judge of 572*] the fitness of the candidate, *and having decided as to his fitness, the alcalde was held to an execution of that decision, and could not recognize an assignee.

We are here called on to award a patent for a floating claim of 50,000 arpents of land in the gold region of California, to an assignee whose vendor claimed under the colonization laws of Mexico, but who never was a colonist, who never did a single act under his contract to colonize, and who, it is admitted, could not have obtained a definite title from the Political Department of the Territory of California, to wit: from the Departmental Assembly, whose province it was to pass on and confirm grants to colonists.

At law, this claim has no standing; it cannot be set up in an ordinary judicial tribunal. It addresses itself to us as founded on an equity incident to it by mere force of the contract, no part of which was ever performed. The claim is as destitute of merit as it can be, and has no equity in it; nor is it distinguishable from that of Clamorgan, which was pronounced invalid in the case of Glenn v. U. S.

If this claim is maintained, all others must likewise be, if the first step of making the concession is proved to have been performed by the acting Governor; as no balder case than the one before us can exist in California, where the grant is not infected with fraud or forgery.

And this presents a very grave consideration affecting pre-emption rights. The country in California is filled up with inhabitants cultivating the valleys and best lands, and where they rely almost as confidently on their government titles, founded on Acts of Congress, as if they had a patent for the land. No other American title is known in the State of California, except such as are founded on the pre-emption laws.

These agricultural people are quite as much *contractors with the* United States as the Mexi*can grantees were contractors* with their gov*ernment. By the Acts* of March 3, 1853, and March 1, 1854, Congress promised to each settler who was on the land March 1, 1854, or might settle on it within two years thereafter, 160 acres, to include his residence, at $1.25 an acre. This was a policy to populate the country, which is yet in progress. That these occupants have an equitable interest, and hold the land as purchasers, is the settled doctrine of the Department of Public Lands, which exercises jurisdiction over them. Much of labor and money has been expended on the faith that a preference right was a safe title, and exempt from floating Mexican concessions, such as that made to Alvarado, and now in litigation here. And this was most natural. Incipient Mexican claims had no standing in an ordinary court of justice, and Congress created special courts to try them, *and prescribed the laws and [*573 rules by which these courts should be governed in their adjudications; and among other rules it was provided, that the decree of the Supreme Court of the United States should govern where they applied. They thus had given to them the force of a legislative enactment. These decisions apply as a governing rule most emphatically to the requirement of a specific location of Spanish claims, to which the court had held litigants with a strictness often complained of, but always necessary for the protection of the public and its alienees; and it was the necessary consequence that cultivators of the soil should believe themselves safe from the ruin that lurks in a floating claim, familiar even to western ploughmen, many of whom remember the history of exhausting and fierce litigation in their own families for the paternal hearth, and who relied on the firm and consistent decisions of this court to protect their new homes on the Pacific. Nor do I think that any pre-emption right can be included in a survey of the Alvarado claim, so as to make the preference right part of the land belonging to the grant, because Col. Fremont's claims has never been located, and our decree cannot disturb innocent owners until it is located. It was so held by this court, in the case of Menard v. Massey, 8 How. 309. And unless that case is disregarded, one having a preference right cannot be deprived of his possession by this floating claim.

Mr. Justice Campbell, dissenting:

The concession upon which the decree in favor of the United States was pronounced, is for ten square leagues, to be located in a district of country which contains above one hundred square leagues. To the concession there is no plan or design to indicate the place of location; nor was there any survey, delivery of judicial possession, occupancy or improvement, at any time prior to the Treaty of Guadaloupe Hidalgo. The conditions to the validity of a grant prescribed by the laws of colonization of Mexico, and which were specifically annexed to the grant under consideration, made these necessary.

The case of Smith v. The U. S. 10 Pet. 326, and many others where the doctrine of that case was applied, is, in my opinion, conclusive of this. The claim arose on a petition of St. Vrain to the Governor-General of Louisiana, in November, 1795, praying for a grant, in full property to him and his heirs, of 10,000 super-

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ficial arpents; with the special permission to locate in separate pieces upon different mines, of whatever nature they may be, without obliging him to make a settlement; which grant, as prayed for, was granted by the Governor-General, in February, 1796.

574*] *The court, in that case, collect some of the principles which had been employed by the court in the settlement of claims under the Treaties of Florida and Louisiana. "We have held," they say, "that, in ascertaining what titles would have been perfected if no cession had been made to the United States, we must refer to the general course of the law of Spain; to local usage and custom; and not what might have been done by the special favor, or arbitrary power of the King or his officers."

"It has also been distinctly decided," they say, "in the Florida cases, that the land claimed must have been severed from the general domain of the King by some grant which gives it locality by its terms, by reference to some description, or by a vague general grant, with an authority to locate afterwards by survey making it definite; which grant or authority to locate must have been made before the Treaty of Cession (i. e., 24th January, 1818.)

The court then coming to the case under consideration, describes it as a "grant to vest in the petitioner a title in full property to all the lands in the province containing minerals, which he might at any time locate in quantities to suit his own pleasure." "Its condition at the cession was precisely as it was at the date of the grant; there was no evidence that the grantee had done or offered to do any act, or made any claim or demand, asserting or affirming any right under the grant." The court say, that at the date of the surrender of Louisiana, "there was not an arpent on which his right had any local habitation; until a location was made, it was a mere authority to locate, which he might have exercised at his pleasure, both as to time and place, by the agency of a public surveyor authorized to separate lands from the royal domain by a survey pursuant to a grant, warrant or order of survey.

"At the time of the cession, nothing had been so severed, either by a public or private surveyor, or any act done by which the King could in any way be considered as a trustee for St. Vrain for any portion of the 10,000 arpents; and there was no spot in the whole ceded territory in which he had, or could claim, an existing right of property. An indispensable prerequisite to such right was some act by which his grant would acquire such locality as to attach to some spot; until this was done, the grant could by no possibility have been perfected into a complete title. It is clear, therefore, that the integrity of the public domain had in no way been affected by this grant (in March, 1804), at the Treaty of Cession."

Here was a grant, "in full property," from the highest political authority having the power to make grants—without condition 575*] *or limitation as to the manner or time of the survey—pronounced invalid for the reason that when the sovereign parted with the territory, it had no definite location nor limit.

The concession now before the court agrees with the one we have considered, as being indefinite, attaching to no particular spot in a large extent of territory. The Mexican Governor of California declares it to be the property of the grantee by the letters then issued, not in full property, but as "subject to the approbation of the most excellent Departmental Assembly, and to conditions underwritten." Among these conditions are those of a survey and delivery of possession by a public officer, and occupancy and improvement in a limited period. For very nearly four years, while the land remained as the property of Mexico, no act was done, nor right asserted to any portion of the ten square leagues, and nothing was performed to distinguish them from any other part of the public domain. The integrity of the public domain in this district had never been disturbed at the Treaty of Guadaloupe Hidalgo, even by a visit from the grantee.

The case of Rutherford v. Greene's Heirs, 2 Wheat. 196, does not conflict, in my judgment, with the case I have cited. The question in that case was, whether an Act of a State Legislature, appropriating a certain number of acres in a particular district of country "to be allotted" by public officers named in the Act, and after that allotment was perfected, whether it amounted to a legal or equitable title (for the case was in chancery), to the particular lot of land, against a claimant under a subsequent entry or purchase from the State. To make that case parallel to this, the claim of the grantee should have rested upon the general grant only, without the completing process of the allotment. The analogy fails, in respect to the present case, at the point where the question of doubt is suggested.

In the case of Smith, this court considered the effect of the acts of the grantee, performed after the Treaty of Cession, towards locating the grant, and whether they had any relation back to the date of the title, so as to unite with it and give definiteness to it. And the court say, that the surveys must be performed by public officers, under a legal authority, as a public trust, and that this was the law of both the United States and Spain. And that the United States, having acquired the territory by cession, were entitled to hold it discharged of all claims, where the specific lands could not be identified by the description in the grant, or a supplementary survey.

The doctrine of this case has been applied with uniformity by this court, in a long series of cases, some of which, with a degree of strictness, bordering upon severity.

Lecompte v. *U. S. 11 How. 119; U. S. [*576 v. King, 3 How. 773; S. C. 7 How. 833; U. S. v. Wiggins, 14 Pet. 334; Bissell v. Penrose, 8 How. 317.

The non-fulfillment of these conditions it was competent to Mexico to overlook or to forgive.

It is probable that, in the lax administration of her laws, in the distant Province of California, all investigation would have been avoided if the cession of the United States had not been made. It is equally within the power of Congress to remit the consequences attaching to the omissions, and to concede as a grace what, in California, might have been yielded from indolence or indulgence.

But Congress has chosen to deal with the subject of titles in California, upon principles of

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law, embracing in that term the whole body of jurisprudence applicable to the subject; and that the solution of all the questions arising upon them shall be made by courts of justice acting upon their fixed rules of judgment. Among the guides it has directed us to follow are the decisions of this court in analogous cases. In my opinion, the cases I have cited control this case, and I do not feel at liberty to depart from what is to me their clear and manifest import.

Decree of the District Court reversed, and cause remanded to the said District Court, for further proceedings to be had therein in conformity to the opinion of this court.

JOHN C. HAYS, Plff. in Err.,
v.
THE PACIFIC MAIL STEAMSHIP COMPANY.

(See S. C. 17 How. 596-600.)

Taxation—vessels in transitu.

The State of California has no jurisdiction over vessels for the purpose of taxation, which were not properly abiding within its limits so as to become incorporated with other personal property of the State, but which were then temporarily, engaged in lawful trade and commerce, with their situs at the home port (New York), where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid.

The assessment was not a judicial, but a ministerial act, and as the assessors exceeded their powers in making it, the officer is not protected.

The payment of the tax was not voluntary, but compulsory to prevent the sale of one of the ships.

Argued Mar. 6, 1855. Decided Mar. 10, 1855.

IN ERROR to the District Court of the United States for the Northern District of California.

The case is stated by the court.

Messrs. Milton S. Latham, Robert J. Brent, and Henry May, for plaintiff in error:

The State of California has the power to tax ships or other property brought within her jurisdiction the same as the property of her own citizens.

Passenger Cases, 7 How. 323; McCulloch v. Md. 4 Wheat. 425; 2 Story's Com. 410, sec. 937; Providence Bank v. Billings, 4 Pet. 561; Weston v. City of Charleston, 2 Pet. 449; License Cases, 5 How. 582.

There is no analogy between the power of taxation and the power of regulating commerce.

9 Wheat. 201; Federalist, numbers 32-34, 36.

Messrs. Samuel F. Vinton and Walter Davidge, for defendants in error:

First. The revenue law of California did not apply to vessels upon which the tax was exacted by the plaintiff in error.

Laws of California, 2d sess. 1851, page 153.

Second. If said law was applicable to said vessels, it was as to them, in violation of the Constitution of the United States, and therefore null and void.

1. The Act in question was a regulation of commerce and the exclusive power of making such a regulation was vested in Congress.

Gibbons v. Ogden, 9 Wheat. 1; Brown v. State of Maryland, 12 Wheat. 419; McCulloch v. Maryland, 4 Wheat. 316; License Cases, 5 How. 504; Passenger Cases, 7 How. 283; Cooley v. Board of Port Wardens, 12 How. 299; The Brig Wilson v. U. S. 1 Brock. 423; Howell v. The State, 3 Gill. 14.

2. The law was repugnant to the clearly manifested will of Congress.

1 Stat. at L. pp. 287, 489, 523, 305, 498; 2 Stat. at L. 103, 510, 568, 694.

3. The law was in substance a duty on imports.

4. The law was in substance a duty on tonnage.

5. As to a portion of the said vessels, the United States had a legal and beneficial interest therein, and they were by law, the means and instruments of executing the laws of the general government, and were in its service and subject to its control and orders.

9 Stat. at L. 187, 367, 323; Weston v. City of Charleston, 2 Pet. 465; Dobbins v. Com. of Erie County, 16 Pet. 447; Cohens v. State of Va. 6 Wheat. 267; Neil v. Ohio, 3 How. 728.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the District Court for the Northern District of California.

The suit was brought in the District Court, by the Company, to recover back a sum of money which they were compelled to pay to the defendant, as taxes assessed in the State of California, upon twelve steamships belonging to them, which were temporarily within the jurisdiction of the State.

The complaint sets forth, that the plaintiffs are an incorporated Company by the laws of New York; that all the stockholders are residents and citizens of that State; that the principal office for transacting the business of the Company is located in the City of New York, but, for the better transaction of their business, they have agencies in the City of Panama, New Grenada, and in the City of San Francisco, California; that they have also a naval dock and ship-yard at the port of Benicia, of that State, for furnishing and repairing their steamers; that on the arrival at the port of San Francisco, they remain no longer than is necessary to land their passengers, mails and freight, usually done in a day; they then proceed to Benicia, and remain for repairs and refitting until the commencement of the next voyage, usually some ten or twelve days; that the business in which they are engaged is in the transportation of passengers, merchandise, treasure, and the United States mails, between the City of New York and the City of San Francisco, by way of Panama, and between San Francisco and different ports in the Territory of Oregon; that the Company are sole owners of the several vessels, and no portion of the interest is owned by citizens of the State of California; that the vessels are all ocean steamships, employed exclusively in navigating the waters of the ocean; that all of them are duly registered at the custom house in New York, where the owners reside; that taxes have been assessed upon all the capital of the plaintiffs represented by the steamers in the State of New York, under the laws of that State, ever since they

NOTE.—Where ships are taxable—see note, 37 L.R.A. 518.

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have been employed in the navigation, down to the present time; that the said steamships have been assessed in the State of California and County of San Francisco, for the year beginning 1st July, 1851, and ending 30th June, 1852, 598*] claiming the *assessment as annually due, under an Act of the Legislature of the State; that the taxes assessed amount to $11,-962.50, and were paid under protest, after one of the vessels was advertised for sale by the defendant, in order to prevent a sale of it.

To this complaint the defendant demurred, and the court below gave judgment for the plaintiffs.

By the 3d section of the Act of Congress of 31st December, 1792, it is provided that every ship or vessel, except as thereafter provided, shall be registered by the Collector of the district, in which shall be comprehended the port to which the ship or vessel shall belong at the time of her registry, and which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, nearest to the place where the husband, or acting and managing owner usually resides; and the name of the ship, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length; and if any ship or vessel of the United States shall be found without having her name, and the name of the port to which she belongs, painted in the manner mentioned, the owner or owners shall forfeit $50.

And by the Act of 29th July, 1850, 9 Stat. at L. 440, it is provided that no bill of sale, mortgage, or conveyance of any vessel shall be valid against any person other than the grantor, etc., and persons having actual notice, unless such bill of sale, mortgage or conveyance be recorded in the office of the Collector of the customs where such vessel is registered or enrolled.

These provisions, and others that might be referred to, very clearly indicate that the domicil of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside. In this case, therefore, the home port of the vessels of the plaintiffs was the port of New York, where they were duly registered, and where all the individual owners are resident, and where is also the principal place of business of the Company; and where, it is admitted, the capital invested is subject to State, county and other local taxes.

These ships are engaged in the transportation of passengers, merchandise, etc., between the City of New York and San Francisco, by the way of Panama, and between San Francisco and different ports in the Territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold 599*] out to the owners sufficient *inducements by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged, or laden on board, independently of any control over them, except as it respects municipal and sanitary regulations of the local authorities, such as are not inconsistent with the Constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the States.

Now, it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a light tax. It may be that the course of trade, or other circumstances, might not occasion as great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, etc., which in no respect can affect the question as to the situs of the property, in view of the right of taxation by the State.

Besides, whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port. Our merchant vessels are not unfrequently absent for years, in the foreign carrying trade, seeking cargo, carrying and unlading it from port to port, during all the time absent; but they neither lose their national character nor their home port, as inscribed upon their stern.

The distinction between a vessel in her home port and when lying at a foreign one or in the port of another State is familiar in the admiralty law. She is subjected, in many cases, to the application of a different set of principles. 7 Pet. 324; 4 Wheat. 438.

We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation, they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, *with their situs at the home port, [*600 where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid.

An objection is taken to the recovery against the Collector, on the ground, mainly, that the assessment under the law of California, by the assessors, was a judicial act, and that the party should have pursued his remedy to set it aside according to the provisions of that law.

We do not think so. The assessment was not a judicial, but a ministerial act, and as the assessors exceeded their powers in making it, the officer is not protected.

The payment of the tax was not voluntary, but compulsory, to prevent the sale of one of the ships.

Our conclusion is, that the judgment of the court below is right, and should be affirmed.

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Mr. Justice Daniel, dissenting:

I dissent from the decision of the court in this case, it being my opinion that neither the Circuit Court nor this court could take jurisdiction over the parties to this suit; and that therefore this cause should be remanded to the District Court. with directions to dismiss it for want of jurisdiction.

Mr Justice Campbell:

I concur in the judgment. But I concur only in consequence of the facts stated in the declaration, and admitted by the demurrer. The material fact is, that the vessels were in transitu, having no situs in California, nor permanent connections with its internal commerce.

Judgment of the District Court affirmed, with costs and interest until paid, at the same rate per annum that similar judgments bear in the State of California.

Judgment affirmed, with costs.

601*] *WILLIAM CHRISTY, Plff. in Er.,
v.
LODOVIC P. ALFORD, Admr. of Henry D. Bullard, Deceased.

(See S. C. 17 How. 601-606.)

Limitations—successive possessions will create statutory bar.

By a statute of Texas, "Every suit to be instituted to recover real estate, as against him, her or them, in possession, under title, or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards," etc., Held that the person sued need not himself have held for three years in order that the statute bar may be effectual; but, that the possession under said statute, might be in two or more, holding in privity, one under another; and if the possession of both so holding under title, or color of title, will make out the term prescribed by said section, then the bar will be effectual.

Hence, when two or more persons, in or under the same title, had possession for more than three years, it is sufficient to create the statutory bar.

Submitted Mar. 1, 1855. Decided Mar. 10, 1855.

IN ERROR to the District Court of the United States for the District of Texas.

This was an action of trespass brought in the District Court of the United States for the District of Texas, by the plaintiff in error, to try the title to a certain tract of land. The trial below resulted in a verdict and judgment in favor of the defendants, whereupon the plaintiffs brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Messrs. J. J. Crittenden, A. H. Lawrence and Robert Hughes, for the plaintiff in error, contended:

First: That the language of the 15th section of the Texas Statute of 1841, affects the possession of him alone against whom the suit is brought.

Second. That from the whole Act together it is manifest that three years' possession was not intended as a bar, for the 14th section gives authority to anyone having a right of entry, to make such entry within ten years.

Messrs. E. P. Hill and J. P. Henderson, for the defendant in error.

We submit that the plaintiff's cause of action in this case accrued to him the very moment the defendant, or those under whom he claims, entered upon the land, claiming it adversely to plaintiff under color of title.

Alexander v. Pendleton, 8 Cr. 462; Jackson v. Elliott, 13 Johns. 118; Hawkins et al. v. Barney's Lessee, 5 Pet. 457; Overfield v. Christey, 7 S. & R. 177; McKay v. Dixon, 5 S. & R. 254; Portis v. Hill's Adm. 3 Tex. 273.

As to the fact of continuity of possession we refer to 1 Shep. Touchst. 446-448; Shannon v. Kiney, 1 Marsh. 4. Herd v. Walton, 2 Marsh. 620.

Mr. Justice Curtis delivered the opinion of the court:

This case comes before us by writ of error to the District Court for the District of Texas. It was an action of trespass, to try the title to a tract of land. On the trial, the defendant relied on the 15th section of the Statute of Limitations, passed in 1841, by the Congress of the then Republic of Texas, which is in the following words: "Every suit to be instituted to recover real estate, as against him, her or them, in possession, under title or color of title, shall be instituted within three years next after cause of action shall have accrued and not afterwards, saying," etc.

In reference to this defense the District Judge instructed the jury, that a possession under the said 15th section might be in two or more, holding in privity, one under another; and if the possession of both so holding will make out the term prescribed by said section, and he sued has title or color of title, then the bar will be effectual.

The plaintiff excepted to this instruction, and the jury found a verdict for the defendant.

Several objections to this instruction have been relied on in this court. The first is, that a holding by two persons for the space of three years, one claiming and holding in privity with the other, does not satisfy the Statute; that the person who is sued must himself have held for the space of three years. The argument is, that the period of three years begins to run when "cause *of action shall have ac- [*602 crued;" that the Statute does not say when a cause of action, or the first cause of action accrued, but when cause of action accrued; that cause of action accrues against each tenant in succession when he enters, whether he come into the land in privity with the preceding occupant or not; for each is a trespasser by an unlawful entry; that the Statute refers, not to the cause of action which first accrues to the plaintiff by reason of an unlawful entry, but to the first cause of action which accrues to him by reason of the entry of the particular person sued. It is conceded that this construction of the Statute is not in conformity with that put upon the 21 Jac. I. ch. 16, and its reenactments in this country; but it is insisted that the particular terms of the Statute in question call for a different interpretation, because the bar therein provided for is confined to certain cases therein enumerated, and is not applicable to all cases of adverse holding for the space of three years.

It must be admitted that the bar afforded by the 15th section of the Statute is confined to

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the particular cases therein described; but the question is, whether that description excludes cases where there has been an adverse holding for three years by different persons holding in privity with each other; and we are of opinion that such cases are included in the 15th section. We think both the language of the law and its subject matter, as well as the analogous cases respecting the interpretation of similar statutes, call for this construction. The plaintiff would read the law as if it had said, "within three years next after cause of action shall have accrued" "against the person sued." But these words are not in the law, nor would the court be justified in interpolating them. It is true, the only cases enumerated in the law are suits against persons in possession under title or color of title. But the definitions of the terms, title and color of title, which immediately follow, are: "By the term title, as used in this section, is meant a regular chain of transfer from and under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfer down to him, her, or them, in possession, without being regular, as if one or more of the memorials or muniments be not registered or not duly registered," etc. It is quite plain, therefore, that when this section speaks of a suit against one in possession under title or color of title, it is not confined to cases in which the defendant was the first to enter under that title. If he be in a regular chain of transfer from and under the sovereignty of the soil, or in a consecutive chain of such transfer, though informal in its instruments, he is a defendant within the descriptive words of this section; and it is wholly im-603*] material *whether he was the first taker from the sovereign of the soil or not.

The words, "as against him, her or them in possession, under title or color of title," restrict the benefit of this bar to those persons, who hold under such a title; the words, "shall be instituted within three years next after cause of action shall have accrued, and not afterwards," prescribe the length of time during which cause of action must have existed, by reason of an adverse holding under such a title. And as by the very terms of the Act, the person setting up this bar must be in a chain of transfer from the sovereignty of the soil down to himself, it necessarily follows, that the defendant setting up the bar must be in privity with his predecessors in the title, and that he cannot rely on the title or possession of any one under whom he does not claim. There is nothing in the Act to restrict the party sued from relying on the possession of any predecessor in that title under the sovereignty of the soil, which has come to himself, and the purpose of the Act requires, that he should be allowed to do so. That purpose was to give repose to such titles by three years' adverse possession. But if the construction for by the plaintiff in error were adopted, three years' possession under such title, by one person, would not quiet that title. If a descent were cast, or an alienation took place, after three years had elapsed, a right of action would accrue against the heir or purchaser who should enter, and that action would not be barred because the defendant had not himself held possession for three years.

This would be an extraordinary anomaly. At the common law, a descent cast tolled the right of entry, because the heir came in by operation of law; and a discontinuance was worked by the alienation of a tenant in tail, so that the alienee could not be entered on by the heir in tail. These rules of the common law were changed, in part, by the 32 Hen. VIII. ch. 33, and have been wholly abrogated in most of the United States; but that the title of the heir or alienee should be worse than that of the ancestor or grantor, and that an action, wholly barred against the latter, should be revived and be in force upon an entry by the former, under a title already protected by the Act, would indeed be strange. We see nothing in the language or objects of the law, and certainly there is nothing in the decisions under analogous laws calling for this interpretation.

Though we do not know that the Supreme Court of Texas has had occasion to decide the precise question here presented, that learned court has repeatedly expressed views of this section of the Act of 1841, in accordance with those we have above given. In Wheeler v. Moody, 9 Tex. 377, that court, in *con- [*604 sidering a defense set up under the 15th section of this Act, say: "The possession need not be continued by the same person; but, when held by different persons, it must be shown that a privity existed between them." So, in Horton v. Crawford, 10 Tex. 390, speaking of the time when the cause of action accrues, within the meaning of this section, they say: "When does the cause of action accrue? Unquestionably, at the instant of possession taken under the circumstances specified in the Statute, viz.: under title or color of title, according to the definition of those terms given in the law himself."

See, also, Portis et ux. v. Hill's Adm'r, 3 Tex. 273.

We understand, therefore, that our views of this Statute are in accordance with those of the Supreme Court of Texas, so far as that learned court has had occasion to express any opinion on the subject; and we hold, in the terms laid down by them in the case of Wheeler v. Moody, that, under the 15th section of the Act of 1841, the possession need not be continued by the same person, and that consequently the instruction of the District Court, in this particular, was correct.

But it is further objected, that the instruction given did not require that the first holder should have been in under title or color of title, but only that the person sued should have title or color of title; and that this instruction would allow the benefit of this bar to one having title, and a possession of less than three years, if he claimed in privity with another who had previously possessed without title. But the instruction must be taken with reference to the admitted facts upon which it was given. Those facts were: "It was proved by the admissions of the parties, by their attorneys, that L. P. Alford and the defendant, by a union of the several possessions, had, next before the commencement of the plaintiff's action, peaceable, adverse and uninterrupted possession for more than three years, claiming under color of title, of six hundred and forty acres of land, by virtue of said Alford's head-right cer-

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tificate, duly recommended, duly surveyed and returned to the General Land Office, and within the boundary of both of one-league surveys of plaintiff, described and mentioned in the second and third count of his petition."

There was no room to argue, nor could the jury find that any part of the three years' possession was held without color of title, for the contrary is expressly admitted. In reference to the particular facts of this case, the instruction was not erroneous in the particular complained of.

It is also urged, that in addition to what was said by the court, the jury should have been told that the defendant, having no title, or color of title, such as that prescribed by the 605*] Statute, *could not have the benefit of the bar, by virtue of the title or color of title of Alford, under whom he claimed; for the reason that, claiming a bar under the Statute, he had to show the circumstances prescribed by it; and the title prescribed having to be a transfer down to him in possession, the requirement was not complied with by showing a title in him under whom he claimed; and the consequence is, that the defendant, instead of proving himself within the rule required, shows himself out of it, and not entitled to the bar.

But upon the facts agreed, this position is not tenable. It was agreed that the defendant's possession was under color of title by virtue of Alford's head-right certificate; and the instruction given by the court required the jury to find that the defendant claimed in privity with Alford; and this privity is also admitted, for he could be in under color of Alford's head right only by force of a consecutive chain of transfer through Alford from the sovereignty of the soil.

He was therefore not setting up color of title in another, but in himself. It is true the record does not show how this privity was created, nor that the defendant was in a consecutive chain of transfer. But the necessity for this proof was done away by the admission of the plaintiff, that the defendant was in possession under color of title; for, as has just been observed, this was equivalent to an admission that he was in under such a chain of transfer from the sovereignty of the soil.

It has also been urged, that the 14th section of this Statute allows an entry within ten years next after the right accrues. We are spared the necessity of discussing this question at large, because it has been distinctly decided by the Supreme Court of Texas, in Horton v. Crawford, 10 Tex. 382; and we concur entirely in the correctness of the reasoning, by which it is there shown that the 14th section of the Act has no effect upon the bar created by the 15th section.

The other matters assigned for error related exclusively to the plaintiff's title. But as the bar under the 15th section of the Statute of Limitations was complete and effectual upon the conceded facts, there can be no error in the judgment in favor of the defendant, even if the court ruled erroneously in respect to the title of the plaintiff; and we have not considered these alleged errors, and give no opinion thereon.

The judgment of the District Court is affirmed, with costs.

End of Vol. 58.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

DECEMBER TERM, 1855,

Vol. 59.

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REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT DECEMBER TERM, 1855,

AND REPORTED HEREIN

VOLUME 59,

AS HAVE ALSO BEEN REPORTED IN

18 HOWARD AND IN 1 MILLER'S DECISIONS.

18 How.	Title.	1 Miller.	Here in.
1	U. S. v. Reading,	1	291
2-4	" "		292
4-6	" "		293
6-8	" "		294
8-11	" "		295
11-13	" "		296
13-15	" "		297
15-16	" "		298
16	McLean v. Meek,	15	277
17-19	"		278
19	" "		279
19	Kissell v. St. Louis, Pub. Schools,	17	324
21	" "		325
21-24	" "		326
24-26	" "		327
26-28	" "		328
28-29	Hartshorn v. Day,	24	272
29-32	U. S. v. Frémont,	26	302
32-33	" "		303
33-40	" "		304
40-41	Sturgess v. Harrold,	31	261
41	" "		262
42	Peck v. Sanderson,	32	262
43-44	Barnard's Heirs v. Ashley's Heirs,	33	285
44-45	" "		286
46-49	" "		287
49-50	" "		288
50	Wright v. Mattison,	40	280
52	" "		281
52-55	" "		282
55-57	" "		283
57-60	" "		284
60	" "		285
60	Graham v. Bayne,	49	265
61-62	" "		266
62-63	" "		267
63	Carrington v. Pratt,	52	267
65-67	" "		268
67-69	" "		269
69	Holroyd v. Pumphrey	57	264
69-71	" "		265

18 How.	Title.	1 Miller.	Here in.
71	Smith v. Maryland,	59	269
72-74	" "		270
74-76	" "		271
76	" "		272
76-80	Jones v. League,	64	263
80-81	" "		264
82-83	Bush v. Person,	67	273
83-86	" "		274
86	Verden v. Coleman,		272
87-89	Minter v. Crommelin,	72	279
89	" "		280
89-90	McCready v. Goldsmith,	74	288
90-92	" "		289
92	U. S. v. Jones,	78	274
94-95	" "		275
95-98	" "		276
98-100	" "		277
100	U. S. v. Cozzi,	84	299
100-103	" "		300
103-105	" "		301
105-106	" "		302
106-108	Sessions v. Pintard,	96	298
108-109	" "		299
109-110	Curtis v. Petitpain,	93	280
110-111	Jecker v. Montgomery,	94	311
111-114	" "		312
114-116	" "		313
116-118	" "		314
118-121	" "		315
121-123	" "		316
123-126	" "		317
126	" "		318
126-128	Ham v. Missouri,	110	334
129-130	" "		335
130-132	" "		336
132-134	" "		337
135	Guild v. Frontin,	118	290
136	Savignac v. Garrison,	119	290
136-137	" "		291
137-140	Parker v. Overman,	121	318
140-142	" "		319
142-143	" "		320
143	Richards v. Holmes,	125	304

Digitized by Google

18 How.	Title.	1 Miller.	Herein.
145–146	Richards v. Holmes,		305
146–148	" "		306
145–149	" "		307
150	Jones v. Johnston,	131	320
151–152	" "		321
152–155	" "		322
155–157	" "		323
157–158	" "		324
158	Griffith v. Bogert,	136	307
161–162	" "		309
162–164	" "		310
164–165	" "		311
165	Little v. Hall,	142	323
169–171	" "		331
171–172	" "		332
173–175	Cooper v. Roberts,	147	338
175–178	" "		339
178–180	" "		340
180–182	" "		341
182	Hickox v. Buckingham,	155	341
187–188	" "		343
188–190	" "		344
190–192	" "		345
192–194	Poydras v. Treas. of La.,	161	350
194–196	" "		351
197	Heirs of Lafayette v. Kenton,	164	345
197–198	" " "		346
198–199	" " "		347
199	Craighead v. Wilson,	166	332
200–202	" "		333
202	" "		334
202	Abbott v. Essex Company,	170	352
211	" "		354
211–214	" "		355
214–216	" "		356
216–217	" "		357
217–219	McLaughlin v. Swann,	176	357
219–221	" "		358
221–223	" "		359
223	Steamboat New York v. Rea,	181	323
224	" "		360
224–226	" "		361
226–229	" "		362
229–230	" "		363
231	Ship Howard v. Wiseman,	186	363
231–233	" "		364
233–235	" "		365
235	McKinney v. Savlego,	192	365
236–237	" "		366
237–240	" "		367
240	" "		368
241	U. S. v. Minn. N. W. R. R. Co.,	198	347
241–243	" "		348
243	Calcote v. Stanton,	200	348
244–245	" "		349
245	" "		350
246	York and Cumb'd R. R. Co. v. Myers,	203	380
248–249	" "		381
249–252	" "		382
252–253	" "		383
253	Shields v. Thomas,	209	368
255–256	" "		369
256–259	" "		370
259–261	" "		371
261–263	Shields v. Thomas,		372
263	Orton v. Smith,	218	303
263–265	" "		304
265–266	" "		303
267	Ward v. Peck,	222	303
267–269	" "		304
269–271	" "		305
272	Murray v. Hoboken L. & I. Co.,	227	372
274–275	" "		373
275–277	" "		374
277–279	" "		375
279–282	" "		376
282–284	" "		377
284–286	" "		378
286	Nutt v. Miner,	240	378
286–289	" "		379
289	" "		380
289	Kinsman v. Parkhurst,	242	385
290–292	" "		386
292–294	" "		387
294–295	" "		388
295–296	Ramson v. Winn,	246	388
296–297	" "		389
297–299	Lessee of McCall v. Carpenter,	250	389
299–301	" "		390
301–303	" "		391
303–306	" "		392
306–307	" "		393
307	*Ex parte* Wm. Wells,	260	421
308–310	" "		422
310–312	" "		424
312–315	" "		425
315–317	" "		426
317–320	" "		427
320–322	" "		428
322–324	" "		429
324–327	" "		430
327–329	" "		431
329–331	" "		432
331	Dodge v. Woolsey,	284	401
336	" "		402
336–339	" "		403
339–341	" "		404
341–343	" "		405
343–346	" "		406
346–348	" "		407
348–350	" "		408
350–353	" "		409
353–355	" "		410
355–357	" "		411
357–360	" "		412
360–362	" "		413
362–364	" "		414
364–366	" "		415
366–369	" "		416
369–371	" "		417
371–373	" "		418
373–376	" "		419
376–378	" "		420
378–380	" "		421
380	Mechanics' and Traders' Bank v. Debolt,	330	422
383	" "		423
384–385	Mechanics' and Traders' Bank v. Thomas,	330	423
385	Wilkins v. Allen,	331	396

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18 How.	Title.	1 Miller.	Here in.
390–391	Wilkins v. Allen,	331	398
391–394	" "		399
394	Conner v. Pough's Lessee,	336	432
395	" "		433
396	South v. State of Maryland,	337	433
401	" "		434
402–403	" "		435
404–405	Lafayette Ins. Co. v. French,	340	451
405–407	" "		452
407–409	" "		453
409	Stanford v. Taylor,	340	453
411–413	" "		454
413–415	Converse v. Burgess,	343	455
415–417	" "		456
417–418	" "		457
418–419	Stockton v. Ford,	352	395
419–420	" "		396
421	Pa. v. Wheeling & Belmont Bridge Co.,	355	435
429–430	" "		436
430–432	" "		437
432–435	" "		438
435–437	" "		439
437–439	" "		440
439–442	" "		441
442–444	" "		442
444–446	" "		443
446–449	" "		444
449–451	" "		445
451–453	" "		446
453–456	" "		447
456–458	" "		448
458–459	" "		449
459	Pa. v. Wheeling & Belmont Bridge Co.,	357	449
460–462	" "		450
462	" "		451
463–464	Goelee v. Shute,	366	452
464–466	" "		453
466–467	" "		454
467	Wood v. Davis,	366	460
468–470	" "		461
470	" "		462
470	Fouvergne v. City of New Orleans,	368	399
471–472	" "		400
472–473	" "		401
473–475	Ledoux v. Black,	401	457
475	" "		458
476–477	U. S. v. Booth,	402	464
477–479	" "		465
479	Ableman v. Booth,	402	465
479	" "		466
480	Bacon v. Robertson,	406	499
480–481	" "		500
481–483	" "		501
483–486	" "		502
486–488	" "		503
488–489	" "		504
489	Masters v. Barredo,	415	460
490–492	" "		467
492–496	" "		468
496–497	" "		469
497	Beauregard v. City of New Orleans,	422	469
497–499	" "		470
499–501	" "		471
501–503	" "		472

18 How.	Title.	1 Miller.	Here in.
503	Union B'k of Tenn. v. Jolly's Adm'rs,	429	472
504–505	" "		473
505–507	" "		474
507–508	McMicken v. Perin,	433	504
508–509	" "		505
509–511	" "		506
511	Maxwell v. Newbold,	436	505
512–513	" "		507
513–516	" "		508
516–517	" "		509
517	Watson v. Tarpley,	442	509
517–519	" "		510
519–521	" "		511
521	Stairs v. Peaslee,	447	474
524–525	" "		475
525–527	" "		476
527–529	" "		477
529–530	" "		478
530	Hudgins v. Kemp, & Same v. Same,	454	511
534	" "		512
534–537	" "		513
537–539	" "		514
539–540	Arguello v. U. S.	466	478
540–542	" "		479
542–545	" "		480
545–547	" "		481
547–550	" "		482
550–552	" "		483
552–553	" "		484
553–555	U. S. v. Cervantes,	474	484
555	" "		485
556–557	U. S. v. Vaca,	476	485
557	U. S. v. Larkin,	478	485
558–560	" "		486
560–562	" "		487
562–565	" "		488
565	" "		489
565–567	Dennistoun v. Stewart,	486	489
568–569	" "		490
570–571	Steamer Oregon v. Rocca,	490	515
571–574	" "		516
574–576	" "		517
576	" "		518
577	Ogilvie v. Knox Ins. Co.,	497	490
579–580	" "		491
580–581	" "		492
581–582	Crockett v. Steamboat Isaac Newton,	499	492
582–584	" "		493
584	Lord v. Steamboat Isaac Newton,	504	493
584	Culbertson v. Steamer Southern Belle,	532	492
585–586	" "		494
586–588	" "		495
588	U. S. v. Shackleford,	506	495
589–591	" "		496
591	" "		497
591–592	Conner v. Elliott,	508	497
592–594	" "		498
595	Pease v. Peck,	512	518
595–597	" "		519
597–599	"		520
599–601	" "		521
602	Strader v. Graham,	519	464

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

DECEMBER TERM, 1855.

THOMAS I. COGGESHALL, William Coggeshall and Cook Borden, Appts.,
v.
JAMES HARTSHORNE and Winslow Ames.

Decree on stipulation.

On hearing of cause, decree entered on stipulation, reversing decree below for damages and costs, and affirming decree for injunction and making it perpetual and without costs to either party.

Argued Dec. 12, 1856. Decided Dec. 12, 1856.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.
Mr. G. T. Curtis for appellants.
Mr. J. A. Loring for appellees.

Mr. Chief Justice Taney made the following order:

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and on the stipulation filed by the counsel of the respective parties, that the following decree should be entered: on consideration whereof, and on the motion of Mr. Curtis, of counsel for appellants, it is now here ordered, adjudged and decreed, that so much of the decree of the Circuit Court as required payment by the appellants to the appellees of the sum of $6,945.63, and interest thereon, as profits, and $691.79, as costs, be, and the same is hereby reversed; and that so much of the said decree as relates to an injunction restraining the appellants, their agents and servants and assigns, from using certain patterns and stoves therein mentioned, be, and the same is hereby affirmed and the injunction made perpetual; and that the said Circuit Court be, and the same is hereby directed to enter a full satisfaction of all damages and costs in this cause; and it is further ordered and decreed by this court, that neither party take any costs in this or the Circuit Court in this cause.

Ex-parte in the Matter of GEORGE BULKLEY, Plaintiff in Error,
v.
CHRISTIAN HONOLD.

LATHROP L. STURGESS, Plaintiff in Error,
v.
CHRISTIAN HONOLD.

(See S. C. 18 How. 40–41.)

Motion for extension of time to file return.

Where the clerk of the Circuit Court certifies that he cannot, consistently with his other duties, return to this court a transcript of the record, within the time required by the rules, a motion for further time to return such transcript will be denied.

Argued Dec. 7, 1855. Decided Dec. 18, 1855.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

On an application of Mr. Lawrence for an extension of time, under the 63d rule of this court, to file the returns of the writs of error in these cases.

Mr. Lawrence, of counsel for the plaintiffs in error, having filed and read in open court a certificate of the clerk of the Circuit Court of the United States for the Eastern District of Louisiana, stating that a return to the writ of error could not be made in less than ninety days after the return day of said writ, moved the court for an extension of the time in conformity thereto.

Messrs. Lawrence and Owen & Vose for plaintiffs in error.

Mr. J. P. Benjamin for defendant in error.

Mr. Justice McLean delivered the opinion of the court:

In the above cases writs of error were allowed on the 21st day of November last, the judgments having been entered on the 16th of that month. The clerk of the Circuit Court certifies that he cannot, consistently with the other duties of his office, make out and have ready the transcript of the record and proceedings in the said causes, in time for the same to reach Washington City at the opening

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of the term of the Supreme Court, nor within less than ninety days thereafter.

On this statement of the clerk, a motion is made for longer time to certify the record.

At the December Term, 1853, this court adopted a rule requiring, where a judgment or decree was entered thirty days before the succeeding term of this court, that the writ of error or appeal should be entered on the record of this court, and the record filed within the first six days of the term. But if less than thirty days intervene between the entry of the judgment or decree and the sitting of this court, the case should be entered on the docket of this court, and the record filed, within thirty days from the commencement of the term.

The above rule was adopted to prevent unnecessary and improper delays, in prosecuting writs of error or appeals in this court from the inferior courts. Thirty days from the commencement of this term affords ample time to the clerk to make out and forward the records in the above cases. The rules of this court can in no respect depend upon the convenience of the clerks of the inferior courts.

ORDER.

On consideration of the motion made by Mr. Lawrence on a prior day of the present term, to wit: on Friday, the 7th inst. and of the following certificate, to wit:

"Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, clerk's office.

Christian Honold v. George Bulkley. } 2392.

I certify that on this 25th day of November, A. D. 1855, a writ of error to the December Term, A. D. 1855, of the Supreme Court of the United States was duly applied for, allowed and filed by the defendant in the above-entitled cause, George Bulkley, from the judgment rendered against him therein in the said Circuit Court on the 16th day of November, 1855.

And I further certify that I cannot, consistently with the other duties of my office, make out and have ready the transcript of the record and proceedings in the said cause in time for the same to reach Washington City at the opening of the term of the Supreme Court to which it is returnable, nor within less than ninety days thereafter.

New Orleans, 21st. Nov., 1855.

Attest: J. W. Curley, Clerk."

It is now here considered and ordered by this court, that the extension applied for be, and is hereby denied; and that the said motion be, and the same is hereby overruled. Per Mr. Justice McLean.

ORDER.

On consideration of the motion made by Mr. Lawrence on a prior day of the present term, to wit: on Friday, the 7th instant, and of the following certificate, to wit:

"Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, clerk's office.

Christian Honold v. Lathrop L. Sturges. } No. 2393.

I certify that on this 21st day of November, A. D. 1855, a writ of error to the December Term, A. D. 1855, of the Supreme Court of the United States was duly applied for, allowed and filed by the defendant in the above-entitled cause, Lathrop L. Sturges, from the judgment rendered against him therein in the said Circuit Court on the 16th day of November, 1825.

And I further certify that I cannot, consistently with the other duties of my office, make out and have ready the transcript of the record and proceedings in the said cause in time for the same to reach Washington City at the opening of the term of the Supreme Court to which it is returnable, nor within less than ninety days thereafter.

New Orleans, 21 Nov. 1855.

Attest: J. W. Curley, Clerk."

It is now here considered and ordered by this court, that the extension applied for be, and the same is hereby denied; and that the said motion be, and the same is hereby overruled. Per Mr. Justice McLean.

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*JAMES B. PECK, William Heilman and Edward H. Frismuth, Owners of the Steamship Columbus, Appellants, [*42

v.

JOHN SANDERSON.

(See S. C. 18 How. 42.)

This court cannot grant a rehearing in a case which has been remitted to the court below.

Argued Dec. 7, 1855. Decided Dec. 18, 1855.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This case was disposed of by this court at the last term.

58 U. S., 178.

It is now again before the court, on a motion by the appellee for a re-argument.

Mr. Waln for appellants.

Mr. Rush for appellee.

Mr. Justice McLean delivered the opinion of the court:

This case was decided at the last term on an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania, and a motion is now made by Mr. Rush, counsel for the appellee, for a re-argument, on the ground that he was prevented by sickness from attending the court at the time of the hearing.

It is a subject of regret that any cause should be heard in the absence of counsel, and especially where the cause of absence, by a failure in the mail, was unknown to the court.

In the above case, the brief of the counsel was before the court, and it is not probable that an oral argument would have changed the result.

But in the case of Browder v. McArthur, 7 Wheat. 58, it was held that this court cannot grant a rehearing in a case which has been remitted to the court below; and in the case of The Washington Bridge Company v. Stewart et

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al. 3 How. 413, the same principle was recognised.

The motion is overruled.

WILLIAM H. JONES, James B. Wells, John Chain, Jonas A. Castaline, Philip C. Paul, William R. Roberts and James Byrne, Plaintiffs in Error,

v.

THOMAS M. LEAGUE.

(See S. C. 18 How. 76-81.)

Change of citizenship, to enable party to sue in federal courts, must be bona fide—short temporary residence insufficient—colorable conveyance, for benefit of grantor, will not enable grantee to sue.

A change of citizenship for the purpose of bringing a suit in a federal court, must be with the bona fide intention of becoming a citizen of the state to which the party removes.

A short absence from the state of which plaintiff was a citizen, in another state without the intention to change his citizenship, is not sufficient.

A conveyance of lands, which is only colorable, to enable grantee to bring an action for the benefit of the grantor, one third of the lands to be received by grantee in consideration that he should pay one third of the costs, and superintend the prosecution of the suit, will not entitle the grantee to bring the action.

The owner of a tract of land may convey it, in order that the title may be tried in the federal courts, but the conveyance must be made bona fide, so that the prosecution of the suit shall not be for his benefit.

Argued Dec. 13, 1855. Decided Dec. 18, 1855.

IN ERROR to the District Court of the United States for the District of Texas.

This was an action for trespass, brought in the District Court of the United States for the District of Texas, by the defendant in error, to try the title to certain premises in said State. On the final trial in the court below, the verdict and judgment were in favor of the plaintiff. The defendants then brought the case here, on a writ of error.

The facts of the case sufficiently appear in the opinion of the court.

Mr. W. G. Hale, for the plaintiffs in error:

The District Court erred in sustaining the demurrer to the first plea to the jurisdiction.

Hart. Dig. 688.

In determining the extent of the judicial power under the Constitution, we must look to things, not names.

McNutt v. Bland, 2 How. 9.

A conveyance for a valuable consideration by a citizen of one state to a citizen of another state, gives the federal courts jurisdiction, though such was the motive of the conveyance.

Smith v. Kernochen, 7 How. 198-217; McDonald v. Smalley, 1 Pet. 623.

The converse is true where no such consideration passes, the title being transferred for the express purpose of giving said courts jurisdiction.

Maxwell's Lessee v. Levy, 2 Dall. 381; S. C. 4 Dall. 330; Hurst's Lessee v. Neil, 1 Wash. C. C. 70-81; Smith v. Kernochen, 7 How. 198-217.

To say that the allegation as to citizenship contained in the plaintiff's petition is prima facie, or presumptive proof of the fact, is absurd.

DeWolf v. Rabaud, 1 Pet. 496; Sheppard v. Graves, 14 How. 505; Gray v. Morris, 5 Pet. 620; Carver v. Jackson, 4 Pet. 82; Kelly v. Jackson, 6 Pet. 632.

Mr. R. Hughes, for the defendant in error:

When there are pleas to the jurisdiction and in bar filed at the same time, the plea to the jurisdiction will be considered waived.

Sheppard v. Graves, 14 How. 510.

By the averments of the petition, the court has jurisdiction. The plea attempted to show that League was a colorable plaintiff only, but the plea made the conveyance from Power to League part of the plea, from which a valuable consideration appears.

Smith v. Kernochen, 7 How. 198.

The jury was properly instructed. The admissions of the plaintiff below were prima facie only. The averment in the petition is prima facie evidence.

Sheppard v. Graves, 14 How. 510.

Hence the two presumptions counteracted each other, and the jury were constrained to find that, at the commencement of the suit, the plaintiff was a citizen of Maryland.

Mollan v. Torrance, 9 Wheat. 537.

Mr. Justice McLean delivered the opinion of the court:

This is a writ of error to the District Court of the United States of the District of Texas.

The plaintiff filed his petition in the District Court, alleging that he was seized in fee of a certain tract of land in the County of Refugio, on St. Joseph's Island, in the State of Texas; beginning on said island at the point nearest the Arkansas bar; thence in a northeasterly direction with the sea shore to the inlet from the sea into the bay; thence north forty-five degrees west to the shore of the bay or lagoon; thence, with the meanders of the bay, to the place of beginning, containing three and one half leagues, be the same more or less. That the defendants entered the same by force and ejected the plaintiff.

And the petition further represents, that the plaintiff having possession of several other tracts of lands of which he was *seized, [*80 the defendants forcibly entered and dispossessed him, etc.; and the petitioner prayed that after due trial, according to the forms of law, he may have judgment for his damages aforesaid, for the recovery of the lands aforesaid.

The defendants plead that the court ought not to take further cognizance of the action of the plaintiff, because they say that the plaintiff claims title under and through a pretended indenture, purporting to be made and entered into on the 11th of May, 1850, by a certain John

NOTE.—Jurisdiction of U. S. Circuit Court depending on parties and residence. See note to Emory v. Greenough, 1 L. ed. U. S. 640.

Colorable conveyances to enable suit to be brought, motive of transfer, when no objection. Coupons, residence of assignor. See note to McDonald v. Smalley, 7 L. ed. U. S. 287.

Citizenship of corporations and their stockholders. Voluntary association. Holders of bonds of corporations secured by mortgage. General answer waives objections to residence. See note to Hope Ins. Co. v. Boardman, 3 L. ed. U. S. 36.

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Power, of the County of Refugio and State of Texas, a certain James Hewetson, of the State of Coahuila, and Republic of Mexico, by his attorney in fact, James Power; and the said James Power, acting for and in behalf of the representatives of Duncan S. Walker, deceased, of the one part, and Thomas M. League, of the City of Galveston, and State of Texas aforesaid, of the other part, but really, and in law and fact, only by the said James Power, of the one part, and the plaintiff, of the other part; which said indenture purported to convey from James Power unto the plaintiff, his heirs and assigns forever, the said tracts and parcels of land described in the petition, and which the plaintiff seeks to recover in this action.

The said conveyance being made to the plaintiff in trust, for the following purposes: that the said League should commence all such suit, or suits, as might be necessary to settle the title to said lands, in the District Court, and should a decision be made adversely in said court, that he would prosecute a writ of error or appeal to the Supreme Court of the United States; and when the litigation was finally determined, the said League would convey two thirds of the land recovered, in which the title should be settled, to said Power and Hewetson, and the representatives of the said Walker, and their heirs and assigns; and until such conveyances were made, should hold said lands for the benefit of said parties; and the plaintiff agreed to pay one third of the expense of litigation, and the expense before that time incurred, which it was agreed amounted to $1,000.

And the defendants allege, that the said Power, at the time of the conveyance, and for years before and ever since, has been a citizen of Texas; and that the said plaintiff has resided in the State of Texas for twelve years, and is a citizen of that State. That before commencing suit he went to Maryland and other States, and remained absent about four months, and on his return brought this suit as a citizen of Maryland; and that the said conveyance was colorable, and was made to give jurisdiction to the courts of the United States.

Three other pleas were filed representing that 81*] the conveyance *was made by Power, a citizen of Texas, and who is the real plaintiff in the case, to give jurisdiction to the federal courts, and that League, is a nominal plaintiff.

The plaintiff admits, for the purposes of this cause, that the only legal title which he claims to have to the several tracts of land in his petition described, is that conveyed to him by James Power, of the State of Texas.

A demurrer was filed to the first plea and issues joined as to the others.

At an early period of this court, it was held in some of the circuit courts, that the averment of citizenship, to give jurisdiction, must be proved on the general issue. And as a consequence of this view, if at any stage of the cause it appeared that the plaintiff's averment of citizenship was not true, he failed in his suit. But it is now held, and has been so held for many years, that if the defendant disputes the allegation of citizenship in the declaration, he must plead the fact in abatement of the suit; and that this must be done in the order of pleading, as at common law.

In this case jurisdiction is claimed by the citizenship of the parties. The plaintiff avers that he is a citizen of Maryland, and that the defendants are citizens of Texas.

In one of the pleas it is averred that the plaintiff lived in Texas twelve years and upwards, and that for the purpose of bringing this suit he went to the State of Maryland, and was absent from Texas about four months.

The change of citizenship, even for the purpose of bringing a suit in the federal court, must be with the bona fide intention of becoming a citizen of the state to which the party removes. Nothing short of this can give him a right to sue in the federal courts, held in the state from whence he removed. If League was not a citizen of Maryland, his short absence in that State, without a bona fide intention of changing his citizenship, could give him no right to prosecute this suit.

But it very clearly appears from the deed of conveyance to the plaintiff, by Power, that it was only colorable, as the suit was to be prosecuted for the benefit of the grantor, and the one third of the lands to be received by the plaintiff was in consideration that he should pay one third of the costs, and superintend the prosecution of the suit. The owner of a tract of land may convey it, in order that the title may be tried in the federal courts, but the conveyance must be made bona fide, so that the prosecution of the suit shall not be for his benefit.

The judgment of the District Court is reversed, for want of jurisdiction in that court.

JOHN HOLROYD, Plaintiff in Error,

v.

LEVI PUMPHREY.

(See S. C. 18 How. 69-71.)

Sale of land for taxes—must be advertised as the property of the one to whom it was assessed—assessment, after death of party, will not invalidate.

A sale of land for taxes as the property of the "heirs of A," where the advertisement did not express the name of the person to whom it was assessed, and it did not appear that the taxes had been paid on the bid, nor that there was any deed to the purchaser, is inoperative.

The facts that the assessment was made to A after his death, and the advertisement of the property, as assessed to him, will not defeat a deed given on tax sale.

Argued Dec. 12, 1855. Decided Dec. 18, 1855.

IN ERROR to the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

The case is stated by the court.

Messrs. A. H. Lawrence and Henry Winter Davis for the plaintiff in error.

Messrs. J. M. Carlisle and Joseph H. Bradley, for the defendant:

NOTE.—Sale of land for taxes, strict compliance with statute necessary. See note to Williams v. Peyton, 4 L. ed. U. S. 518.

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The Corporation could not advertise and sell land for taxes in the name of a dead man.

Pleasance v. The State, 17 Ala. N. S. 190.

Every material prerequisite of the sale must be shown to have been fully complied with, or the sale is void.

Ronkendorff v. Taylor, 4 Pet. 359; Mason v. Fearson, 9 How. 260; Early v. Doe, 16 How. 617.

Mr. Justice Campbell delivered the opinion of the court:

This action was commenced by the plaintiff, 70*] to recover a lot *of land situate within the City of Washington, in possession of the defendant.

His title is derived from a sale by the city collector of taxes, in the year 1846, at which he was the purchaser; and to sustain it he produced, on the trial of the cause, evidence from the Corporation records that the lot had been assessed for taxes as the property of James Thomas, for the years 1844 and 1845; that the taxes for those years were not paid; that the lot had been advertised for sale twelve weeks in one of the city papers, and that he purchased and obtained a deed for the lot from the mayor.

It appeared in the evidence, that James Thomas, to whom the lot had been assessed, had died in 1842; and that the lot had been advertised for sale in 1844, by the collector of taxes, to raise the taxes of that year, as the property of "the heirs of James Thomas," and bid off, but it did not appear that the taxes had been paid on this bid, or that there was any deed to the purchaser, nor was there an assessment of the lots as the property of the heirs.

The Circuit Court gave the following instruction to the jury:

"If, from the whole evidence aforesaid, the jury shall find that the said lots in the said declaration mentioned were, up to the year 1844, assessed on the tax books, at the City of Washington, in the name of James Thomas; that the said James Thomas, to whom they were so assessed, in his lifetime held and claimed the same as his own; that he resided in the said City of Washington, and there died in Nov., 1842, and letters of administration on his personal estate were granted to his son by the Orphans' Court of Washington County, in Dec., 1842; that the said lots were, in December, 1844, advertised and sold by said Corporation for taxes due thereon, in the name of the 'heirs of James Thomas,' and afterwards were advertised and sold as stated in said plaintiff's evidence, then the plaintiff is not entitled to recover in this action."

Our opinion is, that the sale in 1844, as the property of the "heirs of James Thomas," was inoperative upon the title of the plaintiff. The advertisement did not express the name of the person to whom the lot was assessed on the books of the Corporation at the time of such assessment, as was required by the Act of Congress of the 26th May, 1824, amending the city charter (4 Stats. at L. 75, section 2); nor were the taxes due for that year collected by means of its sale; at most, it was an abortive effort to do so, which failing, left the lien of the Corporation on the lot for the assessed taxes, and its legal remedies to enforce it, unimpaired; nor will the fact of the assessment to James Thomas after his death, nor of the advertisement of the property as assessed to him, defeat the conveyance under the sale.

*The Act of Congress above referred to, [*71 provides for the case. It declares "that no sale of real property, for taxes hereafter made, shall be impaired or [made] void by reason of such property not being assessed or advertised in the name or names of the lawful owner or owners thereof, provided the same shall be advertised as above directed." We have seen that the Corporation was directed to advertise the name of the person to whom the lot appeared to be assessed on the books of the Corporation.

The judgment of the Circuit Court is reversed, and the cause remanded for a venire, etc.

JOHN G. GRAHAM, Plaintiff in Error,
v.
ALEXANDER BAYNE.

(See S. C. 18 How. 60–63.)

Cases in common law only, reviewed on writ of error and exceptions—practice—when bill of exceptions necessary—case stated—special verdict—good faith, question of fact—when special verdict is a mistrial—agreement of counsel.

This court, having separate jurisdiction in law and equity, can review cases in common law by writ of error only, and on bills of exception presenting questions of law.

Circuit courts may adopt the forms of pleading and practice of state courts, but no state legislation can be applied to the practice of this court, and the mode in which causes shall be brought into it for review.

In states governed by the common law, and where the circuit courts are not compelled to adopt every new mode of practice of the state courts, the strict rules of the common law should not be relaxed or changed.

Courts of the United States should not be hasty in adopting new codes of practice, which attempt to ingraft the civil law system of pleading and practice on the stalk of the common law.

Counsel may agree to submit both fact and law to the decision of this court, but they cannot by agreement introduce a new practice into this court, or compel it to adopt an Illinois practice Act as to the mode in which cases shall be reviewed in error.

The practice of this court is regulated by the common law and Acts of Congress only.

If the parties agree to submit the trial both of fact and law to the judge, they constitute him an arbitrator or referee.

But no consent can constitute this court appellate arbitrators.

When the error alleged does not appear on the face of the record, or on demurrer, a bill of exceptions to the ruling of the court on questions of law, either in admitting or rejecting testimony, or in instructions to the jury, constitutes the only mode of bringing a case before this court for review.

When there is no dispute as to the facts, counsel may agree upon a case stated in the nature of a special verdict; and the judgment of the court below on such case stated, or verdict, may be reviewed here on writ of error.

An agreement between counsel, that if it should be necessary to a hearing of the cause in this court to treat the evidence in the nature of a special verdict, may be good between themselves, but it cannot compel this court to search through the evidence to find out the facts.

The question of "good faith," under color of title, is one of fact, or of mixed fact and law, to be

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NOTE.—Jurisdiction. Judgment on agreed statement. See note to Stimpson v. Balt. etc. R. R. Co. 13 L. ed. U. S. 442.

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decided by the jury under instructions from the court. It is one necessary to be ascertained before the court can give judgment.

The case contains no finding or agreement as to this material fact.

Where there is a case stated, or special verdict, the Court of Error must not only reverse the judgment below, if erroneous, but enter a correct and final judgment.

If the special verdict be ambiguous or imperfect—if it find but the evidence of facts and not the facts themselves, or finds but part of the facts in issue, and is silent as to others—it is a mistrial, and the Court of Error must order a venire de novo. They can render no judgment on an imperfect verdict or case stated.

No agreement of counsel can substitute the evidence of facts, in place of facts, or require the opinion of the court on an imperfect statement of them.

A writ of error cannot in this way be converted into a chancery appeal, nor a court of error into appellate arbitrators.

Argued Dec. 7, 1855. Decided Dec. 21, 1855.

IN ERROR to the Circuit Court of the United States for the District of Illinois.

This was an action of ejectment, brought in the Circuit Court of the United States for the District of Illinois, by the defendant in error, for the recovery of a certain tract of land situated in that State. The case was tried, by agreement of the parties, by the court without a jury. The court having given judgment for the plaintiff, the defendant sued out this writ of error.

The case is further stated by the court.

Mr. Browning for the plaintiff in error.

Mr. A. Williams for the defendant in error.

61*] *Mr. Justice Grier delivered the opinion of the court:

This case was tried in the Circuit Court for the District of Illinois, without the intervention of a jury, and under the following agreement of counsel:

"Be it remembered, that upon the calling of this cause for trial, by the mutual agreement of the parties, and in accordance with the laws and practice of this State, a jury was waived, and both matters of law and fact were submitted to the court, upon the distinct understanding that the right of either party should be full and perfect to object to the admission of improper evidence, and to insist upon the admission of competent evidence, with the same principle of excepting to the rulings of the court in either case, as though the cause were tried by a jury; and with the right to either party to avail himself in the Supreme Court of any erroneous ruling in this court, precisely as though the cause had been submitted to a jury, and with liberty to either party, if it should be necessary to a hearing of this cause in the Supreme Court, to treat the evidence in this cause in the nature of a special verdict."

The common law has been adopted by Illinois, and all the States except Louisiana. In that State, the courts of the United States have been compelled to adopt the forms of pleading and practice peculiar to the civil law and the code. That system knows no distinction between law and equity. All cases are tried alike on petition and answer, with or without the intervention of a jury, as the parties may elect.

This court having separate jurisdiction, both in equity and law, is compelled to distinguish. They can review cases in common law by writ of error only, and on bills of exception presenting questions of law. The circuit courts may adopt the forms of pleading and practice of the state courts, but no state legislation can be applied to the practice of this court, and the mode in which causes shall be brought into it for review.

The very numerous cases on this subject (from Field v. United States, 9 Pet. 182; to Arthurs v. Hart, 17 How. 6), show the difficulties we have had to encounter in reconciling our modes of review to the Civil Code of Practice as used in the courts of Louisiana.

But in the States governed by the common law, and where the circuit courts are not compelled to adopt every new code of practice invented for the benefit of the state courts, there is no reason why the strict rules of the common law should be in anywise relaxed or changed in this court, to suit the anomalies in practice thus introduced in the circuit courts. That the courts of the United States should not be hasty in adopting new codes of practice, which attempt to ingraft the civil law system of pleading *and practice on the stalk [*62 of the common law, the cases of Bennett v. Butterworth, 11 How. 669, and Randon v. Toby, 11 How. 493, most amply demonstrate.

The 11th section of the Practice Act of Illinois (March 3, 1845) permits matters both of fact and law to be tried by the court, if both parties agree.

Counsel may agree, as in this case, to submit both fact and law to the decision of the court; but they cannot, by agreement, introduce a new practice into this court, or compel us to adopt the provisions of the 22d section of the same Act, as to the mode in which such cases shall be reviewed in error. The practice of this court is regulated by the common law and Acts of Congress only.

See Bayard v. Lombard, 9 How. 530.

If the parties agree to submit the trial both of fact and law to the judge, they constitute him an arbitrator, or referee, whose award must be final and conclusive between them; but no consent can constitute this court appellate arbitrators. When the error alleged does not appear on the face of the record, or on a demurrer, a bill of exceptions to the ruling of the court on questions of law, either in admitting or rejecting testimony, or in their instructions to the jury, constitutes the only mode of bringing a case before this court for review.

It is true, that when there is no dispute as to the facts, counsel may agree on a case stated in the nature of a special verdict; and the judgment of the court below on such case stated, or verdict, may be reviewed here on a writ of error.

See Stimpson v. Balt. & O. R. R. Co. 10 How. 329.

The counsel in this case have agreed that "if it should be necessary to a hearing of this cause in the Supreme Court, to treat the evidence in the nature of a special verdict," this agreement may be good as between themselves, and point out the source from which the facts for a case stated, or special verdict, may be drawn, but it cannot compel this court to search through the evidence to find out the

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facts. The record exhibits the testimony and evidence laid before the judge. It is evidence of facts, but not the facts themselves as agreed or found. The court below decided that a certain deed given in evidence did not show sufficient "color of title" under the Limitation Law of Illinois. The Act referred to requires not only "color of title," but a possession taken and held "in good faith," with payment of taxes. The question of "good faith" is one of fact, or of mixed fact and law, to be decided by the jury under proper instructions from the court. It is one necessary to be ascertained before the court can give a judgment.

Even if we should consent to review this loose statement of evidence as a case stated, 63*] it contains no finding or agreement *whatever, as to this material fact. Where there is a case stated, or special verdict, the court of error must not only reverse the judgment below, if found erroneous, but enter a correct and final judgment.

If a special verdict be ambiguous, or imperfect—if it find but the evidence of facts, and not the facts themselves, or finds but part of the facts in issue, and is silent as to others, it is a mistrial, and the court of error must order a venire de novo. They can render no judgment on an imperfect verdict, or case stated.

See Prentice v. Zane, 8 How. 484.

No mere agreement of counsel can substitute evidence of facts in place of facts, or require the opinion of this court on an imperfect statement of them. A writ of error cannot by these methods be converted into a chancery appeal, nor a court of error into appellate arbitrators.

The judgment of the Circuit Court is, therefore, reversed, and a venire de novo awarded.

NEHEMIAH CARRINGTON, Libelant and Appellant,

v.

THE BRIG ANN C. PRATT, Leonard B. Pratt, Claimant.

(See S. C. 18 How. 63–69.)

Bottomry bond for fictitious items, void—even for amount advanced—general lien not good.

Where bottomry bond is taken for items which are fictitious, which are inserted in the bond with intent to defraud third persons, the entire security is tainted with the fraud and it cannot be enforced by a particeps criminis for the amount actually advanced.

The lender cannot, in such case, resort to the general or implied maritime lien for repairs or advances, in a foreign port.

Such lien may be waived by express contract, or necessary implication. It is waived by a bond entered into in bad faith or with intent to defraud on the part of the lenders, although such bond is void for that reason.

Argued Dec. 7, 1855. Decided Dec. 21, 1855.

APPEAL from the Circuit Court of the United States for the District of Maine.

The case is stated by the court.

Mr. James S. Rowe, for the appellant:

The bottomry bond is not void in toto, but valid to the extent of the actual advances and interest.

The Augusta, 1 Dodson, 689; The Virgin, 8 Pet. 228; The Aurora, 1 Wheat. 107.

The fraud, even if Carrington be particeps criminis, was not such as to render the bond void in toto.

Lane v. Page, Amb. 235; The Gratitudine, 3 C. Rob. 240.

If the bond is invalid in toto now, it was void ab initio, not voidable merely, and the rights of the parties are the same as if the instrument had not been drafted.

Phillips v. Cockayne, 3 Campb. 119; Johnson v. Johnson, 11 Mass. 359; Thurston v. Percival, 1 Pick. 415; Ramsdell v. Soul, 12 Pick. 126.

The libelant had a lien upon the brig for his advances at the date of the bond.

Abb. Ship. part 2d, star paging, 142, 151; The Virgin, 8 Pet. 538; The Hunter, Ware, 249.

The lien has never been extinguished or waived.

Peyroux v. Howard, 7 Pet. 324; Brown v. Gilman, 4 Pet. 255.

Nor was it lost by the subsequent fraud.

Mr. W. P. Fessenden, for appellees:

1. This was peculiarly a contract of bottomry, having all its characteristics and incidents.

Kent's Com. 7th ed. 3, 429, 430; The Fortitude, 3 Sumn. 228; The Wave, 4 Law & Eq. 580.

The draft and agreement do not affect its character.

Kent, 3, 423, 424; The Hunter, Ware, 249; The Nelson, 1 Hagg. 169.

2. Being perfected and in due form, it forms an express lien upon the vessel. Bottomry is a lien of the strictest kind. Only seamen's wages have precedence of it.

The Dawthorpe, 2 W. Rob. 1; Eng. Ad. Rep. p. 79.

Having stipulated for and obtained an express lien of the highest character as by bottomry, the material man or lender necessarily loses or waives the implied or tacit hypothecation.

The common law maxim applies expressum facit cessare tacitum.

The Nestor, 1 Sumn. 1, 78 83–86; Abb. Ship. from Mulloy, 198; The Nelson, before cited; The Tartar, 1 Hagg.

Maritime, like common law liens, are lost by acts inconsistent with the liens; by taking other securities and the like.

Ramsey v. Allegre, 12 Wheat, 611; The William Money, 2 Hagg. 136; The Betsey and Rhoda, Davies, 112; Paul v. Hayford, 22 Me. 234; Story on Bail. sec. 360; Swett v. Brown, 5 Mass. 180; Buck v. Ingersoll, 11 Met. 226; Libby v. Cushman, 29 Me. 432.

3. The libelant having selected his security, must rely upon that alone, so far as the lien is concerned. And this security is lost by its fraudulent character.

The Tartar, 1 Hagg. 14; The Nelson, 1 Hagg. 176; The Sidney Cove, 2 Dodge, 1; Bouvier's Law Dic. tit. Fraud; Willis v. Baldwin, Doug. 450; Smith v. Bromley, Doug. 696; Alsager v. Spaulding, 4 Bing. N. C. 407; Smith v. Hubbs, 10 Me. 70; The Ann C. Pratt, Curtis, 345; Lowry v. Pierson, 2 Bailey, 324.

A court of equity will not aid a party to en-

NOTE.—Bottomry and respondentia bonds and loans. See note to Blaine v. The Charles Carter, 2 L. ed. U. S. 636; and note to Conard v. Atlantic Ins. Co. 7 L. ed. U. S. 189.

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force such a contract, or to escape from the consequences.

1 Story's Eq. sec. 59, cases cited in note to 2 Story's Eq. sec. 697.

This is equally true in the admiralty. Courts of admiralty act as courts of equity.

Brown v. Lull, 2 Sumn. 449; The Betsey and Rhoda, Davies, 110.

The fraud attempted in this case, if intended for the underwriters only, was upon a party directly interested,—and for whom the master was agent in the state of facts then existing.

Bryant v. Com. Ins. Co. 6 Pick. 131; Douglas v. Moody, 9 Mass. 548.

4. The contract being void for fraud, cannot be sustained for any part. The Hunter, Ware, 249, stands alone opposed to legal principles, and that was not a case of fraud. The libelant cannot resort to the lien he might have had, but for the bond.

The Ann C. Pratt, and cases cited, Curtis, p. 352.

5. The insurance company had a right to intervene.

The Mary Ann, Ware, 104.

6. Whether they could intervene or not, if the bond is void, the libel must be dismissed, and the proceeds in the admiralty left for those who have the right to claim them.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal in admiralty from a decree of the Circuit Court of the United States for the District of Maine.

The original libel, filed by Carrington in the District Court against the brig, was founded upon a bottomry bond executed by Airey, the mate and acting master, at the Island of St. Thomas, by which the vessel was hypothecated to the libelant for the payment of the sum of $4,591.42, advanced by him for her necessary repairs and supplies, she having arrived at that port in a disabled condition, together with ten per cent, maritime interest, the whole sum amounting to $5,050.56.

The defense set up to the libel, so far as it is material to be noticed, was, that the bond had been executed for a much larger sum than was loaned, and was received by the lender knowing the same, and in fraud of the rights of the parties interested.

Upon the coming of the proofs, it appeared that the sum really advanced to the acting 66*] master was but $3,877.25, it *being $714.-17 less than the amount for which the bond was given.

The proofs further showed that two sets of accounts and vouchers were made out by the clerk of the libelant, the one corresponding with the truth of the case, the other with the fictitious amount of the bottomry bond; both of which sets were forwarded to the father of the captain of the brig, with letters of advice, both from the lender and Airey, the mate, informing him that the bond was given for the larger sum, and the false accounts and vouchers sent, to enable the owner to make a claim for the same against the underwriters upon the vessels. Captain Pratt, the master of the brig, was on shore with the ship's papers, at St. Michael, when the storm occurred that disabled the vessel, and became separated from her, when Airey, the mate, took the command and proceeded to St. Thomas. By an arrangement between Airey and the libelant, it was agreed that the former should draw a bill in favor of the latter, upon the father of Captain Pratt, for the actual sum advanced, and, if paid at maturity (thirty days' sight), the maritime interest of ten per cent. would be relinquished. This accounts for the communication of the parties with the father on the subject, instead of with Captain Pratt himself.

The District Court, after allowing an amendment of the libel at the sitting, setting up a claim upon the vessel for the true sum advanced, with the maritime interest, held that a lien existed upon the brig in favor of the libelant, for this amount, by operation of the general admiralty law, and decreed accordingly.

The claimant appealed to the Circuit Court; that court reversed the decree below and dismissed the libel, concurring with the District Judge that the bottomry bond was fraudulent and void, and could not be admitted as the foundation of a decree in favor of the libelant, for any amount; but differed with him upon the other question in the case, and held that the contract between Airey and the lender, for security by bottomry, and fulfillment of that agreement by the execution of the bond, were acts wholly inconsistent with the idea of a general or implied maritime lien on the vessel, and that none therefore existed.

Upon full consideration, we all agree that the Circuit Court is right, and should be affirmed.

As it respects the right to a recovery upon a bottomry bond, the libelant is met by the defense resting upon the familiar principle that a court administering justice upon principles of equity will not lend its aid to enforce the fulfillment of a contract in favor of a party to it, which is founded in fraud. 2 Story's Eq. sec. 298, and cases. In such cases, the court leaves both parties where the law finds them, giving no relief or countenance to *claims of this [*67 description. Here, the underwriters, who were sought to be defrauded by the use of the fictitious accounts and vouchers, were directly interested in the transaction, as the fair expenses of the repairs of the brig fell within one of the perils insured against. Any contrivance, therefore, to exaggerate them, or by which evidence could be furnished to enable the owner to recover on his policy a greater amount than actually advanced, was dishonest and fraudulent, and can receive no countenance in a court of justice.

It is insisted, however, that the security should be held valid for the amount actually advanced, conceding it to be void for the excess. It is true that a bottomry bond may be good in part and bad in part, and may be upheld even in cases when taken for a sum in the aggregate larger than that which properly constitutes a lien upon the vessel within this species of security. There are many cases to this effect. Abbott, 126, n.; 1 Wheat. 107; 8 Pet. 228. These are cases, however, in which the items rejected were not properly chargeable on the ship, or were embraced within the bond from inadvertence or mistake, and entirely consistent with the good faith of the parties in the transaction. They stand upon widely different principles from those where the objectionable items

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are fictitious, and inserted in the bond with the intent to defraud third persons. The entire security in such cases becomes tainted with the fraud, and a particeps criminis is not allowed to come into court to enforce it, even for the money advanced or expended; for to permit it would afford countenance to the fraud by giving partial effect to it.

By holding the security valid to the extent of the loan, rejecting the excess, the guilty party would risk nothing; for, when detected in the fraud, he would still be enabled to reimburse himself for the amount really due. We have seen that the rule of equity—and which is the rule of admiralty in such cases—refuses to interfere for relief, and leaves the parties where the law finds them.

Assuming, then, the bond to be void, as an hypothecation for the money advanced, and therefore not available to charge the vessel, can the lender resort to the general or implied maritime lien that it is claimed attaches in cases of repairs or advances in the foreign port, in the absence of any special agreement to the contrary?

We think not. The contract of hypothecation, by bottomry, under which the money was loaned, is different from that implied by the general admiralty law. In the one case, the money advanced is payable only in the event of the safe arrival of the vessel at the port of destination, the lender taking the responsibility of the sea risk, and entitled to charge extraordi- 68*] nary interest. *According to the terms of the bond in this case, Carrington & Company, the lenders, agreed to stand to and bear the hazard and adventure thereof, on the hull or body of the said brig, during her voyage," and the condition is, "to pay or cause to be paid at the expiration of five days after first arrival of said brig," etc.; but, "if, during the said voyage, an utter loss of said brig by fire, enemies or other casualty, shall unavoidably happen, etc., then this obligation to be void;" and in the case of hypothecation the owner is not personally liable for the advance or repairs. In the other—the case of an implied lien—the obligation to pay the money is absolute; and to secure the payment, the vessel, the credit of the owner and of the master himself, are pledged.

Now, it is well settled that the lien implied by the general admiralty law may be waived by the express contract of the parties, or by necessary implication; and the implication arises in all cases where the express contract is inconsistent with an intention to rely upon the lien. A familiar instance is where the money is advanced or repairs made, looking solely to the personal responsibility of the owner or master. Abbot, 125, n.; Ib. 116, n., Story's ed. 1829. In that case, no credit being given to the vessel as a security, the implied lien is necessarily displaced.

It is true, in this case credit was given to the vessel by the lenders, and a lien thus provided for; but it was one altogether different from that implied by the admiralty law, and inconsistent with an intention to look to that as a security for the loan, as much so as if he had agreed to look solely to the personal responsibility of the owners.

It is insisted, *however, assuming the bond to* be void and inoperative, that the lender is then remitted to his implied lien, the same as if no bond had been given. How this might be in a case where the instrument was defective and void, for want of authority to execute it, or for any other cause consistent with the good faith of the parties, it is not now necessary to inquire, or express any opinion. But we think it clear that no such principle can be admitted in a case where the bond has been avoided on the ground that it was entered into in bad faith, and with intent to defraud, on the part of the lenders. Any other conclusion would be giving to a party the benefit of his own turpitude, which the law forbids.

The admiralty law treats this species of security with a good deal of indulgence, and properly so, as the advances to the master at the foreign port, by the merchant, is oftentimes essential, to enable the vessel to earn her freight, and is for the general interest of commerce. The advance is made also frequently at great *risk, on the part of the lender, he [*69 being a stranger to the owner and master, and must look, from necessity, mainly to the pledge of the vessel for his security. The court, therefore, leans in favor of upholding these hypothecations, disregarding technical objections and nice distinctions, which sometimes invalidate instruments at common law; but they are the creatures of necessity and distress, and are entered into in the absence of the owner, who has no opportunity to guard his interests; and the transactions, therefore, out of which they arise should be strictly watched, and the observance of the utmost good faith exacted from all the parties concerned.

It has been recently held, in the Court of Exchequer in England, that the master can pledge the ship for repairs, or loan of money for that purpose, in the foreign port, only by bottomry security; and that in the absence of this, the merchant must look to the personal responsibility of the owner or master.

73 Eng. Com. Law R. 417, Shepherd v. Ambler & Stainbank.

As this question does not necessarily arise in this case, it is not important to inquire as to the rule of the admiralty in this country in this respect.

Judgment of the court below affirmed.

Aff'g—1 Curt. 340.

ISAAC R. SMITH, Owner of the Sloop Volant,

v.

THE STATE OF MARYLAND.

(See S. C. 18 How. 71-76.)

State law forbidding taking oysters with scoop, constitutional—vessel, with U. S. license, may be forfeited under such law—land below high water mark, owned by state—state may preserve public right of fishery.

A law of a state, that it shall be unlawful to take oysters in any of the waters of the state with a scoop or drag, or any other instrument than tongs or rakes, and forfeiting to the state the vessel employed for such unlawful purpose, is not repugnant to the Constitution of the United States.

NOTE.—Title to land between high and low water marks—see note, 45 L.R.A. 227. Governmental control over right of fishery—see note, 39 L.R.A. 581.

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It is within the legislative power of the state to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of such law.

Whatever soil below high water mark is the subject of exclusive ownership, belongs to the state on whose borders, or within whose territory, it lies.

But this soil is held by the state subject to and in trust for the enjoyment of the public right of fishery. The state may forbid all such acts as would render the public right less valuable, or destroy it.

Argued Dec. 13, 1855. Decided Dec. 21, 1855.

IN ERROR to the Circuit Court of the Second Judicial Circuit of the State of Maryland, in and for Anne Arundel County.

The case is stated by the court.

Messrs. **John H. B. La Trobe** and **George T. Campbell**, for plaintiff in error:

The Oyster Laws of Maryland are unconstitutional.

8th sec. 1st art. Const. U. S.; 2d sec. 3d art. Const. U. S.

The taking of oysters out of the season with destructive instruments is an offense punishable in admiralty as a misdemeanor.

2 Brown, C. and A. Laws, 375.

The laws contain no provision for an oath before issuing warrant.

They are repugnant to the 2d sec. art. 4, Const. U. S.

Mr. **J. Mason Campbell**, for defendant in error:

In support of the State's position, its counsel will insist that the soil of the Chesapeake Bay is vested in the State of Maryland, as the successor of the lord proprietary, and that the object and effect of the law assailed, is to protect the oysters while fixed in such soil, and for which it alone has title to them before they become articles of commerce; and that the protection thus extended must not obstruct the free use of the waters of Maryland for commerce or navigation.

Brown v. Kennedy, 5 H. & J. 105; Casey v. Inloes, 1 Gill. 512; Corfield v. Coryell, 4 Wash. C. C. 371; Bennett v. Boggs, Bald. 72; Marlin v. Waddell, 16 Pet. 367; 3 Kent. Com. 439.

2. The State will further contend that the offenses punished by the laws in question are not within the admiralty and maritime jurisdiction of the United States.

Corfield v. Coryell above cited; U. S. v. Bevans, 3 Wheat. 386; 2 Brown, Civ. and Adm. Law Ap. 420.

Mr. Justice **Curtis** delivered the opinion of the court:

This is a writ of error to the Circuit Court for Anne Arundel County, in the State of Maryland, under the 25th section of the Judiciary Act of 1789. It appears by the record that the plaintiff in error, being a citizen of the State of Pennsylvania, was the owner of a sloop called the Volant, which was regularly enrolled at the port of Philadelphia, and licensed to be employed in the coasting trade and fisheries; that in March, 1853, the schooner was seized by the sheriff of Anne Arundel County, while engaged in dredging for oysters in the Chesapeake Bay, and was condemned to 73*]be forfeited to the State of Maryland, *by a justice of the peace of that State, before whom the proceeding was had; that on appeal to the Circuit Court for the county, being the highest court in which a decision could be had, this decree of forfeiture was affirmed; and that the plaintiff in error insisted, in the Circuit Court, that such seizure and condemnation were repugnant to the Constitution of the United States.

This vessel being enrolled and licensed, under the Constitution and laws of the United States, to be employed in the coasting trade and fisheries, and while so employed having been seized and condemned under a law of a state, the owner has a right to the decision of this court upon the question, whether the law of the State, by virtue of which condemnation passed, was repugnant to the Constitution or laws of the United States.

That part of the law in question containing the prohibition and inflicting the penalty which appears to have been applied by the State Court to this case, is as follows (1833, ch. 254):

"An Act to Prevent the Destruction of Oysters in the Waters of this State.

Whereas, the destruction of oysters in the waters of this State is seriously apprehended, from the destructive instrument used in taking them, therefore—

Sec. 1. Be it enacted by the General Assembly of Maryland, That it shall be unlawful to take or catch oysters in any of the waters of this State with a scoop or drag, or any other instrument than such tongs and rakes as are now in use, and authorized by law; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel employed for the purpose, together with her papers, furniture, tackle and apparel, and all things on board the same."

The question is whether this law of the State afforded valid cause for seizing a licensed and enrolled vessel of the United States, and interrupting its voyage, and pronouncing for its forfeiture. To have this effect, we must find that the State of Maryland had power to enact this law.

The purpose of the law is, to protect the growth of oysters in the waters of the State, by prohibiting the use of particular instruments in dredging for them. No question was made in the court below whether the place in question be within the territory of the State. The law is, in terms, limited to the waters of the State. If the County Court extended the operation of the law beyond those waters, that was a distinct and substantive ground of exception, to be specifically taken and presented on the record, accompanied by all the necessary facts to enable this court to determine whether a voyage of a vessel, *licensed and en- [*74 rolled for the coasting trade, had been interrupted by force of a law of a state while on the high seas, and out of the territorial jurisdiction of such state.

To present to this court such a question upon a writ of error to a state court, it is not enough that it might have been made in the court below; it must appear by the record that it was made, and decided against the plaintiff in error.

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As we do not find from the record that any question of this kind was raised, we must consider that the acts in question were done, and the seizure made, within the waters of the State; and that the law, if valid, was not misapplied by the County Court by extending its operation, contrary to its terms, to waters without the limits of the State. What we have to consider under this writ of error is, whether the law itself, as above recited, be repugnant to the Constitution or laws of the United States.

It was argued that it is repugnant to that clause of the Constitution which confers on Congress power to regulate commerce, because it authorizes the seizure, detention and forfeiture of a vessel enrolled and licensed for the coasting trade, under the laws of the United States, while engaged in that trade.

But such enrollment and license confer no immunity from the operation of valid laws of a state. If a vessel of the United States, engaged in commerce between two states, be interrupted therein by a law of a state, the question arises whether the state had power to make the law by force of which the voyage was interrupted. This question must be decided, in each case, upon its own facts. If it be found, as in Gibbons v. Ogden, 9 Wheat. 1, that the state had not power to make the law, under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention is unlawful, and the proceedings under the law invalid. But a state may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws.

In considering whether this law of Maryland belongs to one or the other of these classes of laws, there are certain established principles to be kept in view, which we deem decisive.

Whatever soil below low water mark is the subject of exclusive propriety and ownership, belongs to the state on whose maritime border, and within whose territory, it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence.

Pollard's Lessee v. Hagan, 3 How. 212; Martin v. Waddell, 16 Pet. 367; Den v. The Jersey Co. 15 How. 426.

But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, 75*] *among which is the common liberty of taking fish, as well shell fish as floating fish.

Martin v. Waddell; Den v. Jersey Co.; Corfield v. Coryell, 4 Wash. C. C. 376; Fleet v. Hegemen, 14 Wend. 42; Arnold v. Mundy, 1 Halst. (N. J.), 1; Parker v. Cutler, Mill-dam Corporation, 2 Appleton (20 Me.), 353; Peck v. Lockwood, 5 Day, 22; Weston et al. v. Sampson et al. 8 Cush. 347.

The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held.

Vattel, bk. 1, ch. 20, sec. 246; Cornfield v. Correll, 4 Wash. 376.

It has been exercised by many of the States. See Angell on Tide Waters, 145, 156, 170, 192, 193.

The law now in question is of this character. Its avowed, and unquestionably its real object is, to prevent the destruction of oysters within the waters of the State, by the use of particular instruments in taking them. It does not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong, and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the State of Maryland, or may lawfully be enjoyed in common by all citizens of the United States; whether this public use may be restricted by the State to its own citizens, or a part of them, or by force of the Constitution of the United States, must remain common to all citizens of the United States; whether the national government, by a Treaty or Act of Congress, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the State holds this soil, or its power to define or control that trust, are matters wholly without the scope of this case, and upon which we give no opinion.

So much of this law as is above cited may be correctly said to be not in conflict with, but in furtherance of, any and all public rights of taking oysters, whatever they may be; and it is the judgment of the court, that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law. To inflict a forfeiture of a vessel on account of the misconduct of those on board—treating the thing as liable to forfeiture, because the instrument of the offense is within established principles of legislation, which have been applied *by most civilized governments. The [*76 Malek Adhel, 2 How. 233, 234, and cases there cited. Our opinion is, that so much of this law as appears by the record to have been applied to this case by the court below is not repugnant to the clause in the Constitution of the United States which confers on Congress power to regulate commerce.

It was also suggested that it is repugnant to the 2d section of the 3d article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court, in United States v. Bevans, 3 Wheat. 386, that this clause in the Constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the Constitution. The objection that the law in question contains no provision for an oath on which to

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found the warrant of arrest of the vessel, cannot be here maintained. So far as it rests on the Constitution of the State, the objection is not examinable here, under the 25th section of the Judiciary Act. If rested on that clause in the Constitution of the United States which prohibits the issuing of a warrant, but on probable cause supported by oath, the answer is, that this restrains the issue of warrants only under the laws of the United States, and has no application to state process.

Barron v. Mayor, etc., of Baltimore, 7 Pet. 243; Lessee of Livingston v. Moore et al. 7 Pet. 469; Fox v. Ohio, 5 How. 410.

The judgment of the Circuit Court of Maryland in and for Anne Arundel County is affirmed, with costs.

SAMUEL VERDEN, Plff. in Er.,
v.
ISAAC COLEMAN.

(See S. C. 18 How. 86.)

Decree dissolving injunction, not a "final decree."

A decree upon motion to dissolve injunction in chancery cause, which does not finally dispose of the action, is not a final decree, which can be re-examined in this court, under the Judiciary Act.

Argued Dec. 14, 1855. Decided Dec. 21, 1855.

IN ERROR to the Supreme Court of the State of Indiana.

The case is sufficiently stated in the opinion of the court.

Messrs. Gillet and Mace for plaintiff in error.

Mr. Baird for defendant in error.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiff filed his bill in the Circuit Court of Benton County, Indiana, sitting in chancery, to obtain a decree to cancel a mortgage and the mortgage note, and also to restrain, by injunction, the mortgagee from proceeding upon the power of sale contained in the mortgage until the final hearing, and from thence perpetually.

A temporary injunction was granted in vacation upon the usual conditions, which was dissolved, on the coming in of the answers upon the motion of the defendants, by the Circuit Court.

From the order dissolving the injunction there was an appeal to the Supreme Court of Indiana, where, after argument, the decree of the Circuit Court was affirmed. Upon this decree this writ of error is prosecuted.

This court has repeatedly decided that a decree upon a motion to dissolve an injunction in the course of a chancery cause, and where the bill is not finally disposed of, is not such a final decree as can be re-examined in this court, under the terms of the 25th section of the Judiciary Act of the 24th September, 1789.

McCallum v. Eager, 2 How. 61; Gibbons v. Ogden, 6 Wheat. 448.

The writ of error is dismissed.

NOTE.—What is "final decree" or judgment of state or other court from which appeal lies—see *notes, 5 L. ed. U. S. 302; 49 L. ed. U. S. 1001.*

ISAAC HARTSHORN, Plff. in Er.,
v.
HORACE H. DAY.

(See S. C., 18 How., 28, 29.)

Practice on filing record.

Where the record is filed by defendant in error, and subsequently, but within the time prescribed by the rule, the plaintiff in error files the record, the cause is filed and docketed prematurely by defendant in error, and should be dismissed.

Cause stricken from the docket, and the record delivered defendant in error.

Motion made and decided Jan. 2, 1856.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

It appears that the record in this case was filed and docketed at the instance of the defendant in error on November 24th, 1855. It also appears that the plaintiff in error filed the record and docketed the case on December 1st, 1855, within the period allowed by the 63d rule.

On motion by defendant to withdraw record.

Messrs. Bradley, Ames and O'Conner for plaintiff in error.

Messrs. Richardson, Jenckes, Stanton and Gillet for defendant in error.

Mr. Justice McLean delivered the opinion of the court:

In the above case, a motion was made by the defendant that he be permitted to withdraw the record filed and docketed by him, and have it printed at his own expense, without losing its place on the docket.

Rule 63, published in 16 How. requires that, when an appeal on writ of error shall be taken to this court thirty days before the commencement of the ensuing term, the record shall be filed within the first six days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate of the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed.

But the rule states, the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court; and if the case is docketed and a copy of the record filed with the clerk of this court, by either party, within the periods of time above limited and prescribed by this rule, the case shall stand for argument at the term.

The above case was docketed in this court, by the defendant in error, before the expiration of the time allowed the plaintiff to file the record.

The plaintiff in error filed the record and had the case docketed before the expiration of the six days after the commencement of the term; he was therefore within the rule, and was guilty of no laches. Had he failed to do this, the defendant, on the certificate of the clerk, might have docketed and dismissed the cause, or he might have produced the record and docketed the case which, under the rule, would stand for argument at the present term. But the case cannot be dismissed or docketed by the defendant unless the plaintiff in error or appellant shall be in default.

The above cause is therefore dismissed.

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DAVID BUSH, Plaintiff in Error,
v.
JAMES T. PERSON, Administrator de bonis non, of Maborn Cooper, Deceased.

(See S. C. 18 How. 82-86.)

Discharge in bankruptcy does not free from estoppels by covenant.

The personal discharge in bankruptcy of a covenantor does not free him from an estoppel arising by law from his prior covenant of warranty of title and against incumbrances in his deed.

If the covenantor of title of lands be afterwards discharged in bankruptcy, and subsequently acquires title by an incumbrance which his covenant warranted against, he is estopped, as against his covenantee, from asserting it, notwithstanding his discharge.

Argued Dec. 14, 1855. Decided Jan. 2, 1856.

IN ERROR to the High Court of Errors and Appeals to the State of Mississippi.

The case is stated by the court.

Mr. A. J. Bayard, for the plaintiff in error:

The covenant of warranty or against incumbrances comes within the meaning of the Act of Aug. 12, 1841, and is provable against the bankrupt's estate, though an uncertain contingent demand against the bankrupt. Secs. 4 and 5 of the Act cited.

Stat. at L. Vol. V. p. 440; 4 Kent's Com. 7th ed. 524, 531.

It is not necessary that a party should be in the position to sue on his demand, to enable him to prove it under the Act of Congress.

Mace v. Wells, 7 How. 272; Stone v. Miller, 4 Harr. 16 Pa. St. 450.

The effect of the discharge under the Bankrupt Act upon the lien of mortgage and upon the personal covenants contained in the mortgage, should be distinguished.

Ex parte Christy, 3 How. 292.

Mr. J. J. Crittenden, for the defendant in error:

The covenants expressed and implied in the deed of trust run with the land, and they were not discharged by the bankruptcy.

4 Kent's Com. 471; Greenby v. Wilcox, 2 Johns. 1; Kerr v. Shaw, 13 Johns. 236; Withy v. Mumford, 5 Cow. 137; Birney v. Hann, 3 A. K. Marsh. 324; Marston v. Hobbs, 2 Mass. 432; Chapman v. Holmes, 5 Halst. 20.

These covenants draw to them all right and title that the grantor may afterwards acquire, and they are not discharged by bankruptcy.

1 Sug. Vend. 171; 2 Sug. Vend. 104 and cases cited; Murray v. Derotenham, 6 Johns. Ch. 60; Shep. Touch. 181; Co. Litt. 265, A.

The purchase by the plaintiff in error inured to the confirmation of the deed of trust. Even if that was not a legal consequence, equity would not permit him to set up such a purchase against his own deed of trust.

1 Story Eq. secs. 187, 323.

Mr. Justice Curtis delivered the opinion of the court:

A bill to foreclose a mortgage on a lot of land in Mississippi was filed by the administrator of the assignee of the mortgage in the Superior Court of Chancery in that State. The complainant obtained a decree of foreclosure, and the respondent appealed to the High Court of Errors and Appeals, where the decree of the Superior Court of Chancery was affirmed. The appellant then prosecuted the writ of error, which brings the case before this court.

The case was, shortly, this: The appellant was one of two mortgagors. When the mortgage was executed, the land was incumbered by a lien from a judgment previously recovered against the mortgagors.

After executing the mortgage the appellant became a bankrupt, under the Act of Congress of August 19, 1841 (5 Stat. at L. 440), and received his discharge.

The land was exposed to sale to satisfy the judgment lien, and the appellant, after his *discharge, purchased it. The Court of [*83 Appeals of Mississippi decided:

1st. That though the deed of mortgage contained no express covenant of warranty, the words "grant, bargain and sell," which were in the deed, under the law of that State, imported covenants of warranty of title, and against incumbrances, and for quiet enjoyment, as effectually as though such covenants had been expressly set out in the deed.

2d. That, under the law of Mississippi, if there had been no discharge in bankruptcy, the appellant would be estopped by his covenants from setting up his after acquired title to defeat the mortgage.

3d. That the discharge in bankruptcy did not enable him to do so.

This last position is the only one re-examinable here; the decision by the State Court of all matters depending exclusively upon the law of the State, being conclusive, on a writ of error, under the 25th section of the Judiciary Act of 1879.

The question for our consideration is, what effect the discharge of a bankrupt has upon estoppels, arising by law from covenants of warranty contained in his deeds of conveyance of land.

To determine this, it is necessary to have in view the different modes of operation of such covenants. They are contracts, and an action lies for recovery of the damages sustained by their breach. At law, they run with the land; and if the covenantor subsequently acquire an outstanding paramount title, it inures by force of the covenant to him who claims under the deed of the covenantor. This rule is now established in the law of this country, and has been affirmed in numerous decisions in this and other courts. Many of them may be found collected in a note to 2 Smith's Leading Cases, 545, etc.

In equity the covenantor is treated as estopped by his covenant to assert that any outstanding title existed inconsistent with what he undertook to sell and convey.

The argument on the part of the appellant is, that under the 4th section of the Bankrupt Act he was discharged from all debts, contracts, and other engagements provable under the Act; that not only the debt secured by this mortgage, but the covenant of warranty itself, was provable under the Act. And consequently, the covenantor, being released from the covenant, it could no longer have the operation allowed to it by the courts of Mississippi.

It must be admitted, that if the covenantee or his assignee had released the covenant, it

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would be difficult to maintain that it could continue in existence for any purpose. But it must be considered, that whatever discharge has 84*] taken place in this case, *is by force of a statute, which may have so qualified and limited its effect as still to leave the covenant in existence for one purpose, though not for others; and that the question, whether it has done so, can be determined only by examining the Act and ascertaining the will of the Legislature in this particular.

The second section of the Act contains this proviso: "That nothing in this Act contained shall be construed to annul, destroy or impair any lawful rights of married women or minors, or any liens, mortgages or other securities on property, real or personal, which may be valid by the laws of the States respectively and which are not inconsistent with the provisions of the second and fifth sections of this Act." There does not appear to have been anything in this mortgage inconsistent with those sections; and it is not denied that the mortgage itself, considered simply as a conveyance of land, remained unaffected by the Act.

It is therefore obvious, that though the bankrupt, personally, was released by the Act, the debt due from the land continued undischarged. In this particular, beyond all doubt, the discharge by the Act differs from a release by the creditor; since, if the latter had released the debtor, the mortgage would thereby have been satisfied, and the charge on the land destroyed.

The intention of the Legislature to carry out this distinction between the personal liability of the debtor and the liability of the land, and to preserve the latter in full force, unaffected by the discharge of the debtor, is clearly declared by the Act. The Act says, in so many words, that a mortgage, valid by the law of the State, shall not be impaired by anything in the Act.

We think there is sufficient reason why this proviso should be so construed as completely to save the effect and operation of all estoppels running with the land and operating at law to pass the legal title, or in equity to conclude the grantor from asserting the existence of a title inconsistent with what he undertook to sell and convey. The purpose of the Legislature to afford complete and effectual protection to mortgage titles, against anything which was to be done under the Act, and the broad and strong terms in which this purpose is expressed, require us to say that the debtor cannot derive from the Act an enabling power to do or assert anything which will impair a mortgage otherwise valid. Nor is there any incongruity with established principles, in holding that the personal discharge of the debtor does not free him from the estoppel.

If this obligation could rest solely upon a covenant, effectual in law to charge the grantor in a personal action, it would follow, that when such personal liability was released by the Bankrupt Act, the estoppel would naturally fall 85*] with it; and that an *intention to preserve the estoppel ought to be clearly indicated, to induce the court to say that it was not destroyed; but such estoppels do not depend on personal liability for damages. This is apparent, when we remember that estoppels bind, not only parties, but privies in blood and estate, though not personally liable on the covenants creating the estoppel.

See Carver v. Jackson, 4 Pet. 85, 87; White v. Patten, 24 Pick. 324; Wark v. Willard, 13 N. H. 389; Baxter v. Bradbury, 20 Me. 26.

Indeed, it is the settled doctrine of this court, not only that no existing personal liability is necessary to work an estoppel, but that none need have existed at any time. In Van Rensselaer v. Kearney et al, 11 How. 322, it was held, after great consideration and a full examination of the authorities, that "if a deed bear on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties; then, although it may not contain any covenants of title, in the technical sense of the term, still the legal operation and effect of the instrument will be as binding on the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least so far as to estop them from ever afterwards denying that he was seised of the particular estate at the time of the conveyance.

It is familiar law, also, which was applied in Carver v. Jackson, 4 Pet. 86, 88, that a mere recital of a fact in a deed is as effectual an estoppel as a covenant. There is no necessary connection, therefore, between the personal liability of the debtor on his covenant, and the estoppel which arises therefrom, and it is not an incongruity for the Legislature to preserve the latter while they discharge the former.

Estoppels which run with the land and work thereon are not mere conclusions; they pass estates and constitute titles; they are muniments of title, assuring it to the purchaser. Their operation is highly beneficial, tending to produce security of titles; and if a discharge under the Bankrupt Law were allowed to destroy this mode of assurance, it would in an important particular impair the operation of deeds containing it. This, by the express words of the Bankrupt Law, is prohibited.

In Stewart v. Anderson, 10 Ala. 504, the Supreme Court of Alabama had this precise question before them, and held the bankrupt estopped. A similar decision was made by the Court of Appeals of Maryland in reference to the effect of a discharge under the Insolvent Law of that State.

Dorsey v. Gassaway, 2 H. & J. 411.

*Our opinion is, that the decree of the [*86 High Court of Errors and Appeals of Mississippi should be affirmed, with costs,

Decree affirmed, with costs.

THE UNITED STATES, Plffs. in Err.,
v.
CATESBY AP ROGER JONES.
(See S. C. 18 How. 92–100.)

Moneys sent by Secretary of Navy to pay expenses of sickness of absent naval officer, is not chargeable against him.

A navy officer, on leave of absence in Paris, was wounded by accident during the revolutionary outbreak there, and placed on special duty, and $1,000 was sent him by the Secretary of the Navy to pay

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his expenses attending his injuries, which was disbursed by him for that purpose. Held, that such sum could not be charged against him by the accounting officer of the Treasury.

The propriety of detaching such officer on special duty, of furnishing him with such moneys for medical attendance and expenses, are within the jurisdiction and discretion of the head of the Navy Department, and not subject to revision by officers of other departments.

Submitted Dec. 20, 1855. Decided Jan. 2, 1856.

IN ERROR to the Circuit Court of the United States for the District of Columbia.

The case is stated by the court.

Mr. C. Cushing, Atty.-Gen. for the plaintiff in error:

1. The expenses incurred by the defendant Jones, while in France, on leave of absence, were not chargeable to the United States. One object of the Act of March 3, 1835 (4 U. S. Laws, 755, 757), was to uproot the system of extra allowances. The exception allowing mileage, shows that no other exception was intended.

2. The Secretary of the Treasury was not authorized under the Act of Jan. 31, 1823 (3 U. S. Laws, 723, sec. 1), to make the advances to Jones.

3. The accounting officers are not bound to allow in a settlement of an account with an officer, a credit for money unlawfully received or expended without authority of the law. The resolution of March 3, 1849 (9 U. S. Laws, 419, sec. 2), does not apply to the present case. The opinions of the Atty.-Gen. cited by the opposing counsel are inapplicable to the case.

4. Money belonging to the government, which has been wrongfully received, can be recovered back in an action at law.

5. The President is not authorized to expend marine hospital money collected under the Act of July 16, 1789 (1 U. S. Laws, 605, 606), anywhere else than in the district in which it was collected.

Messrs. Carlisle and Jones, for the defendant in error:

The President had power to order this advance of money to the defendant.

Opinions of the Attys. Gen. Parkhurst case Vol. I. p. 679; Thorpe's case, Vol. I. p. 785; Parkhurst's case, Vol. I. p. 913; Lessel's case, Vol. II. p. 1998.

The order of the Secretary of the Navy was the order of the President.

U. S. v. Eliason, 16 Pet. 291.

The money sought to be recovered, having been paid with knowledge of all the facts, cannot be recovered back.

Bilbie v. Lumley, 2 East., 469; Donaldson v. Means, 4 Dall. 109; Stark. Ev. part 4, p. 112.

Mr. Justice Grier delivered the opinion of the court:

The action in this case is for money had and received by the defendant Jones. It was entered amicably, and submitted on a case stated.

The defendant is a lieutenant in the Navy of the United States. In December, 1851, he was in Paris, on leave of absence, and was severely and dangerously wounded by accident, during the émeute or revolutionary outbreak in that month. In July, 1852, he was placed by the Secretary of the Navy on special duty, for the collection of information relative to the steam navy of France. Afterwards in August, 1852, the sum of $1,000 was transmitted to him by the Secretary of the Navy, with orders to apply it "to discharge the expenses attending the injuries received by him in Paris." It is admitted that this money was disbursed according to the orders of the Secretary. The accounting officers of the Treasury have charged the amount so disbursed by the defendant against him on his pay account, "and have refused to recognize the authority of the Secretary of the Navy in the premises."

The reason alleged for this refusal by the accounting officer is, that by his construction of the second section of the Act of 3d of March, 1835, ch. 27, the Secretary of the Navy had no authority to make such appropriation of the funds of the government *in his hands. [*95 The Act, so far as it is material, is in these words: "That the yearly allowance provided in this Act is all the pay, compensation and allowance which shall be received under any circumstances whatever by any such officer, etc."

Notwithstanding an opinion of a late Attorney-General to the contrary, the accounting officer "entertains no doubt" that the expenses attending the medical treatment of a sick and disabled officer or seaman are among the "allowances" prohibited by this Act, and has consequently felt bound to repudiate the Secretary's construction of the law, and his opinion as to the powers and duties of his Department.

For the purposes of this case, however, it will not be necessary for the court to decide between these discordant opinions as to what things come within the category of "allowances," according to the true intent and meaning of the Act of Congress.

It is the peculiar province and duty of the Navy Department to provide medical stores and attendance for the officers and seamen attached to that service. It may truly be said, also, to enter into the contract of the government with persons so employed by them. For this purpose, a bureau of medicine is attached to this Department, and numerous medical officers appointed. The law, moreover, exacts from every officer and seaman a monthly contribution from their wages, to make provision for the sick and disabled. These contributions are applied, under the supervision of the President, to the erection and maintenance of marine hospitals, and similar institutions for the benefit of seamen.

The exigences of the service often require the employment of soldiers and sailors at a distance from public hospitals, and when the attendance of the medical officers cannot be obtained; or consequently, in fulfilment of the humane policy of the government, it frequently becomes necessary to employ, temporarily, physicians not regularly commissioned. For in this way alone can the Department perform the duty assumed by the government, of providing the necessary medical attendance for those who become sick or disabled in its service. The Executive Department of the government, to which is intrusted the control of the subject matter, must necessarily determine all questions appertaining to the employment and payment of such temporary agents, and the exigency which demands their employment. The Secretary of the Navy represents the President,

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and exercises his power on the subjects confided to his Department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the Constitution and laws, do not re-96*] quire the approval of any officer of *another department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments.

In the case before us, the defendant has not come before the accounting officers of the Treasury, claiming from the government an "allowance" for medical attendance while on leave of absence, and submitting to these officers the propriety and legality of such "allowance." On the contrary, the agreed case shows that a sum of money had been transmitted to the defendant by the Secretary of the Navy to be disbursed, and that he had disbursed it according to his orders; and whether it was for paying for services acknowledged by the Secretary to have been rendered to the government, for medical attendance on the defendant himself, or on another, could make no difference. The liability of the defendant to refund this money to the government, is founded on the act of the accounting officer charging him with it, because, in his opinion, the Secretary of the Navy had mistaken the law or abused his discretion.

We are of opinion that he was not bound to assume this responsibility.

The propriety of detaching the defendant on special duty in France, of furnishing him with medical attendance while so employed, and of adopting and ratifying his act in the employment of such physician, under all the circumstances, are all subjects peculiarly within the jurisdiction and discretion of the head of the Navy Department, and not subject to revision or correction by the officers of any other department.

The judgment of the Circuit Court is, therefore, affirmed.

Dissenting, Mr. Justice Daniel and Mr. Justice Catron.

Mr. Justice Daniel dissenting:

I am unable to concur in the opinion of the court just pronounced in this cause, for the reason that this opinion, upon mere assumed and hypothetical considerations of hardship or motives by which the Legislature may have been influenced, undertakes directly to contravene, and in reality to annul a law, than which there is not one more clear or more positive in its provisions to be found upon the statute book.

With respect to considerations of hardship in the operation of a positive law, or of the motives of those by whom it has been enacted, I can, in expounding its provisions, assume no power which is legitimate; those are subjects exclusively within the province of the law makers, and to them it belongs to control them. 97*] *The Statute here referred to as being affected by the opinion in this case, is that bearing date on the 3d of March, 1835 (4 Stat. at L. 755, 757), regulating the pay of the Navy of the United States.

If it were by me deemed regular to seek for the objects of Congress in the changes by this law of the provisions of previous statutes, those objects might perhaps be correctly inferred from the fact that, by the law of 1835, now under consideration, the compensation previously made to officers of the Navy was in many, if not in every instance, at least doubted. But I deem it proper to confine myself to the language of the Statute of 1835; and to expound its clear and unambiguous terms without reference to anything dehors those terms, and especially freed from any rule of interpretation so uncertain as mere conjecture.

By this law, after regulating the pay of naval officers of every grade, it is declared, sec. 2: "That no allowance shall hereafter be made to any officer in the naval service of the United States, for drawing bills, for receiving or disbursing money, or transacting any business for the government of the United States, nor shall he be allowed servants, or pay for servants, or clothing, or rations for them, or pay for the same, nor shall any allowance be made to him for rent of quarters, or to pay rent for furniture, or for lights or fuel or transporting baggage." After the above enumeration, comprehensive as it is, we find in the law the following exclusion of any and every allowance which might be claimed, upon the ground of its having been omitted in the enumeration preceding it: "It is hereby expressly declared that the yearly allowances provided by this Act, is all the pay, compensation, and allowance that shall be received, under any circumstances whatsoever by any such officer or person, except for traveling expenses when under orders, for which ten cents per mile shall be allowed."

That the officers of the Navy were cognizant of the mandate of this law, must be presumed; but in addition to this legitimate conclusion, it is known as an historical fact in the public administration of the government, that, by a circular addressed to them, they were severally informed of the provisions of the law; besides which, they must unavoidably have learned them by every settlement for their pay at the Treasury.

How, then, it can be possible to escape from the comprehensive language of the Statute, which may well be styled "the exclusion of every conclusion" in favor of the claim by Lieut. Jones, it passes my power to perceive. It will not be pretended by anyone that the advance made to him was a portion of his yearly pay, yet the Statute declares that the yearly pay shall be "all the pay, compensation and allowance that *shall be received by any [*98 such officer or other person, under any circumstances whatsoever, except for traveling expenses, for which ten cents per mile may be allowed."

Surely the phrase "under any circumstances whatsoever" is broad enough to comprehend any casualty to which any person may be exposed.

But it has been alleged, in excuse for the retention of this money by Lieut. Jones, that there was no naval surgeon in Paris, and that the money was advanced by the Secretary of the Navy. To the first part of this apology it is a sufficient reply to state: 1st, that the Statute has declared the pay of the officer to

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be a sufficient allowance under all circumstances whatsoever, and therefore, under the circumstances of this case, no allowance beyond that graduated by the law itself could properly be claimed; 2d, that the government could be under no conceivable obligation, even independently of the express exclusion of the law, to provide medical or surgical attendance to wait upon an officer off duty, and not necessarily exposed to any of the perils of duty; that had Lieut. Jones been on duty, he would have been attended by a portion of the medical staff, and been, if in reach of them, entitled to the benefit of the naval hospitals; and thus, under the regular usages of the service, been supplied with those aids for which the law and the usages of the service has made provision. Everyone can conceive the danger of abuse attendant on a practice, by an officer, of employing a surgeon or physician, ad libitum, to attend him when off duty, and to charge the expense of such employment to the government as a legitimate allowance to the officer when off duty.

It is no excuse for an irregularity like this to say, that where troops or vessels are employed on distant service there may be resort to medical or surgical aid; in such an instance, the persons called in would be engaged for the army, the fleet, or the corps generally, at regulated rates, and the account for such services would be settled and certified in conformity with such rules or rates; but an instance of this kind, justified by necessity alone, and conducted by rule, can bear no similitude to the advance, without authority of law or usage, of a round sum of money to one whose compensation had already been provided, and to be expended by him according to his own tastes or ideas, without known regard to any other criterion, and to be accounted for to nobody.

The Secretary of the Navy had no authority of law for making the advance in question. It was not within the provisions of the law for the creation and application of the hospital fund. That fund, by the law which created it, is to be applied to objects, and in modes designated, and the present instance falls not within either of the directions of the law.

99*] *But it has been insisted that the Secretary of the Navy, having ordered the payment of this money, the subordinate or beneficiary cannot be called on for reimbursement; first, because the payment having been voluntarily made by the government, the money could not be recovered back upon the rules governing actions for money had and received; and second, that the Secretary himself, if anyone, and not his subordinates, should be made accountable. These two excuses do not appear to be altogether consistent; for if the money was paid under a competent authority, and with full knowledge and in good faith, there could be no recovery on any account. But it is denied that the Secretary had the power to make the payment or advance, or that he can be looked upon as being the government, or in any respect, as being identified with the government, except so far as he is acting within his regular constitutional and legal sphere. To hold the converse of this, would be to justify the most irregular and flagrant abuses, and to cover them with the excuse that they were the acts of the government itself which had been wronged.

Well, then, with respect to any protection which can be extended to the recipient of this money upon the mere ground that it was paid to him under an order from the Secretary of the Navy. The officers of the Navy must, like all others, be presumed to be cognizant of the law. If, then, with this necessary imputation of knowledge, an officer, either through the ignorance or carelessness, or mistake or connivance of the agent of the government, get possession of and apply to his own advantage the funds of that government, and seek to protect himself by alleging a voluntary payment to him, such a defense would seem to be warranted neither by law, nor equity, nor good faith.

Again, it has been insisted that the sum of money having been advanced by direction of the Secretary of the Navy, the auditor, by whom, according to law, the accounts of Lieut. Jones were to be settled, could have no right to question the legality or regularity of such advance, or to charge it to the officer who had used it; and this position seems to be rested upon the naked position that the auditor, being subordinate to the Secretary of the Navy, has no right or power to examine into his acts, although such are necessarily complicated or connected with the actings and doings of those transactions the law requires him to examine and adjust. To such a rule of proceeding as this, I can by no means subscribe; I know of no rule of subordination which can justify, much less demand, a departure from the law, or from integrity, in obedience merely to the fact of inferiority in the gradation of place. Each and every officer has his duties to perform, and is bound to their performance *with independence and good faith; and [*100 no matter whose acts may be brought before him, whether those of his immediate superior or one much higher in power, he is bound to bring them to all the test of the law, and to pronounce upon all, from the greatest to the least, by one inflexible rule—the rule of duty; and surely, when an appeal is made to tribunals of justice, they should recognize no standard but that of the law itself.

My opinion is, that the decision of the Circuit Court should be reversed, and judgment entered for the plaintiffs.

WILLIAM J. McLEAN and John M. Bass, Executors of Henry R. W. Hill and William J. McLean, being the Surviving Partner of the Firm of N. & J. Dick & Co., Appellants,

v.

JAMES L. MEEK, Administrator of Joseph Meek, and James L. Meek and Joseph Meek.

(S. C. 18 How. 16-19.)

Administrators—recovery against administrator in one state is no evidence against administrator of same person in another state—the account remains open and is governed by the Statute of Limitations of latter state.

NOTE.—Lex loci in distribution of assets. Lex loci of domicil of testator governs validity of will and distribution. Situs of personal property. Foreign will necesary to be proved where assets are. See note to Smith v. Bk. of Georgetown, 8 L. ed. U. S. 212.

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The record of a recovery against the administrator of A, in Tennessee, is no evidence against another administrator of A, in Mississippi.

These administrations were independent of each other; no connection existed between them; each represented the intestate by an authority co-extensive only with the state in which the appointment was made.

The demand remained an open account as against the Mississippi administrator, and therefore subject to be barred by the Statute of Limitations of three years of that State.

Submitted Dec. 19, 1855. Decided Jan. 3, 1856.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The bill in this case was filed in the Circuit Court of the United States for the Southern District of Mississippi, by the appellants, against James L. Meek, administrator of Joseph Meek, for a discovery of assets and debts, and for the recovery of upwards of $20,000 claimed to be due them, as surviving partners of the firm of Dick & Co., from the estate of Joseph Meek, deceased.

The bill was subsequently amended, so as to add James L. Meek and Joseph T. Meek as parties.

The court below dismissed the bill, and the complainants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. J. P. Benjamin, for the appellants:

There was privity between the two administrators.

Aspden v. Nixon, 4 How. 467; Stacy v. Thrasher, 6 How. 44.

These authorities, relied on by the appellees, are conclusive against them.

The rule of law requiring transfer of surplus proceeds of the ancillary to the principal administration, at the instance of the creditors, is established.

Harvey v. Richards, 1 Mason, 381; Dawes v. Head, 3 Pick. 128; Gravillon v. Richards, 13 La. 293; Sto. Con. Law, 513.

Fraud existing in this case, the Statute of Limitations does not apply. The decree in Grubb v. Meek, in 1849, had the effect of a credit, and also prevented the Statute of Limitations from running.

Even if the court be of the opinion that the surplus of the Mississippi assets ought not to be transferred to the Tennessee administrator, it will order the application of these assets to the payment of the complainants' demand.

Hagan v. Walker, 14 How. 29.

Mr. W. P. Harris, for the appellees:

A court of equity in Mississippi has no power to grant the relief asked for in this case.

Hutchinson's Miss. Code, 45; Green v. Creighton, 10 Sm. & M. 159; Aspden v. Nixon, 4 How. 467.

The charge of fraud relates to the situation and condition of the property—has nothing to do with the debt itself; hence it did not prevent the running of the Statute of Limitations.

Farned v. Harris, 11 Sm. & M. 367; Vanhouten v. Reily, 6 Sm. & M. 440; Smith v. The State, 13 Sm. & M. 140.

Mr. Justice Catron delivered the opinion of *the court:*

Hill and McLean sued James L. Meek, administrator of *Joseph Meek, by bill in [*18 equity, in the Circuit Court of the United States for the Southern District of Mississippi, for upwards of $20,000, alleged to be due the complainants by Joseph Meek at the time of his death.

He died in February, 1838, and was then domiciled in Davidson County, Tennessee. In September, 1838, Jesse Meek was appointed administrator of Joseph Meek's estate in said county. In November, 1840, the estate was alleged to be insolvent, and a bill was filed in the Chancery Court exercising jurisdiction in Davidson County, by Jesse Meek, the then administrator, and John Munn, and his wife (who was a daughter of Joseph Meek), setting forth the insolvency, and praying for judicial administration of the assets among the creditors of the deceased, according to the Statute of that State. To this bill the creditors were the proper defendants, and entitled to share the assets ratably. The other children of the deceased were also made defendants, and acted by their guardian.

Nathaniel and James Dick & Co. presented a claim for allowance of $21,445 and which was allowed by the Chancery Court in May, 1846, and about $2,000 of it was afterwards paid out of the assets distributed; and for the balance remaining unpaid the present bill was filed, seeking a discovery of assets from the administrator in Mississippi, and payment therefrom.

The evidence relied on to sustain the suit and establish the demand was a copy of the record from the Chancery Court of Tennessee; and the principal question is, whether this proceeding bound the administrator or affected the assets in Mississippi.

There is one circumstance worthy of explanation. Jesse Meek administered in Mississippi, 30th February, 1838, on Joseph Meek's estate, but his letters were revoked in 1841, and John Munn was appointed administrator de bonis non, and afterwards James L. Meek was appointed, and superseded Munn; and James L. is here sued.

During the contest in the Tennessee court, when Dick & Co. established their demand, Jesse Meek was the Tennessee administrator, and Munn and Joseph L. Meek were successively administrators in Mississippi.

These administrations were independent of each other; the respective administrators represented Meek, the deceased intestate, by an authority co-extensive only with the state where the letters of administration were granted, and had jurisdiction of the assets there, and were accountable to creditors and distributees according to the laws of the state granting the authority. No connection existed, or could exist, between them, and therefore a recovery against the one in Tennessee was no evidence against the other in Mississippi, Stacy v. Thrasher, 6 How. 44, lays down this distinct rule.

*But if there was evidence of the de- [*19 mand, as alleged, and which we do not doubt exists, yet it is only evidence of an open account existing at the time of Joseph Meek's death, in 1838, and therefore subject to be barred by the Act of Limitations in Mississippi barring such claims, if suit is not brought to enforce them within three years next after the cause

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of action accrued. The answers of the administrator and heirs of Joseph Meek rely on the Act of Limitations as a bar to relief, and which bar would necessarily be allowed, if the cause was remanded, so that further evidence might be introduced. As it now stands, however, there is no evidence of the demand, and therefore we order that the decree of the Circuit Court be affirmed.

87*] *WILLIAM T. MINTER, Hiram F. Saltmarsh, and Ashley Parker, Plaintiffs in Error,

v.

CHARLES CROMMELIN.

(See S. C. 18 How. 87-89.)

Land reserved to Indian, if abandoned, is forfeited—Secretary can decide whether abandoned—patent, evidence of that fact and of preliminary steps—patent presumed valid.

Where land reserved to a Creek warrior, under the Act of March 3d 1817, passed to carry into effect the Treaty with the Creek Indians, had been abandoned by the warrior, it became forfeited to the United States.

The fact of abandonment, the Secretary was authorized to decide, and if he did so find, he might then order the land to be sold as other public lands.

A patent issued under the pre-emption laws of the United States, is evidence that all previous steps had been regularly taken to justify the making of the patent; and one of such steps being an order from the secretary to the register to offer the land for sale because the warrior had abandoned it, the court is bound to presume that such order was given, and such fact is not open to controversy.

The presumption is that the patent was valid and passed the legal title.

(Mr. Justice CAMPBELL did not sit in this cause.)

Argued Dec. 17, 1855. Decided Jan. 3, 1856.

IN ERROR to the Supreme Court of the State of Alabama.

The case is stated by the court.

Mr. P. Phillips for the plaintiff in error.

Mr. Joseph H. Bradley for the defendant in error.

Mr. Justice Catron delivered the opinion of the court:

The material facts of this case are as follows:

On the 12th of April, 1820, a certificate, No. 28, issued from the Land Office of the United States to Tallasse Fixico, a friendly chief of the Creeks, appropriating to his use and occupancy fraction 24, T. 18, R. 18, east of Coosa River, in pursuance of the Act of Congress of 3d March, 1217, passed to carry into effect, the Treaty of Fort Jackson, of August 9, 1814, with the Creek Indians.

The reservee, Tallasse Fixico, was in possession of the land, and while in possession, in 1828, he sold it, for a valuable consideration, to George Taylor, to whom he gave a deed and the possession of the land at the time of sale.

The said Taylor, while in possession, in July, 1834, sold to C. Crommelin, the defendant in error, a portion of the land—about forty acres. The purchaser received deeds for the same at the time of sale, dated 12th and 14th July, 1834, and immediately, or a short time thereafter, entered into possession, and has continued in possession until the present time.

On the 4th of June, 1339, Isham Bilberry and Samuel Lee obtained, from the Land Office at Cahawba, a pre-emption certificate, No. 35,-014, in their favor, under the Pre-emption Act of 1834, *for southeast fractional quar- [*88 ter of sec. 24, T. 18, R. 13, being a part of Tallasse Fixico's reservation, and embracing the land in possession of the defendant in error, and which is the land sued for, viz.: the forty acres purchased by him from Taylor.

On the same day, viz.: 4th June, 1839, Bilberry and Lee assigned the pre-emption certificate to the plaintiffs in error, Hiram F. Saltmarsh, William T. Minter, and Ashley Parker, in whose favor a patent was subsequently issued.

The State Court charged the jury, "that if they found the defendant held for a series of years, and continued to hold possession under deeds from Taylor, and that Taylor held possession under Tallasse Fixico, and that the plaintiffs were never in possession, that then the defendant held under color of title, and was in a condition to contest the validity of the patent.

"2. That the certificate of possession which issued to Tallasse Fixico, was an appropriation of the land by the government of the United States to a particular purpose; and that if Tallasse Fixico, in 1829, did abandon said land, it was not subject to entry under the pre-emption laws. That the patent under which the plaintiffs claimed title, was issued under the pre-emption laws of the United States; that the land conveyed by said patent was not subject to entry under pre-emption, and that therefore said patent had issued contrary to law, and was void."

To this charge the plaintiffs excepted.

A verdict and judgment were rendered for the defendant, and the plaintiffs took up the cause to the Supreme Court of Alabama, where the judgment was affirmed, to bring up which judgment a writ of error was prosecuted out of this court.

The State Court in effect pronounced the patent, under which the plaintiffs claimed title, to be void for want of authority in the officers of the United States to issue it, on the supposition that the land was reserved from sale when it was entered and granted. The presumption is, that the patent is valid, and passed the legal title; and furthermore, it is prima facie evidence of itself that all the incipient steps had been regularly taken before the title was perfected by the patent. It has been so held by this court in many instances, commencing with the case of Polk v. Wendell, 9 Cr. 98, 99.

But if the executive officers had no authority to issue the patent because the land was not subject to entry and grant, then it is void, and the want of power may be proved by a defendant at law, 8 Cr. 99. And the question here is, whether the defendant has proved the want of authority.

The 6th section of the Act of 1817 provides that no land *reserved to a Creek warrior [*89 should be offered for sale by the Register of the Land Office, unless especially directed by the Secretary of the Treasury. Both by the Treaty and the Act of Congress, it was declared

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that if the Indian abandoned the reserved land, it became forfeited to the United States. The fact of abandonment the Secretary was authorized to decide, and if he did so find, he might then order the land to be sold as other public lands. The rule being that the patent is evidence that all previous steps had been regularly taken to justify making of the patent; and one of the necessary previous steps here being an order from the Secretary to the Register to offer the land for sale, because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs, was adjudged in the case of Bagnell v. Broderick, 13 Pet. 450, and is not open to controversy anywhere, and the State Court was mistaken in holding otherwise.

The defendant being in possession, without any title from the United States, we deem it unnecessary to discuss the effect of the parol proof introduced in the State Circuit Court to defeat the patent.

It is therefore ordered that the judgment of the Supreme Court of Alabama be reversed.

LOUIS CURTIS, Benjamin Curtis, John L. Hubbard, James B. Curtis, and Henry A. Booraine, Plaintiffs in Error,

v.

MADAME THERESA PETITPAIN, wife of Victor Feste, and Manderville Marigny, late Marshal U. S. for the Eastern District of Louisiana.

(See S. C. 18 How. 109, 110.)

Cause will not be heard on agreed statement—nor will orders of court below be reviewed.

A cause will not be heard upon an agreed statement of facts, it not being such transcript as required by the 11th and 31st rules.

A contest between judgment in circuit court and judgment in state court as to priority of payment, arising upon rules, is not such judgment as this court can re-examine. Bayard v. Lombard, 9 How. 530.

Argued Dec. 24, 1855. Decided Jan. 3, 1856.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

Messrs. Taylor and Perin for plaintiffs in error.

Mr. Benjamin for defendants in error.

Mr. Justice Campbell delivered the opinion of the court:

110*] *The record certified in this cause consists of "an agreed statement of facts," which the parties submitted to the court on the rules taken by the plaintiffs against the defendants, and the judgment rendered thereon, and a judgment rendered on a motion for a new trial, being the proceedings after the submission of the case.

The case stated is, that the plaintiffs recovered a judgment against Victor Feste in the Circuit Court of the United States. That an execution issued thereon, and a seizure was made of immovable as well as movable property; which was sold, and the proceeds held by the marshal.

While these proceedings were pending, Madame Feste recovered, in one of the state courts, a decree against her husband, Victor Feste, for the separation of property and the amount of dowry brought in marriage and thereupon served notice upon the marshal, claiming to have satisfaction of her legal mortgage, in preference to the execution creditor, from the moneys in his hands, and obtained a rule from the court requiring him to answer her claim. The plaintiffs, upon their part (as the case states), also obtained a rule to enforce the payment of the money to them on their execution. To settle these conflicting claims was the object of the agreed case thus submitted to the court.

Two questions arise in limine, either of which is, in our opinion, decisive of this cause: 1st. That this is not such a transcript as will satisfy the 11th and 31st rules of this court, under the decision of Keene v. Whittaker, 13 Pet. 459; and 2d, that this is not such a judgment as this court can re-examine, according to the principle of Bayard v. Lombard, 9 How. 530. And we agree with the defendants upon both these questions.

The cause is dismissed, with costs.

JOEL WRIGHT, Plaintiff in Error,

v.

SCHUYLER H. MATTISON.

(See S. C. 18 How. 50-60.)

Color of title, what is—a question of law—good faith, question for jury.

"Color of title" is that which in appearance is title, but which in reality is no title. No exclusive importance is to be attached to the invalidity of a colorable or apparent title, if the entry or claim has been made under it in good faith.

A claim to property under a conveyance, however inadequate to carry the true title, and however incompetent the grantor may have been to convey, is a claim under color of title, and one which will draw to the possession of the grantee the protection of the Statutes of Limitation.

What is color of title is a question of law, upon the facts.

But what is good faith in the party claiming under such color, is a question of fact for the jury.

The court below erred in assuming to decide upon the question of good faith on the part of defendant; such question belonged exclusively to the jury.

The court below also erred in deciding that, defendant being in possession of lands and permitting them to be sold for taxes, and becoming the purchaser thereof himself, the deed upon such sale was not such an instrument as could be given in evidence, under the Illinois Statute of 1839, to show color of title.

NOTE.—Jurisdiction. Judgment on agreed statement—see note to Stimpson v. Balt. etc. R. R. Co. 13 L. ed. U. S. 441.

NOTE.—What is necessary to constitute adverse possession. Requisites of—see notes 5 L. ed. U. S. 398; 40 L. ed. U. S. 215.

What constitutes color of title—see notes, 2 L.R.A. 513; 9 L.R.A. 775.

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Argued Dec. 6, 1855. Decided Jan. 7, 1856.

IN ERROR to the Circuit Court of the United States for the District of Illinois.

The case is stated by the court.

Messrs. C. H. Browning and N. Bushnell, for the plaintiff in error:

Where a private individual knows that another person claims, and is in actual enjoyment of the land which belongs to him, and neglects to prosecute his right at law, where there is nothing to prevent his so doing, he will be barred by the Statute of Limitations.

Ang. on Lim. 397; Drayton v. Marshall, 1 Rice, Eq. (S. C.), 373; Skyles v. King, 2 A. K. Marsh. 388.

The authorities show that color of title is that which appears to be title, and yet is not any title. However defective the title may be, it is still entitled to the protection of the Statute of Limitations.

Radford v. Harbyn, Cro. Jac. 122; Lawrence v. Hunter, 9 Watts, 73; Waggoner v. Hastings, 5 Pa. St. 300; Parish v. Stevens, 3 S. & R. 298; Dikeman v. Parish, 6 Pa. St. 210; Fitch v. Mann, 8 Pa. St. 506; Overfield v. Christie, 7 S. & R. 173; Jackson v. Todd, 2 Cai. 183; Jackson v. Harder, 4 Johns. 202; Clapp v. Bromagham, 9 Cow. 557; Smith v. Stewart, 6 Johns. 47; Jackson v. Thomas, 16 Johns. 299; Jackson v. Wheat, 18 Johns. 44; Jackson v. Newton, 18 Johns. 360; Jackson v. Ellis, 13 Johns. 119; Griswold v. Butler, 3 Conn. 246; Rogers v. Hillhouse, 3 Conn. 402; Moody v. Fleming, 4 Ga. 115; Wilson v. Kilcannon, 4 Hayw. 185; Darby v. McCarroll, 4 Hayw. 288.

All the cases above cited are in harmony with the decisions of this court, unless the case of Moore v. Brown be an exception, and in that case no question under color of title arose.

Bradstreet v. Huntington, 5 Pet. 402; Ewing v. Burnett, 11 Pet. 41; Ellicott v. Pearl, 10 Pet. 442; Gregg v. Sayre. 8 Pet. 244.

In Illinois the dictum as to color of title in Irwin v. Brownell, 11 Ill. 462, has been virtually overruled.

Davis v. Easley, 13 Ill. 192.

If it be admitted, therefore, that the plaintiff in error had no legal right to purchase the land at tax sale, it does not follow that he did not thereby acquire color of title. This depended upon whether or not he purchased in good faith; and this was a question of fact which should have been submitted to the jury.

Gregg v. Sayre, 8 Pet. 253; Ang. on Lim. 436; Clapp v. Bromagham, 9 Cow. 558.

Mr. A. Williams, for the defendant in error:

There was no residence on the land for seven years, within the meaning of the Act of 1835.

Smith v. Frost, 2 J. J. Marsh. 427; Poage v. Chinn, 4 Dana, 58; Webbs v. Hynes, 9 B. Mon. 388; Trimble v. Smith, 4 Bibb. 257; Anderson v. Turner, 3 A. K. Marsh. 134; White v. Bates, 7 J. J. Marsh. 541; Davis v. Young, 2 Dana, 303; Harrison v. McDaniel, 2 Dana, 354.

The only question, therefore, is whether the defendant had claim and color of title, made in good faith under the Act of 1839.

The deed of Dec. 20, 1823, was void upon its face, the sale being made at a time when the law did not authorize it. It was not admissible to show claim and color of title.

Irving v. Brownell, 11 Ill. 414; Moore v. Brown, 11 How. 424.

The deed of Jan. 10, 1833, recited a sale for taxes, Jan. 11, 1831. At this time defendant was occupying and receiving the rents and profits of the land, and was under both moral and legal obligations to pay taxes, and therefore could not in good faith let it be sold, and buy it in himself for said taxes.

Choteau v. Jones, 11 Ill. 300; Frye v. Bank of Illinois, 10 Ill. (5 Gilm.), 367; Voris v. Thomas, 12 Ill. 443; Ralston v. Hughes, 13 Ill. 470; Douglass v. Dangerfield, 10 Ohio, 152.

Mr. Justice Daniel delivered the opinion of the court:

The questions determined by the Circuit Court, whose decision we are called on to review, arose upon the construction of two statutes of the State of Illinois, which limit the right of action against the possessors of lands, held by purchasers in virtue of sales and conveyances under the authority of the State, for the non-payment of taxes.

The provisions of the statutes in question are as follows:

January 17, 1835, sec. 1. "That, hereafter, no person who now has, or hereafter may have, any right of entry into any lands of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record from this State or the United States, or from any public officer authorized by the laws of the State to sell such lands for the non-payment of taxes, or from any sheriff, marshal, or other person authorized to sell such lands on execution, or under any order, judgment or decree of any court of record, shall make any entry therein except within seven years from the time of such possession being taken; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title."

By the Statute of 1839 it is enacted, "That hereafter every person in the actual possession of lands or tenements, under claim and color of title made in good faith, and who shall, for seven successive years after the passage of this Act, continue in such possession, and shall also during the said time pay all the taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of the taxes for the term aforesaid, shall be entitled to the benefit of this section."

In this case in the Circuit Court, which was an action of ejectment, the plaintiff's lessee, the defendant in error here, exhibited in proof a release from the widow of the patentee from the United States, of the premises in question; also deeds of conveyance from the heirs of the patentee, with the exception of one of those heirs, who was a minor, and whose estate or interest

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in the premises, there seems to have been no at- [*53] tempt to transfer. *The lessee of the plaintiff further proved the possession of the premises by the defendant at the commencement of the action on the 15th of July, 1851.

The defendant, to maintain the issue on his part, offered to read in evidence to the jury a deed of the 20th of December, 1823, from the auditor of public accounts of the State of Illinois, to Nathaniel Wright and Joel Wright, for the land in controversy, reciting the public sale of those lands by the auditor, in pursuance of the several Acts of the General Assembly of the State, and of the Act entitled "An Act for levying and collecting a tax on land and other property, approved February 18th, 1823," and the bidding off the said lands to Nathaniel Wright and Joel Wright, as the best bidders, for the sum of $11.06, being the tax and costs due thereon for the years 1821 and 1822.

In connection with the aforegoing deed from the auditor, the defendant offered to read in evidence to the jury a deed, properly executed and recorded, from the said Nathaniel Wright to the defendant, Joel Wright, for the northeast quarter of section thirty-four (the premises claimed); and offered further to prove to the jury that the said defendant had been in the actual possession of the premises for more than seven years next preceding the commencement of this suit, and had paid all the taxes assessed thereupon; and the defendant stated by his counsel, that the purpose of offering the evidence was to secure to the defendant the benefit and protection of the Seven Years' Limitation Laws of 1835 and 1839.

To the introduction of this evidence by the defendant, the plaintiff objected, assigning for his objection the following causes:

1. That the defendant had neither proved, nor offered to prove, that the requisitions of the Revenue Law of 1823 had been complied with, prior to the sale of said land for taxes as stated in the auditor's deed, and that the deed was not prima facie evidence of these facts.

2. That said deed was void upon its face.

The court excluded the evidence thus tendered by the defendant, who excepted to the opinion of the court.

The defendant next offered in evidence a deed from the auditor of public accounts to the defendant, dated on the 10th day of January, 1833, in which it is stated, that in conformity with all the requisitions of the several laws in such cases made and provided, the auditor had, on the 11th day of January, 1831, exposed to sale a certain tract of land, being the northeast quarter of section thirty-four, in township seven north, in range four east of the fourth prin- [*54] cipal meridian, for the sum of $1.82, *being the amount of the tax for the year 1830, with the interest and costs chargeable on the said lands; and that the said Joel Wright had offered to pay the aforesaid sum for the whole of the said land; and the said Wright having paid the said sum into the Treasury of the State, the auditor thereby granted and conveyed to the said Wright the whole of the northeast quarter of section thirty-four as above described (being the land in controversy), subject to the right of redemption, as provided by law.

This last-mentioned deed from the auditor was admitted in evidence without objection, and as well as the former deed from the auditor to Nathaniel and Joel Wright, bearing date on the 20th of December, 1823, was shown to have been regularly recorded in the proper recording office.

By a statement of facts agreed between the counsel, it was in proof on the trial, that Joel Wright, claiming that he and his brother, Nathaniel, were owners and tenants in common in fee-simple of the land in controversy, took possession of it in 1829, by inclosing and putting under actual cultivation a portion thereof, and that, from time to time, he had extended his inclosures, until, in 1841, he had all the said quarter section under actual cultivation, with the exception of about twenty acres; and that from the date last mentioned forward, he had continued in actual possession and cultivation of the said land; and had paid all the taxes assessed upon the said land from the year 1840 to 1851, inclusive of both years, and that the land was of the value of more than $3,000.

The evidence having been closed on the part of the plaintiff, and on that of the defendant, the plaintiff moved the court for the following instructions to the jury, viz.:

"That the deed offered in evidence by the defendant, of the 10th of January, 1833, from the auditor to the defendant, is of itself such a title as will protect a party in the possession of land under the Act of 1839, provided it is made in good faith, and connected with the payment of taxes for seven successive years, and a continued possession for that time; but if the jury believe from the evidence that the defendant was in possession of the land in controversy, claiming to be the owner in fee, in the year 1829, and so continued to remain in possession until the year 1833, then he could acquire no title by permitting the land to be sold for taxes, and becoming the purchaser thereof in 1831; and the auditor's deed to the defendant on the sale of 1831 for the taxes of 1830, given in evidence by the defendant, conveys no title, and is not a title obtained in good faith; and such a deed, if obtained in the manner aforesaid, is not such a title as brings his possession within the protection of the Limitation Acts of 1835 and 1839.

*This last instruction having been giv- [*55] en as prayed by the plaintiff, was excepted to by the defendant.

After the closing of the testimony, there were, on the part of the defendant, five several instructions prayed of the court. Of these, the first two having been granted, and no exception to them having been reserved, they are therefore not properly subjects for comment here.

The third one of these instructions being deemed unimportant, under the view which we take of this cause, will be dismissed without particular remark.

The fifth instruction prayed for by the defendant below, the materiality of which will hereafter be shown, was in the following words, viz.: "That the questions whether the deed given in evidence was made in good faith, and whether the defendant has occupied the said land under said deed in good faith, are questions of fact which must be decided by the

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jury upon consideration of all the facts and circumstances given in evidence upon the trial of this cause." This fifth instruction the court refused to grant, except with the qualification, viz.: "That this, as a general proposition, is true, but as a matter of law, the court charges the jury, that any man who is in possession of land, claiming to be the owner thereof, and who permits the land to be sold for the non-payment of taxes, and who himself becomes the purchaser, and acquires a deed under such purchase, such title cannot be said, within the meaning of the law, to be made in good faith."

To the above refusal and qualification by the court, the defendant in the ejectment excepted.

From the sketch which has been given of the proceedings in this cause in the Circuit Court, it is shown that the defendant did not found his title either exclusively or principally upon the provisions of the Statute of 1835, but relied in defense of that title, and of his possession, equally, if not chiefly, upon the Statute of 1839, and the acts of the auditor performed in the execution and under the authority of the latter law. And it is in viewing this cause as controlled by the provisions of the Statute of 1839, that we regard it as entirely disembarrassed of any doubt or perplexity, which might surround an attempt to rest its decision upon a construction of the law of 1835. Hence we have dismissed from our consideration the several questions discussed and ruled in the Circuit Court, with reference to the law of 1835, as being irrelevant to the points regularly involved in this cause, which depend essentially upon the Statute of Illinois of 1839.

By the 1st section of this Statute, as we have already seen, it is declared, "That hereafter 56*] every person in the actual possession *of land or tenements under claim and color of title made in good faith, and who shall for seven successive years after the passage of this Act continue in such possession, and shall also during said time pay all taxes legally assessed on such land or tenements, shall be held and adjudged to be the legal owner of said land or tenements, to the extent and according to the purport of his or her paper title."

There exists no controversy in this case as to the facts, that the defendant in the ejectment proved the actual possession by him of the land, and the payment of all the taxes assessed thereon, for seven successive years previously to the institution of this suit. The proof of these facts by the defendant, therefore, left open under the 1st section of the Statute of 1839 the single inquiry, whether it was shown or attempted to be shown by him that he held under claim and color of title made in good faith.

We deem it unnecessary to examine in detail, the numerous decisions adduced in the argument for the plaintiff in error, to define and establish the meaning of the phrase "color of title." The courts have concurred, it is believed, without an exception, in defining "color of title" to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith.

We refer to a few decisions by this court which are deemed conclusive to the point, that a claim to property, under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the Statutes of Limitation, other requisites of those statutes being complied with. We will, lastly, upon this point, refer to a recent decision of the Supreme Court of the State of Illinois, which not less for its intrinsic strength than on account of the circumstance that it is an interpretation by the highest judicial authority of the State, of the peculiar local legislation of that State, is entitled to special attention and respect.

In the case of Gregge v. The Lessee of Sayre et ux., 8 Pet. 253, 254, in which the question was raised as to the effect of a deed impeached either for fraud in the grantor, or want of estate in him co-extensive with the terms of the instrument, *this court say: [*57 "It is not necessary to decide whether these conveyances were fraudulently made by Ormsby (the grantor) or not. The important point is to know whether Gregg and wife (the grantees) had knowledge of the fraud if committed, or participated in it. This knowledge the Circuit Court charged the jury was immaterial, as the fraud of Ormsby rendered the deeds void, and consequently they could give no color of title to the adverse possession. This construction is clearly erroneous. If Ormsby be justly chargeable with fraud, yet if Gregg and wife did not participate in it; if, when they received their deeds, they had no knowledge of it, there can be no doubt that the deeds do give color of title under the Statute of Limitations. Upon their face the deeds purport to convey a title in fee; and having been accepted in good faith by Gregg and wife, they show the nature and extent of their claim to the premises."

The case of Ewing v. Burnett, 11 Pet. 41, was one in which plaintiff and defendant claimed under conveyances from the same grantor. The grantee in the junior deed relied upon his title as being protected by proof of adverse possession for the time of limitation. The introduction of this deed was objected to, because, as it was alleged, the defendant had notice of the claim of the grantee in the elder conveyance. To an objection thus urged to the introduction of the junior deed, this court said that there were two answers: 1st, that the jury might have negatived the proof of such notice; second, though there was such notice of a prior deed as would make a subsequent one inoperative to pass a title, yet an adverse possession for twenty-one years, under claim and color of title merely void, is a bar."

So late as the year 1851, in the case of Pillow v. Roberts, in the 13th of Howard, speaking of the protection extended by statutes of limitation to a possession held under claim of color of title, this court say, "statutes of limitation

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would be but of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims adversely to all the world." And again, in the same case, it is said, in order to entitle the defendant to set up the bar of the statute after five years' adverse possession, he had only to show that he and those under whom he claimed held under a deed from a collector of the revenue of lands sold for the non-payment of taxes; he was not bound to show that all the prerequisites of the law had been complied with, in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof before the defendant could have the benefit of this 58*] law, it would *require him to show that he had no need of the protection of the statute before he could be entitled to it. Such a construction would annul the statute altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title.

The case of Woodward v. Blanchard, 16 Ill. 424, decided by the Supreme Court of Illinois, within a few months past, was like the case at present under review—an action of ejectment against a purchaser of land sold for the non-payment of taxes.

The defendant in the ejectment relied, for the maintenance and protection of his title and possession, upon the Statute of Illinois of 1839, already quoted; professing to hold under claim and color of title as expressed in that Statute, all the other requirements of the law being fulfilled. The defense thus alleged superinduced, necessarily, a construction of the Statute as to the signification of the phrase "claim or color of title made in good faith," and in their interpretation the court institute a comparison between its provisions and those of the Statute of 1835, and point out the distinctive features of each. With respect to the law of 1839, they say: "There is in this act not only a change in the facts, but an evident intention to dispense with part of the requirements of the former Act, and to relax the strictness required in others. Possession is retained in one case, but residence is dispensed with; connection in the chain to be deduced of record, and its deduction from specified sources, are dispensed with; in place of these, claim and color of title made in good faith, with the payment of taxes, are substituted as to lands in possession. But as to another class of lands (vacant or unoccupied), possession and claim are both dispensed with, and the party is only required to show color of title in good faith." Further on, the court say: "We are, therefore, under this defense, not driven to the springs of sources of the title, to inquire if they be pure, nor to the successive channels through which it may pass, for the purpose of removing obstructions to or difficulties in its course and transmission. But we come at once to the party defendant, to inquire if he had a claim and color of title with his possession, at the beginning of this period; if they were made in good faith, and his possession continued and was accompanied by the payment of taxes for seven successive years." What say the court is claim? The act of taking possession, if otherwise unexplained, will be referable to the paper title, and understood as making claim under it. Color of title may be made through conveyances, or bonds, or contracts, or bare possession under parol agreements.

Nor is it at all important whether the title be weak or strong; for color of title is acquired to establish an adverse possession *for the [*59 operation of the Statute, which commences by disseisin of the rightful owner with a claim of the land. But our Statute requires this color of title to be accompanied by a written evidence, "a paper title," and an act or motion of the mind. It must be in good faith. Defects in the title may not be urged against it as destroying color, but, at the same time, might have an important and legitimate influence in showing a want of confidence and good faith in the mind of the vendee, if they were known to him, and he believed the title therefore to be fraudulent and void. What is color of title is matter of law, and when the facts exhibiting the title are shown, the court will determine whether they amount to color of title. But good faith in the party, in claiming under such color, is purely a question of fact, to be found and settled as other facts in the cause. We can entertain no doubt in this case that the auditor's deed to the purchaser at the tax sale is color of title in Woodward, in the true intent and meaning of the Statute, and without regard to its intrinsic worth as a title. "Good faith," say the court, "is doubtless used here in its popular sense, as the actual existing state of the mind, whether so from ignorance, skepticism, sophistry, delusion or imbecility, and without regard to what it should be from given legal standards of law or reason."

We have quoted at some length from the opinion of the Supreme Court of Illinois, both on account of the clearness and accuracy of its reasoning, and on account of the respect which is due to it, as an interpretation of a statute of the State by her supreme judicial authority. We entirely approve of the exposition of the Supreme Court of Illinois, in its opinion of what constitutes color of title, upon well established general principles, and within the scope and meaning of the Statute of 1839, and in relation to the nature of the question of what constituted good faith in the possessor or such colorable title, and also as to the manner in which that question should be determined, viz.: as a question of fact determinable by the jury, and not by the court.

But the court in the case before us withdrew from the jury, and assumed upon itself the right of deciding upon the motives and intention of the defendant in the ejectment; and it was with the view, doubtless, of exercising this function, that the qualification of the fifth prayer of the defendant was added by the court, and that the court had previously, at the instance of the plaintiff, instructed the jury, that although the deed of the 10th of January, 1833, from the auditor to the defendant, was of itself such a title as would protect the party in possession under the act of 1839, connected with payment of taxes and continued possession for the period of limitation, yet if the *defendant, being in possession of the [*60 land in controversy, had permitted it to be sold

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for taxes, and had himself become the purchaser thereof, the deed of the auditor in pursuance of such sale, could convey no title to the defendant, and was not a title obtained in good faith. The accuracy or inaccuracy of the legal positions taken by the court in this instruction, we deem it not necessary at present to determine.

We hold, that in assuming to decide upon the question of good faith on the part of the defendant, the court exerted an authority not legitimately belonging to it; a power exclusively appertaining to the jury. We further hold, that it was error in the court to decide as it did upon the prayer of the plaintiff in ejectment, and by its qualification annexed to the fifth prayer of the defendant, that the deed from the auditor of the 10th of January, 1833, was not such an instrument as could be adduced in evidence under the Statute of 1839, in order to show color of title. We are therefore of the opinion that the decision of the Circuit Court be reversed, and that this cause be remanded to that court, with directions to order a venire facias de novo for the trial thereof, in conformity with the law as herein expounded.

43*] *ELIZABETH I. BARNARD, Mary A. Barnard, Corrine Barnard, William S. Barnard and Thomas Barnard, Infant Children and Sole Heirs of Thomas Barnard, Deceased, by William Cannon, their Guardian and Next Friend, Complainants and Appellants,

v.

MARY W. W. ASHLEY, Executrix; and William E. Ashley, and Frances A. Ashley, and Henry C. Ashley, an Infant, by Mary W. W. Ashley, his Guardian, Heirs, etc., of Chester Ashley, Deceased, and Silas Craig, Representatives.

(See S. C. 18 How. 43-50.)

Pre-emption laws of 1830 and 1834—judgment of register and receiver not conclusive—court will examine the facts—when pre-emption may be claimed.

In cases under the pre-emption laws of May 29th, 1830, and June 19, 1834, the power of deciding on the facts which entitled a party to a right of pre-emption was vested in the Register and Receiver, from whose decision there was no direct appeal to higher authority.

But even under those laws the proof on which the claim was to rest was to be made agreeably to rules to be prescribed by the Commissioner of the General Land Office: and if not so made, the entry would be suspended when the proceeding was brought before the Commissioner by an opposing claimant.

Where an entry had been allowed on ex parte affidavits, which were impeached, and the land claimed by another on an opposing entry, the course was to return the proof and allegations, in opposition to the entry, to the district office, with instructions to call all parties before the Register and Receiver, and make inquiry into the matters charged, on proofs by each party, and to report the proceeding to the General Land Office with their opinion; and on this return the Commissioner exercises a supervision and control over the acts of the Register and Receiver. This has been the practice.

Where pre-emption right to public lands is claimed against a subsequent title from public authorities, the court will examine the facts to ascertain which party has the better right.

The Register and Receiver do not so act in a judicial capacity, that their judgment on the matter is conclusive.

The facts and statutes examined in this case.

Under the occupant law of June 19, 1834, one could lawfully enter lands, if he was in possession when the Act was passed, and cultivated any part of it in 1833.

One who built a cabin on land in 1833, and in January, 1834, sold out his improvements to another and removed away and resided elsewhere in June, 1834, is not entitled to preference of entry.

The evidence being doubtful as to one quarter section, this court affirms the decree of the Circuit Court as to that.

Argued Dec. 5, 1855. Decided Jan. 8, 1856.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Mr. Albert Pike for the appellants.

Mr. A. H. Lawrence for the appellees.

The case is stated by the court.

Mr. Justice Catron delivered the opinion of the court:

The proceedings in the court below consisted of a bill filed by Barnard against Ashley and Craig, praying that certain patents for lands issued to the defendants might be decreed to be canceled, upon the ground of a violation of pre-emption rights on part of the complainant, to the following tracts, viz.: N. E. ¼ and S. W. fr. ¼ of sec. 27; S. E. fr. ¼ of sec. 28, T. 18 S., R. 1 W.; S. W., fr. ¼ of sec. 15, T. 19 S., R. 1 W.; S. E. ¼ of sec. 22, T. 18 S., R. 1 W.; and a cross bill on part of Ashley to be quieted in his title to the S. E. qr. of sec. 22, against the right set up by Barnard to that tract, under a junior *patent therefor, upon the ground [*44 that Barnard had no right to this tract, and that the patent was issued to him improperly.

The title of Ashley and Craig (the appellees) to the first four tracts, is derived from a sale to them, of the land in controversy, by the Governor of Arkansas, in consequence of a selection made by him of the land under certain provisions of the Acts of Congress of March 2, 1831, and of July 4, 1832 (4 Stat. at L. 473, 563), upon which selection and sale patents were issued by the United States. The title to the S. E. ¼ of sec. 22, T. 18 S., R. 1 W., is derived from the location of what is called a "Lovely donation claim" on this quarter section, by virtue of the provisions of the 8th section of the acts of the 24th of May, 1828 (4 Stat. at L. 306) and 6th of January, 1829. Ibid. 329.

According to the conceded facts, it is insisted, on the part of Ashley and Craig, that the Register and Receiver having, on due proof and examination, rejected Barnard's claims to a preference of entry of the four quarter-sections, he is thereby concluded from setting them up in a court of equity, because the Register and Receiver acted in a judicial capacity, and their judgment, being subject to no appeal, is conclusive of the claim. And the cases of Wilcox v. Jackson, 13 Pet. 509, and Lytle v. The

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State of Arkansas, 9 How. 333, are relied on to maintain this position.

In cases arising under the pre-emption laws of May 29th. 1830, and of June 19th, 1834, the power of ascertaining and deciding on the facts which entitled a party to the right of pre-emption was vested in the Register and Receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. But even under these laws, the proof on which the claim was to rest was to be made "agreeably to the rules to be prescribed by the Commissioner of the General Land Office;" and if not so made, the entry would be suspended, when the proceeding was brought before the Commissioner by an opposing claimant. In cases, however, like the one before us, where an entry had been allowed on ex parte affidavits, which were impeached, and the land claimed by another, founded on an opposing entry, the course pursued at the General Land Office was to return the proofs and allegations, in opposition to the entry, to the district office, with instructions to call all the parties before the Register and Receiver, with a view of instituting an inquiry into the matters charged; allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed to introduce proofs; and on the close of the investigation, the Register and Receiver were instructed to report the proceeding to the General Land Office, with their opinion as to the effect of the proof, 45*] *and the case made by the additional testimony. And on this return, the Commissioner does in fact exercise a supervision over the acts of the Register and Receiver. This power of revision is exercised by virtue of the Act of July 4, 1836, sec. 1, which provides "that, from and after the passage of this Act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands; and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States." The necessity of "supervision and control," vested in the Commissioner, acting under the direction of the President, is too manifest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish by ex parte affidavits, cultivation and possession of particular quarter sections of land when the fact is untrue. That the Act of 1836 modifies the powers of registers and receivers to the extent of the Commissioner's action in the instances before us, we hold to be true. But if the construction of the Act of 1836, to this effect, were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety.

The case relied on, of Wilcox v. Jackson, 13 Pet. 511, was an ejectment suit, commenced in February, 1836; and as to the acts of the Register and Receiver, in allowing the entry in that case, the Commissioner had no power of supervision, such as was given to him by the Act of July 4, 1836, after the cause was in court.

In the next case (9 How. 333) all the controverted facts on which both sides relied had transpired, and were concluded before the Act of July 4, 1836, was passed; and therefore its construction, as regards the Commissioner's power, under the Act of 1836, was not involved. Whereas, in the case under consideration, the additional proceedings were had before the Register and Receiver in 1837, and were subject to the new powers conferred on the Commissioner.

In Lytle's case, we declared that the occupant was wrongfully deprived of his lawful right of entry, under the pre-emption laws, and the title set up under the selection of the Governor of Arkansas was decreed to Cloyes, the claimant—this court holding his claim to the land to have been a legal right, by virtue of the occupancy and cultivation, subject to be defeated only by failure to perform the conditions of making proof and tendering the *purchase money. There the facts were [*46 examined to ascertain which party had the better right; and following out that precedent, we must do so here.

Governor Pope was authorized to select lands equal to ten sections in the Territory of Arkansas, in tracts not less than a quarter section each, and to sell the same for the purpose of raising a fund to erect public buildings in the Territory. The three first-named quarter sections lie in township 18, the survey of which was made and returned to the Local Land Office, and approved June 4, 1834, when the lands therein were subject to entry by the Governor.

He made his final amended selections of the three tracts in township 18, June 6th, 1834. The bill claims title to these tracts under the occupant law of June 19, 1834. As Governor Pope's assignees, Craig and Ashley, had a vested right when the Act of June 19 was passed; it did not operate on these lands, which were appropriated to the use of the United States; and patents for them were properly awarded to the purchasers from the Governor.

The condition of the S. W. ¼ of sec. 15, T. 19, differs from the preceding lands in this: the township survey of No. 19 was found to be inaccurate when first returned to the Land Office at Little Rock, and a resurvey was ordered as to some of the section lines, which were not finally adjusted till the 19th of July, 1834.

Governor Pope had selected the S. W. ¼ of sec. 15, on the 29th of May preceding, relying on the inaccurate survey; and it is insisted for Barnard's heirs, that the selection was invalid, as it could not be made of unsurveyed lands; and that township No. 19 could not be legally recognized as surveyed, until the survey was settled and adopted by the Surveyor-General of the district.

Our opinion is, that the selection could only take effect from the 19th of July, 1834, when the township survey was sanctioned, and became a record in the District Land Office. As the occupant law passed June 19, 1834, Barnard's assignor, Richmond, could lawfully enter the quarter section, if he had occupied the same

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as required by law; that is to say, if he was in possession when the Act was passed, and cultivated any part of the land in the year 1833.

The bill alleges that Richmond occupied the quarter section June 19, 1834; that he had cultivated the same in 1833, and made due proof of his right of pre-emption.

It is further alleged, that on the 20th day of January, 1834, some five months before the Occupant Law was passed, Barnard purchased from Richmond the quarter section in dispute, 47*] and *took his title bond for a conveyance when Richmond should obtain a patent for the land; and by force of this bond the bill prays to have the patent to Craig and Ashley adjudged to have been for Barnard's benefit, and that the land be decreed to Barnard's heirs.

The Act of 1834 revived the Act of 29th of May, 1830, "to grant pre-emption rights to settlers." That Act provides (sec. 3) "that all assignments and transfers of rights of pre-emption given by this Act, prior to the issuing of patents, shall be null and void."

The Act of January 23, 1832, allowed a transfer of the certificate of purchase. Here, however, the assignment was made in January, 1834, when no law allowing of a preference of entry existed; but, as no reliance seems to have been placed in the pleadings on this ground of defense, we will not rest our decree on it.

As respects Richmond's occupation, according to the Act of 1834, John Monholland, Edward Doughty, and Daniel Kuger each swear, in similar language, "that Richmond, in the year 1833, cultivated part of the S. W. fr'l qr. sec. 15, in T. 19 S., R. 1 W. of the principal meridian, and raised a corn crop on the same in that year (1833), and was in possession of the same on the 19th of June, 1834." Kuger says Richmond had his dwelling house on the quarter section, and resided there on the 19th of June, 1834.

Jacob Silor, examined on part of the respondents, Ashley and Craig, states that he resided on Grand Lake, quite near the quarter section in dispute, since 1830. He says: "In February, 1833, when I arrived on the aforesaid lake, there was a turnip patch on the southwest fractional quarter of fractional section 15, in township 19, south of range 1 west, claimed by one Edward Doughty, which I believe he abandoned in consequence of the location of the ten-section claim on the land. After Doughty left the aforesaid fractional quarter, William Richmond, in December, 1833, built a cabin where the turnip patch claimed by the said Edward Doughty was made, and planted some eschallots. The aforesaid William Richmond lived in the same township, on the Mississippi River, on the lands owned by Mr. Cummins or Mr. Shaw, on June 19, 1834; and never did live on section 15, from the time I went on the lake to the present day."

Benjamin Taylor deposes that he settled with his negroes on township 18, in February, 1834; that in the spring of that year he examined with care the several tracts of land of Ashley and Craig, with a view to purchase them; and being asked what the situation of the S. W. ¼ of 48*] section 15 was, when *he examined it, answers, that "there was a small burn of cane, perhaps twenty yards square, uninclosed, without the appearance of ever having been cultivated, and no house was thereon." We suppose that it had been burnt by fire up in the woods, or removed during the winter of 1833-4.

We hold the truth to be, that Richmond built a cabin in 1833, and in January, 1834, sold out his improvements to Barnard and removed away, and resided elsewhere in June, 1834, and consequently was not entitled to a preference of entry.

The next subject of controversy is the S. E. ¼ of sec. 22, T. 18. Ashley, by cross bills, prayed to have his title quieted to this quarter section against Barnard's heirs, and the Circuit Court granted him the relief he asked.

The half of section 22 was entered by Ashley on a floating warrant known as a Lovely claim. By the Act of January 6, 1829, no one was permitted to enter the improvement of an actual settler in the territory, by virtue of such floating warrant; and it is alleged that Barnard was such an actual settler, and had an improvement on the S. E. ¼ sec. 22, T. 18, before Ashley entered it.

The cross bill alleges that Barnard had improvements on sec 23, but that they did not extend to the S. E. ¼ of sec. 22 previous to the 4th of June, 1834, when Ashley entered the land. It was shortly before that time that Martin had corrected the eastern boundary of sec. 22, locating it about one hundred yards further west, and which was adopted as the true line at the Land Office. In support of the bill, Benj. Taylor deposes, as already stated, that he removed to the immediate neighborhood of the lands in dispute in February, 1834, when he examined the ¼ sec. 22, with a view to purchase it from Ashley. He states that Thomas Barnard cultivated the S. W. ¼ of fractional sec. 23, in 1834; but that his cultivation and improvement did not extend to the south half of sec. 22, nor had any other person residence or cultivation thereon.

Philip Booth states that Barnard showed him (Booth) an improvement on the S. E. ¼ of sec. 22 early in 1834; thinks it was an extension of his farm of two or three acres. It had been cleared the year before, but there was no cultivation. The witness does not recollect whether the clearing extended beyond the old line or the new one.

Silas Craig, who was a competent witness for Ashley in this separate proceeding, deposes that he was with Martin, the surveyor, when the lines were run and adjusted, late in February, 1834; that the new and proper line bounding the section east is about one hundred yards west of the first line, which was rejected by the Surveyor-General; that when he was at the southeast corner *of the section, he exam- [*49 ined Barnard's improvement, and ascertained that it did not extend west to the new line at any place. He seems to have made it his business to see if the improvement of Barnard extended to the S. E. qr. in dispute.

Romulus Payne was called on to prove the value of mesne profits and improvements; he says that Barnard commenced the cultivation on the S. E. ¼ of sec. 22 in 1837.

John Monholland, Edward Doughty, and several other witnesses, swear on behalf of the defendants to the cross bill, in general terms, that

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Barnard had possession of the S. E. ¼ sec. 22 on the 19th of June, 1834, and that he had an improvement on part of it in 1833.

Barnard, in proving up his pre-emption right swore that he was cultivating the ¼ section in 1833, and in possession on June 19, 1834. And this affidavit is indorsed by two witnesses, Harrison and Butler, who merely say that they have heard Barnard's affidavit read, and that it is true.

So, likewise, Jacob Silor indorsed William Richmond's affidavit, made before a justice of the peace and intended to secure a preference of entry for Barnard in Richmond's name, and which was declared sufficient by the Register and Receiver; and yet, when Silor was re-examined as a witness in this cause, he conclusively proved that Richmond left the land, and resided elsewhere when the Occupant Law of June 19, 1834, was passed.

The ex parte affidavits of Butler and Harrison, and those of Monholland and Doughty, were obviously written out for them to swear to as matter of form, but made with so little knowledge, on part of the witnesses, of the section lines, and the number of quarter sections on which they deposed improvements existed in 1833 and 1834 as to be of little value. And the same may be safely said of other witnesses whose affidavits were taken without cross-examination.

It is most obvious that these loose affidavits obtained by the interested party have been made, as to the improvement being on the quarter section claimed, on the information of him who sought the preference of entry; the witnesses not knowing, of their own knowledge, where the true section line was, over which they swear Barnard's improvement extended in the year 1833.

When the last examination was had before the Register and Receiver in 1837, Barnard's own witnesses, Philip Booth and John F. Harrison, swore the facts to be, that Barnard had "deadened the timber and cleared away the cane," in a part of S. E. ¼ sec. 22; that he fenced it early in 1834, and made a crop of corn on it that year, and was in possession June 19, 1834. Booth, in a subsequent affidavit, contradicts his first statement. That there was no cultivation on the quarter section in 1833, 50*] *we think is satisfactorily established; nor had Barnard any right to enter it. And such was the final opinion of the Register and Receiver, which the Commissioner of the General Land Office reversed, and ordered a patent to issue to Barnard.

The Circuit Court was obviously of opinion, as appears from the decree it made, that Craig and Taylor's evidence established the fact that Barnard had no part of the quarter section in possession in 1833 or 1834, and hence decreed for the complainants in the cross bill. And, in the doubtful state of the evidence, we are not prepared to say that this court can hold otherwise, and therefore affirm the decree, and order the cause to be remanded for further proceedings, as respects the profits and improvements.

Aff'g—Hemp. 665.

ROBERT H. McCREADY et al., Claimants of the Steamboat Bay State, her Tackle, machinery, etc., Appellants,

v.

GOLDSMITH WELLS et al.

(See S. C. 18 How. 89-92.)

Rate of speed of steamer—sixteen or seventeen miles an hour in fog and frequented waters, not admissible—sailing vessel not at fault for not ringing fog bell or blowing horn.

Collision. Court cannot lay down any fixed rule as to proper rate of speed of steam vessels. This must depend on the circumstances of each case.

But a rate of sixteen or seventeen miles an hour in a dense fog, in waters frequented with sailing vessels, is inadmissible, and proves the steamer in fault in case of collision with a schooner at anchor.

The schooner not held in fault, under the circumstances of this case, for not blowing a horn, or ringing a fog bell; it not appearing that it would have been of any avail, and no usage to do so having been established.

Submitted Dec. 20, 1855. Decided Jan. 8, 1856.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The owners of the schooner Oriana filed a libel for damages sustained in a collision, against the steamer Bay State. The District Court adjudged both vessels at fault, and decreed that the defendants pay half the damages.

The Circuit Court reversed this decree on appeal, and the entire damage to the Oriana was decreed against the steamer. The facts of the case appear in the opinion of the court.

Mr. D. Lord, for the appellants, argued that the schooner was the cause of the collision; that she failed to give notice of her proximity on hearing the approach of the steamer; and that the steamer was not in fault.

Steinbach v. Rae, 14 How. 536; The Europa, 14 Jurist, 627; S. C. 2 Eng. Law & Eq. 557; The Perth, 3 Hagg. Adm. 414; The Iron Duke, 2 Wm. Rob. Adm. 378.

Messrs. F. B. Cutting and Owen for the appellees.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal in admiralty, in case of collision, from a decree of the Circuit Court of the United States for the Southern District of New York.

The collision occurred on Long Island Sound, off Watch Hill light, on the Connecticut shore, between the schooner Oriana and the steamer Bay State on the 13th of August, 1847, when the former was run down and sunk. The schooner was ladened with coal, and on her way to New Bedford. The steamer was engaged in one of her usual trips from Fall River, through the Sound to the City of New York. On the morning of the accident the weather was thick and foggy, and so dark that a vessel could not be seen over two or three hundred feet off, and

NOTE.—Collision. Rights of steam and sailing vessels with reference to each other, and in passing and meeting—see note, 13 L. ed. U. S. 537.

Speed of vessels in a fog—see note, 41 L. ed. U. S. 1053.

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the wind at a dead calm. The schooner lay helpless on the water.

The steamer is a large vessel, some sixteen hundred tons burden, with powerful engines, and of great speed, and was coming down the Sound at the time at the rate of sixteen or seventeen miles the hour. The hands on board the schooner heard the noise of her paddle wheels before she appeared in sight: she was within less than her length when they could first discern her; and she had approached within that distance of the schooner before that vessel was discerned by the hands on board the steamer.

The place where this collision occurred is in the direct track of the coasting trade between the Eastern States, New York and Pennsylvania, and where the waters are greatly frequented by vessels engaged in it.

We agree, that it is not for this court to lay down any fixed and inflexible rule as it respects the rate of speed of steam vessels navigating these waters. This must depend upon the circumstances attending each particular case. These may justify a rate deemed prudent navigation at one time, that would be wholly unjustifiable at another. But we feel 91*] no difficulty in *saying, that in a case circumstanced as the present one, a fog so dense that the most vigilant lookout would be unable to discern a vessel at a distance of more than sixty or a hundred yards—navigating at the time, waters frequented with sailing vessels—a rate of sixteen or seventeen miles the hour is altogether inadmissible as prudent or reasonably safe navigation. According to the testimony of the pilot, it would take four or five minutes to stop the Bay State at this rate of speed; at a reduced rate, it would of course take a proportionably less time. This, in addition to the better opportunity for each vessel approaching to adopt the proper maneuver to avoid the collision, should admonish those engaged in navigating vessels of this description, of the propriety, if not necessity, of slacking their speed in thick weather, and especially in a track where other water craft are usually to be met.

Some of the officers on board this steamer, as is apparent from the evidence, were laboring under a very imperfect appreciation of their whole duty as regarded her proper navigation.

A passenger on board, who witnessed the collision, was struck by the impropriety of the rate of speed, and asked why they ran so fast in a fog; and was answered that it was necessary, in order to enable them to keep their reckoning in going from place to place. And we learn, also, from the testimony of the pilot and some others, that they make no difference in the rate of speed in consequence of a fog; that they go slow when making land, or a light, or in narrow passages, and when sounding the lead, as if the only precautions they were bound to observe in the navigation were as it respected the safety of their own vessel.

We will only repeat what we said in the case of The New Jersey, 10 How. 606: "That it may be matter of convenience that steam vessels should proceed with great rapidity; but the law will not justify them in proceeding with such rapidity, if the property and lives of other persons are thereby endangered."

We are all satisfied that this vessel was grossly in fault, on account of the rate of speed with which she was moving, under the circumstances, at the time of the collision.

The remaining question is, whether or not the schooner was also in fault. And this, in the present case, depends upon another, namely: whether she omitted any precautionary measures which she was bound to observe under the circumstances, such as beating empty casks, or blowing a fog horn, with a view to give notice to vessels approaching, of her position.

A good many witnesses have been examined as to the usage of vessels navigating the Sound, in respect to the blowing of horns, beating of empty barrels, and the like, in thick and foggy *weather; but on looking carefully into [*92 the testimony, it would be found that no such general or established usage has been proved.

The evidence of most of the experienced masters who have been examined goes to disprove the prevalence of any such usage. The practice is occasionally resorted to in the navigation of the Sound, but with what advantage or security against accidents, does not distinctly appear. Without much more evidence of the usage, and of its utility in preventing collisions, than is shown in this case, we cannot say that the omission to comply with it is of itself chargeable as a fault against the schooner. It may well be, that the use of these means should be entitled to consideration upon a nice question of proper vigilance and caution, in a case of collision between two vessels, like any other precautionary measure that might tend to prevent its occurrence. Beyond this, we do not think the evidence as disclosed in the case would justify us in carrying the effect of the omission.

Besides, we are not satisfied, upon the evidence, that the precautionary measure of blowing horns, or ringing a fog bell, would have been of any avail under the circumstances of this case. The witnesses on the part of the steamer agree that the noise of the motion of the vessel in the water is so great that it could be heard at a much farther distance than their own fog bell; and several of them consider the bell useless for this reason; and one of them states expressly that he did not recollect ever hearing a horn while on a steamboat when she was under way, but had after she stopped. A horn, it is said by some of the witnesses, cannot be heard, at the farthest, over a mile and a half; and if so, it certainly could not be heard anything like that distance, if at all, on board a steamboat in motion. The steamer, as we have seen, was moving at a rate of more than a mile in four minutes; and taking into view the size of the Bay State, with her powerful engines, together with this rate of speed, it is quite apparent that if a horn could have been heard at all, it could not, upon any reasonable conclusion, in time to have materially influenced the result.

We are satisfied the decree of the court below is right, and should be affirmed.

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135*] *ALBERT H. GUILD and John F. Lightner, Partners in Trade Under the Style and Firm of Henry Huggs & Co., Plaintiffs in Error,

v.

JOSEPH FRONTIN.

(See S. C. 18 How. 135.)

Where trial by court, special verdict or agreed statement necessary to a review—if verdict or statement imperfect, venire de novo awarded—no error appearing, and no exceptions, judgment affirmed.

Where trial below is by the court without jury, a special verdict or agreed statement of facts must be put on record, in order to a review in this court, of the judgment or writ of error.

If such verdict do not find all the issues, or the agreed statement be incomplete, this court may award a venire de novo, because of the mistrial.

But having jurisdiction of the cause, and no error appearing on the face of the record, and no bill of exceptions on any question of law, the judgment must be affirmed.

Argued Dec. 28, 1855. Decided Jan. 8, 1856.

IN ERROR to the District Court of the United States for the Northern District of California.

Mr. M. Blair for the plaintiffs in error.

Mr. F. B. Cutting for defendant in error.

Mr. Justice Grier delivered the opinion of the court:

The record and proceedings in this case are in conformity with the practice of the state courts of California. It was tried without the intervention of a jury; and the testimony, together with the court, filed of record. But there is no special verdict, or agreed statement of facts, on which the judgment was rendered, nor is there any bill of exceptions, sealed by the court, to their decision on any question of law. We are, in fact, called upon to review the case on the pleadings, exhibits and testimony, as if it were a bill in chancery. Our very frequent decisions on this subject seem not to have come to the knowledge of the bar in the court below. Parties may, by consent, waive the trial of issues of fact by a jury, and submit the trial of both facts and law to the court. It will not be a mistrial. But if they wish the judgment of the court to be reviewed on a writ of error, a special verdict or agreed statement of facts must be put on record. The issues of fact must be ascertained and made certain, before a court of error can review the decision of an inferior court. If the verdict do not find all the issues, or the agreed statement in the nature of a special verdict be imperfect or incomplete, this court may order a venire de novo, because of the mistrial, as in the case of Graham v. Bayne, at this term. But having jurisdiction of the cause, and no error appearing on the face of the record, the judgment of the court below must be affirmed.

The case of Prentice v. Zane, 8 How. 470, is directly in point on this subject.

*ALFRED SAVIGNAC, Plff. in Er., [*136

v.

ABRAHAM GARRISON.

(See S. C. 18 How. 136-137.)

Neglect to survey, etc., out lot in St. Louis, did not impair title—questions whether the lot, etc., were within the Act of 1812, are for the jury.

Neglect to procure the survey and location of an out lot in St. Louis, under the Act of May 26, 1824, did not operate to impair or forfeit the title acquired under the Act of June 13, 1812.

Whether or not the lot and the inhabitation, cultivation or possession thereof comes within the purview of the Act of 1812, confirming titles to out lots in St. Louis, are questions of fact for the jury.

Argued Dec. 28 and 31, 1855. Decided Jan. 10, 1856.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The case is sufficiently stated in the opinion of the court.

Mr. S. S. Baxter, for plaintiff in error:

The Act of June 13, 1812, for the settlement of land claims, 2 Stat. at L. 748, makes proprio vigore a present grant of all the claim of the United States in this lot, and vested a full title thereto in the heirs of Simoneau.

This title did not require additional confirmation under the Act of May 26, 1824, 4 Stat. at L. 68. Nor did this title require any concession, survey, or written permission to take possession and cultivate these lands to support it.

Guitard v. Stoddard, 16 How. 494; Chouteau v. Eckhart, 2 How. 344; Mackay v. Dillon, 4 How. 421; Les Bois v. Bramell, 4 How. 449; Strother v. Lucas, 12 Pet. 410; Vasseur v. Benton, 1 Mo. 296; Trotter v. Public Schools, 9 Mo. 69; Page v. Scheibel, 11 Mo. 167; Harrison v. Page, 16 Mo. 182; Kissell v. Public Schools, 16 Mo. 553; Gamache v. Piquignot, 17 Mo. 310; S. C. 16 How. 452.

The confirmation of 1812 vested the lands in Simoneau's heirs and the second confirmation vested nothing in Mackay or those claiming under him.

Polk v. Wendell, 5 Wheat. 293; Patterson v. Jenks, 2 Pet. 233; Danforth v. Wear, 9 Wheat. 673; Ricard v. Williams, 7 Wheat. 59; Preston's Heirs v. Bowmar, 6 Wheat. 580.

The judgment is erroneous because the verdict was for more land than the defendant was in possession of.

Bear v. Snyder, 11 Wend. 592; Holmes v. Seely, 17 Wend. 75.

Mr. T. Ewing for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Missouri.

The plaintiff below, Garrison, brought an action of ejectment against Savignac, to recover the possession of a lot of land in the City of St. Louis, claiming title derived from the confirmation of Mordecai Bell's Spanish claim by the Act of Congress of 1835.

The defendant claimed title to the lot under the 1st section of the Act of 13th of June, 1812, which provided "that the rights, titles and claims to town or village lots, out lots, common field lots, and commons, in, adjoining and

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belonging to the several towns or villages (enumerating several, of which St. Louis was one), which lots have been inhabited, cultivated or possessed prior to the 20th December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages, according to their several right or rights in common thereto."

Evidence was given on the trial, by the defendant, deducing a title or claim to the lot in question, derived from Charles Simoneau, and also evidence tending to prove that the lot was an out lot within the purview of the Act of 1812, and that Simoneau was in possession and cultivation of it prior to the 20th December, 1803.

137*] *After the testimony closed, the court instructed the jury that "there was no evidence that Simoneau cultivated any out lot or common field lot; nor that any one existed at the place where the cultivation was; nor had the Act of 1812 application to this land, so far as Simoneau or those claiming under him are concerned. And further, that if there had existed an out lot or common field lot, undefined by boundaries, which was claimed on the ground of inhabitation, cultivation or possession, then the Act of the 26th May, 1821, required that the fact of inhabitation, cultivation or possession, and the boundaries and extent of such claim, should be proved before the Recorder of Land Titles, to enable the Surveyor-General to distinguish the private from the vacant lots. And no steps having been taken under the Act of 1824, nor any authoritative location or survey of the land, at any time, either under the Spanish government or the government of the United States, the evidence given in this case will not enable the defendant to resist a recovery by the plaintiff."

The case of Guitard et al. v. Stoddard, 16 How. 494, decided since this case was tried at the circuit, disposes of both branches of the instructions to which we have referred, holding that whether or not the lot, and the inhabitation, cultivation or possession thereof came within the purview of the Act of 1812, were questions of fact for the jury; and that the neglect to procure the survey and location, under the Act of 1824, did not operate to impair or forfeit the title acquired under that of 1812.

As the judgment of the court below must be reversed for errors in the instructions referred to, it is unimportant to take notice of any other questions raised on the trial or in the argument.

Judgment reversed, and venire de novo to issue.

1*] *THE UNITED STATES, Appellants,
v.
PEARSON B. READING.

(See S. C. 18 How. 1-16.)

Mexican grant in California—omission to comply with conditions in grant, does not necessarily destroy title—what are excuses for such omission—duty of Mexican Governor—grants to foreigners—recitals in grant and record, evidence—effect of grantee's abandonment of Mexican allegiance.

That grantee had not complied with the condition to build upon the land, and to have it inhabited, within one year, and had omitted to obtain a judicial possession and survey, are charges of negligence, to be determined by the proof in each case.

That the house put upon it was burnt, and grantees driven from possession by the Indians, and grantee compelled to be absent on military duty, disprove the objection in regard to occupation and cultivation.

That the only officer authorized to give judicial possession and permit a survey, was absent on military expedition against the Indians, and could not perform such duties, although petitioned to do so, answers the objections on these points.

These, however, are minor objections against the confirmation of the grant, and not essential to the decision of the case.

The grantee's title would not have been lost, because the conditions annexed to the grant had not been fulfilled, unless it is shown that there had been, on his part, such unreasonable delay or want of effort to fulfill those conditions as would amount to an intention to "abandon his claim," before the Mexican power had ceased to exist, and that he was now endeavoring to resume it from its advanced value under the United States. Frémont's case, 17 How. 560.

A right and title passed by the Governor's grant, but its definitive validity was suspended for the approval of the Assembly, and so continued suspended, until such approbation had been given, when the title became definitive.

But if that approval was refused, it did not take away, nor in any way qualify the grantees title, but only kept its final validity in suspense, until the grant had been rejected by the supreme government of the Republic.

It was the Governor's duty, after its rejection by the Assembly, to forward the documents of title to the supreme government for its decision.

It was also the duty of the Governor, and not that of the grantee, to forward grants of land given by him to the Departmental Assembly.

If the Governor failed to transmit the documents, from any cause whatever, the grantee's title continued to be what it was when the grant was given, and is sufficient, after the territory had been transferred to the United States, for confirmation under its statute.

Foreigners were included with those to whom the Governors of the Mexican territories might make grants of land for the purpose of cultivating and inhabiting them.

The recital in the grant of the grantee's Mexican naturalization, and the admission by the record of the regularity and genuineness of the documentary title, are conclusive, and preclude all other inquiries about it.

The fact that the grantee joined the forces of the United States in the war with Mexico, is insufficient to raise a presumption that he meant to abandon his claim.

The Mexican government having, by its conduct, indicated its wishes, and design to drive the naturalized immigrants from the United States from their homes and from its territory, and giving them no protection, the grantee's conduct in joining the American forces is blameless of treachery to Mexico.

If grantee had voluntarily and without excuse abandoned his Mexican allegiance for that of his nativity the United States, the latter government could not urge it as a cause for the forfeiture of his title to land acquired from Mexican laws.

By the law of war either party who receives among his troops one who has quit the other, by honor and the usage of nations, gives him protection personally, and security for all that he has.

(Mr. Justice CATRON and Mr. Justice DANIEL did not concur in some of the above propositions.)

Argued Dec. 4 and 5, 1855. Decided Jan. 11, 1856.

APPEAL from the District Court of the United States for the Northern District of California.

On the 4th of Dec. 1844, Governor Micheltoreana issued a grant to Pearson B. Reading, a Mexican by naturalization, for the land known as Buena Ventura, subject to the approval of

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the Departmental Assembly; and subject also to the following conditions contained in the grant: that within the year he should build a house and it should be inhabited; that he should solicit from the proper magistrate the judicial possession by whom the boundaries should be marked out; that the judge who should give possession should cause it to be measured according to the ordinance; and that the overplus should remain to the nation for convenient uses; that he should not convey in entail or mortmain; that if he should contravene the conditions, he should lose his right to the land, and it should be denounced by any other person.

On Feb. 9, 1852, the appellee presented his claim to the Board of Commissioners for the rancho called Buena Ventura. On Dec. 18, 1852, the Commissioners confirmed the grant to the extent of a quantity of six square leagues. The United States appealed. The District Court affirmed the decision of the Board of Commissioners, from which decree this appeal is taken. The case is further stated in the opinion of the court.

Mr. C. Cushing, Atty-Gen., for appellants:

1. Reading, not being a Mexican citizen, could not take and hold a grant of land in a Mexican territory. He describes himself in his petition as "a native of the United States," and a resident in Mexico since 1842. The onus of proving lawful naturalization rests with him.

2. As an alien, he was not entitled to take and hold lands in California which was a frontier territory. Decree of March 11, 1842.

3. The grant was not approved by the Departmental Assembly. Without the approbation of the Assembly, there was no grant passing any title.

4. Reading would have no claim in law or in equity on Mexico, to complete and confirm his incipient title, if she had not transferred California to the United States by the Treaty.

5. Reading abandoned whatever claim he had before the final conquest by the United States.

As to the first of these, the obtaining the approval of the Departmental Assembly, the grantee had no part to perform in that behalf. The grantee could not be deprived of his vested interest by the neglect of the Governor to report the necessary documents to the Departmental Assembly, according to the regulations of 1828.

Taylor v. Brown, 5 Cr. 242; Lytle v. Arkansas, 9 How. 333.

As to the other condition, the judicial mensuration, the grantee performed his part—that of applying to the proper magistrate.

The United States have not claimed, nor attempted to exert, the power to annul Mexican grants for non-performance of conditions subsequent.

9 Stat. at L. 633, ch. 41, sec. 11.

Independent of the express guaranty of the Treaty, the law of nations would afford protection for the property of those who inhabited the conquered and ceded territory.

U. S. v. Percheman, 7 Pet. 86; Mitchell v. U. S. 9 Pet. 734; Soulard v. U. S. 4 Pet. 511; Strother v. Lucas, 12 Pet. 435; including incomplete titles, grants, concessions and orders of survey.

Cases above cited and Chouteau v. U. S. 9 Pet. 145; Delassus v. U. S. 9 Pet. 133.

The evidence showed a compliance with, as far as possible, the condition of the grant.

On the question of abandonment, Mr. Cushing cited the following authorities:

Phillips v. Shaffer, 5 S. & R. 215; Blaine v. Crawford, 1 Yeates, 287; Smith v. Brown, 1 Yeates, 513; Fisher v. Larick, 3 S. & R. 319; Watson v. Gilday, 11 S. & R. 337; Jones on Land Office Titles, 175-182; Holliman v. Peebles, 1 Texas, 673; Horton v. Brown, 2 Texas, 78; Yates v. Iams, 10 Texas, 168; Rivers v. Foote, 11 Texas, 662.

A claim once abandoned cannot of right be resumed.

Pennock v. Dialogue, 2 Pet. 1; Shaw v. Cooper, 7 Pet. 292; McClurg v. Kingsland, 1 How. 202.

Messrs. Bibb, Howard, Walker and Lawrence, for the appellee:

By the grant of the Governor, an estate in fee vested immediately in the grantee, Fremont v. U. S. 17 How. 558, subject to be defeated by non-performance of condition. Of the condition annexed, two only need be noticed, as there is no pretense that the others were unfulfilled.

U. S. v. Arredonào, 6 Pet. 691; 13 Pet. 133; U. S. v. Sibbold, 10 Pet. 322.

Mr. Justice Wayne delivered the opinion of the court:

We find in the record of this appeal, that Reading, the appellee, was an immigrant from the United States, in the then Mexican territory of California, in the year 1842, and that he afterwards became a citizen of the Mexican Republic. After residing there for two years, he petitioned the Governor, Micheltoreana, for a grant of land called Buena Ventura, situated on the bank of the River Sacramento, bounded on the north by vacant lands; on the east by the River Sacramento, and on the south and west by vacant lands, according to a plat annexed to his petition. The Governor referred the petition to the Secretary of State for information concerning it. The Secretary, in reply, says the petitioner was a proper person for the Governor's favor, and upon the official certificate of Jno. A. Sutter (who was military commandant of the northern frontier of California, and charged with civil jurisdiction also) he declares that the land asked for was vacant and could be granted. The Governor directed the title to be issued, and it was prepared for his signature.

It is as follows:

"Citizen Micheltoreana, General of Brigade of the Mexican Army, Adjutant-General of the Staff of the same, Governor, Commandant-General, and Inspector of the Department of the Californias.

Whereas, Don Pearson B. Reading—a Mexican by naturalization—has made application, for his personal benefit, for land known by the name of Buena Ventura, on the margin of *the River Sacramento, from the creek [*4 called Lodo (Lodoso, Muddy), which is on the north as far as the Island de Sangre, with six square leagues in extent; and the proper proceedings and investigations having been previously complied with, according to the provisions of the laws and regulations concerning the matter, by virtue of the authority vested in me, in the name of the Mexican nation, I have

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granted to him said land, subject to the approval of the most excellent Departmental Assembly."

There are also conditions annexed to the grant, which may be seen in the reporter's statement of the case. The grant was signed by the Governor, and countersigned by the Secretary of State, on the 4th of December, 1844, and entered into the archives of the Territory on the same day, with an order from the Governor that the title, being held as valid, should be delivered to the interested party for his security and other purposes.

The power of the Governor to make such a grant of land is admitted. The regularity and genuineness of the entire proceeding, and its entry into the archives of the Territory, are not disputed; but Reading's right to a confirmation of it is denied, upon several grounds. Each objection shall have due consideration, not because all of them require it, but to prevent the same points from being urged again in cases of a like kind.

It is said the grant was provisional only, having been made subject to the approval of the Department Assembly; and as that had not been given, that it passed no such interest in the land to Reading as entitled him to a confirmation of the grant. Other objections were urged against the confirmation of it, arising out of the national status of Reading when he received the grant, and also out of the fact, that, in the war between Mexico and the United States, he left the standard of the former, and joined the American forces which invaded California. And it was said, as it had been in Frémont's case, that he lost whatever right he had to the land, and subjected it to be denounced by any other person, because he had not complied with the condition to build a house upon it, and to have it inhabited, within a year from the date of the grant, and because he had omitted to obtain a judicial possession and measurement, or survey of it. The last two objections are charges of negligence, which must be determined by the proofs in the cause. In our opinion, they do not show either negligence or omission in the particulars mentioned. The witness Hensley says it was upon his suggestion that Reading applied for the land. He knew the locality of it, from having been there. After stating that he had seen a paper purporting to be a grant of the land, dated in December, 1844, he says that Reading visited it in August, 1845, and that they were ten days together upon the land, looking for suitable 5*] *locations for fields and building sites. That Reading then put upon it a Frenchman named Julian, to build a house for him and to keep possession of it; that at that time Reading placed upon the land horses and cattle. That the house was built. It was afterwards burnt by the Indians, and Julian was killed by them. Ford, another witness, who went to that part of the country in March, 1846, as one of a military company to quell an outbreak of the Indians, confirms Hensley's statement in respect to Julian's possession of the land for Reading, but says that he had been forced by the Indians to abandon the house he had built; and that the horses which had been put upon the land, or others belonging to Reading, had been driven from it by Julian, as it was impossible to keep them there on account of the hostilities of the Indians. And Sutter accounts very satisfactorily for Reading's absence from the land during the years 1845 and 1846, in his reply to the question, if it would have been safe for Reading to have resided personally on his ranche during the revolution and hostilities of those years, when he says Major Reading had hardly time to do so, as he was nearly all the time required by me to do service. Sutter had said before, in his answer to another question, that he had been, in the years 1844, 1845 and 1846, military commandant of the northern frontier of California, and was also charged with the civil jurisdiction in all that region of country; and as such, that he had official power to order Reading upon military duty, and that he had done so. It appears also from his testimony, that he kept Reading so employed in the service of Mexico, with the exception of short intervals, from the early part of the spring of 1845 into a part of the year 1846, until Col. Frémont invaded Upper California; when, shortly afterwards, Reading joined him. The facts of the case, in respect to the occupation and cultivation of the land by Reading's agent, disprove the objection. Such an agency for building a house, and having it inhabited by the agent, was as good a compliance with the condition requiring that to be done, as if it had been done personally by Reading. The objection that he had disregarded the condition of the grant, in not having obtained judicial possession and a survey of the land, is answered by the declaration of Sutter, the only person officially authorized to give it, and without whose permission no survey could have been made. He says that Reading applied to him in the spring of the year 1845, to be put in judicial possession of the land, but that he had not complied, because his military engagements in the field against the Indians, just before and following the application, had disabled him from doing so; and that the revolution which followed Col. Frémont's coming, was his reason for not having given to Reading *judicial [*6 possession, according to the prayer of his petition for that purpose.

We have noticed these minor objections against the confirmation of this grant, that the real merits of the transaction might be known, and not because it was essential to the decision of the case. For, even if the proofs in the case, in respect to the grantee's occupancy of the land, had been otherwise than they have been shown to have been, his title to it would not have been lost, because the conditions annexed to the grant had not been fulfilled; unless it could be shown that there had been on his part such unreasonable delay or want of effort to fulfill those conditions as would amount to an intention "to abandon his claim" before the Mexican power had ceased to exist, and that he was now endeavoring to resume it, from its enhanced value under the government of the United States. This court considering in Frémont's case, 17 How. 560, the same objections which are now under our consideration in this, uses the following language: "Regarding the grant to Alvarado, therefore, as having given him a vested interest in the quantity of land therein specified, we proceed to inquire whether there was any breach of the conditions an-

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nexed to it, during the continuance of the Mexican authorities, which forfeited his right, and revested the title in the government. The main objection on this ground is the omission to take possession, to have the land surveyed, and to build a house on it within the time limited in the conditions. It is a sufficient answer to this objection to say, that negligence in respect to these conditions and others annexed to the grant, does not, of itself, always forfeit the right of the grantee."

"It subjects the land to be denounced by another, but the conditions do not declare the land forfeited to the state upon the failure of the grantee to perform them. The chief objects of these grants was to colonize and settle the vacant lands. The grants were usually made for the purpose, without any other consideration and without any claim of the grantee on the bounty or justice of the government. But the public had no interest in forfeiting them, even in these cases, unless some other persons desired and was ready to occupy them, and thus carry out the policy of extending its settlements. They seem to have been intended to stimulate the grantee to prompt action in settling and colonizing the land, by making it open to appropriation by others in case of his failure to perform them. But, as between him and the government, there is nothing in the language of the conditions, taking them altogether, nor in their evident object and policy, which would justify the court in declaring the land forfeited to the government, where no other person 7*] sought to appropriate them, and *their performance had not been unreasonably delayed. Nor do we find anything in the practice and usages of the Mexican tribunals, as far as we can ascertain, that would lead to a contrary conclusion.

It was also urged that no title passed by the grant, as it had not received the approval of the Departmental Assembly. Our examination of the Decrees of the 18th August, 1824, and of the 21st of November, 1828, leads us to a different result. A right and title passed by the Governor's grant, but its definitive validity was suspended, for the approval of the Assembly: and so it continued to be suspended until its approbation had been given, when the title became definitive. But if that was refused, it did not take away, nor in any way qualify, the grantee's title, but only kept its final validity in suspense until the grant had been rejected by the supreme government of the republic; it being the duty of the Governor, after its rejection by the Assembly, to forward the documents of title to the supreme government for its decision.

Further, we must infer from the same Decrees, and particularly from the 5th article of that of the 21st of November, 1828, that it was the duty of the Governor, and not that of the grantee, to forward grants of land given by him to the Departmental Assembly. The latter might very well, after that had been done by the Governor, solicit the approval of the Assembly, personally or by an agent, by all those considerations which had gained him the Governor's favor. But if the Governor failed to transmit the documents, from any cause whatever, the grantee's title continued to be just what it was when the grant was given. Nor could any neglect or refusal of the Governor to transmit his grantee's documents of title to the Assembly take from him his right in the land, if the grant had been made with a due regard to what the Decree of the 18th August, 1824, required, and in conformity with the cautionary regulations of that of the 21st November, 1828. In other words, from our reading of those decrees, the Governor could not either directly recall a grant made by him, or indirectly nullify it when it had been conferred conformably with them. Those decrees prescribe a course of action for such grants, and impose upon the Governor the execution of it. When thus the archives of the Territory of the Californias do not show that the Governor's grants of land had been sent to the Departmental Assembly; or that, having been sent, they had been rejected, and that after such rejection they had not been sent, by the Governor making the grants, to the supreme executive government for a final decision —the titles of the grantees are just what they were in their beginnings, and are sufficient, now that the territory has been transferred to *the United States, for confirmation under [*8 its Statute of the 3d March, 1851. Such grants, so circumstanced, are equitable titles, protected by the Treaty of Guadaloupe Hidalgo, and by the laws and usages of nations concerning the rights of property, real and personal, of the inhabitants of a ceded or conquered country. And we may add, they are protected by the usages of Mexico in respect to such grants, the archives of California showing that a very large portion of the land in the occupation of its inhabitants was held by titles wanting the approval of the Departmental Assembly. And we entirely concur with Mr. Commissioner Hall, in the opinion given by him in the case, that the want of such approval in so many instances, as are shown by the archives of the Territory, was owing to the fact that the political affairs of the Territory had been in confusion for several years preceding its cession to the United States. That the Assembly had seldom been called together, and when assembled its sessions had been brief, and occupied with the consideration of pressing matters of a public character; and that the governors making grants had very much neglected to present them to the Assembly for approval. We are of the opinion that Reading's right to a confirmation of his grant cannot be refused on account of its not having had the approval of the Departmental Assembly.

We will now dispose of the objections to a confirmation of this grant, connected with Reading's national status when he received his documentary title, and with his having subsequently joined the forces of the United States in the war with Mexico. It is said he was not a naturalized citizen of the Mexican Republic when the grant was conferred, and that if he was, his title was forfeited to Mexico, for having fought against her; and if not forfeited, that his course in that particular should be taken as full proof of his intention to abandon all right and title to the land.

The case, as it is made in the record, does not require from us a particular consideration of the circumstances under which foreigners might receive and retain grants of land, by the Decrees of 1824 and 1828. It is enough to say,

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that the Mexican Republic, from the time of its emancipation from Spain, always dealt most liberally with foreigners in its anxiety to colonize its vacant lands. It invited them to settle upon her territory, by promises of protection of them and their property. And, by the first Article of the Decree of 1828, for colonizing her vacant lands, foreigners were included with those to whom the governors of the territories might make grants of land for the purpose of cultivating and inhabiting them.

But the fact of Reading's Mexican naturaliz- [*9] ation is not an *open question in this case. The record admits of the regularity and genuineness of his documentary title for the land. The admission is as good for all of the necessary recitals in them, as it is for the main purpose for which they were inserted in those documents. That was a grant of land. The recitals are those "requisite conditions," stated in the second and third paragraphs of the Decree of November 21, 1828; concerning which, the Governor is enjoined to seek for information, which, when affirmatively ascertained, make the foundation for the Governor's exercise of his power to grant vacant lands.

In his petition for a grant, Reading says he is a native of the United States, and had resided in the country since the year 1842. The Governor states him to be a Mexican by naturalization, in the grant, and "that as the proper proceedings and investigations had been previously complied with, according to the provisions and laws and regulations concerning the matter," he, in virtue of the authority vested in him, grants to the petitioner the land known as the Buena Ventura, on the margin of the River Sacramento, from the creek called Lodo (Lodoso, Muddy), which is on the north as far as the Island de Sangre, with six square leagues in extent, subject to the approval of the Departmental Assembly, and on the conditions annexed to the grant. Now, this is not merely the language of clerical formality, though it might be the same from usage in like cases, but it is a declaration of the Governor's official and judicial conscience; that his power to make the grant has been used in a fit case, for the approval of it by the Departmental Assembly, or for the decision of the supreme executive government, in case the action of the Assembly should make it necessary for him to carry it there for its decision.

We consider it conclusive of the fact of the petitioner's Mexican naturalization, precluding all other inquiries about it, in our consideration of this case, by the record.

The last objection was, that Major Reading having joined the forces of the United States in the war with Mexico, had forfeited his right to the approval of his grant by the authorities of Mexico, which the United States might take advantage of to defeat his claim; and if not so, that the fact itself raised a strong presumption that he meant to abandon it. As to the last, there is nothing in the record from which such an intention can be inferred, and the fact itself is insufficient for such a purpose. There is much to show the reverse, if the circumstances and condition of the country are considered, when Reading joined Frémont. There had been in the year 1845 a successful revolution in California, by which Torena, the Governor, had been deposed; his powers had been assumed by Colonel Don *José Castro, without any [*10 authority from the supreme executive government of Mexico. It was followed by Indian outbreaks, with marked hostility to the foreigners who had settled in California, and more so against those from the United States than to any other class. If they were not instigated, they certainly were not discouraged by the existing government. Its conduct indicated its wishes, if not a fixed design, to drive the naturalized immigrants from the United States from their homes and from the Territory. In such a state of things, Col. Frémont carried the war into California. Neither the supreme government, nor the territorial, gave protection to its inhabitants, and it had become part of the war policy of Mexico to suspect the fidelity of settlers from the United States to their Mexican allegiance, and plans were formed to get rid of them. We take the fact from other authentic sources, and Sutter speaks of it in the record, with positiveness as to himself. Reading had good cause for like apprehensions, and having joined Col. Frémont under such circumstances, his conduct may be said to have been blameless of all treachery to Mexico.

But if they were otherwise, and Reading had voluntarily, and without circumstances to excuse it, abandoned his Mexican allegiance for that of his nativity, the United States could not urge it as a cause for the forfeiture of his title to land acquired from Mexican laws, and in the mode in which those laws had been executed by the governors of the states and territories of that Republic.

War has its incidents and rights for persons and for nations, unlike any that can occur in a time of peace; and they make the law applicable to them. One of them is, that by the law of war either party to it may receive and list among his troops such as quit the other, unless there has been a previous stipulation that they shall not be received. But when they have been received, a high moral faith and irrevocable honor, sanctioned by the usages of all nations, gives to them protection personally, and security for all that they have or may possess. They are exempt also from all reproach from the sovereignty to which their services had been rendered. Nothing that they claim as their own can be taken from them, upon the imputation that they had forfeited or meant to relinquish it by the abandonment of their allegiance to the sovereignty which they had left.

The reverse would partake of Sir Guy Carleton's "impossible infamy," though when used by him in reply to a letter from *General [*11 Washington, not so well applied, as it might be, if the United States was allowed to interpret the Treaty of Guadaloupe Hidalgo, so as to take for itself Reading's land, because he had joined its forces in the war with Mexico.

Having considered every objection made to the confirmation of this grant, and believing no one available for such a purpose, it only remains for us to declare our affirmance of the award of the Commissioners, and the decree of the District Court.

Mr. Justice Catron:

I agree that the grant to Major Reading describes the land he applied for, so that it can be

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ascertained and surveyed; and second, that he took possession and built a house on it within a year after the execution of the grant, in compliance with its material condition, and that the judgments of the Board of Commissioners, and of the District Court of California, were proper. But there are no facts in the case on which any question can be raised, whether the grantee, Reading, was subject to be denounced for failing to take possession and building a house; and therefore I cannot agree that the doctrine should be introduced into the opinion here, as it may embarrass the court in other cases in which the question will properly arise.

Nor can I be committed to the assumption extracted from Frémont case, and sought to be sanctioned in the principal opinion, that a Spanish concession, authorizing the grantee to occupy and cultivate, is indefeasible in its operation, although the land was never possessed nor occupied, unless some person shall denounce the land as forfeited, and obtain a second concession for it from the Governor. The assumption signifies that every incipient concession made by Mexican authority secured the land to the claimant without the performance of any one condition; that the claimant is only bound to prove that the concession was signed by a person holding the office of governor at the time; or, in other words, that the grant was not forged. How ruinous such an assertion may eventually prove in the cases of old and abandoned claims is quite manifest, as it must apply in all cases where the same land is covered by different grants; the oldest will of course be the better title, unless the younger grantee can show that the land had been denounced, and the first grant revoked by the authority that made it. When such a case is presented, and we are called on to consider this doctrine of a "denouncement," I wish to be free to do so, unaffected by previous assertions and dicta in cases that did not involve the question, and in which it was never considered by me.

12*] *That the Frémont case did not involve the doctrine is manifest; it was a floating claim for 50.000 arpents of land, subject to be located by selection and survey in any part of a large section of country bounded by rivers and mountains; and the opinion of this court was, that Alvarado took, and Col. Frémont held, as assignee of Alvarado, a pervading interest in the entire section of country, and that the land might be taken anywhere within it, so that the rights of others were not disturbed. The rule is, so far as I know, throughout the former dominions of Spain on this continent, where donations of land have been made for the purpose of cultivation or pasturage, and where the donations imposed the condition that the grantee should occupy and cultivate the land, and he failed to do so or abandoned it, that the claim under it was defeated.

It is assumed that the Frémont claim stood on the footing of that of General Greene, for 25,000 acres derived from North Carolina, to be located and surveyed within the military district by commissioners designated for that purpose.

General Greene's grant, in effect, was a floating claim, just such an interest in the lands as was reserved for the officers and soldiers of the North Carolina line, by virtue of warrants issued to them, and which might be located in a land office in any part of the military district. This is the doctrine held by the courts of Tennessee, where the land lies, in reference to General Greene's grant, and the interest that warrant holders had in common with General Greene, as will be seen by the case of Neal v. E. T. College, 6 Yerg. 190.

General Greene acquired no specific land; he acquired by the Act of Legislature a promise of the specified quantity, to be ascertained by a subsequent survey and allotment. And this was the condition of the Frémont title, as this court decided.

Now, how was it possible for anyone to apply to a Mexican governor, and ask for Alvarado's land, because he did not inhabit or cultivate it, or because he had abandoned it? He never had any land; he only had a promise of land, or a common interest in a large tract of country; and the idea of anyone denouncing a holder of this floating claim, and asking for the particular land it covered, would have been unmeaning and idle.

The Frémont case, therefore, furnished no grounds for raising or deciding the question of denouncement, and the repeal of the first grant and of regrant to another. What is now claimed for the opinion in that case, as part of the court's legitimate decision, can only be treated as an assertion, and as part of the reasoning of the court in coming to a conclusion on other questions involved in the controversy.

Cases of denouncement in advance of a second grant for the *same land are unknown in [*13 California, so far as we are advised; and the result of holding this proceeding necessary before a second grant could be made (although no survey of the first had been secured, nor any possession taken), must result in the conclusion that among several concessions for the same land, the oldest will hold it; and those in possession under younger grants must yield the possession. This is the common law doctrine on which the Frémont case is supposed to have been decided. But is this the true rule as regards double grants, according to the Spanish law, as administered in countries formerly owned and governed by Spain?

The law has been established in Louisiana for nearly forty years, that where the Spanish authorities have granted the same land twice, and the younger grantee has taken possession and performed the conditions of inhabitation and cultivation, he is entitled to hold the land; and this was held in contests between the first and second grantees, and in cases where no denouncement had been made in favor of the younger grantee.

Boissier et al. v. Metayer, 5 Mar. 678 (1818); Gonsoulin's Heirs v. Brashear, 5 Mar. N. S. 33; Baker v. Thomas, 4 La. 414; Broussard v. Gonsoulin, 12 Rob. I.

The correctness of these decisions I have never doubted, and which have been substantially followed by this court, when it held, as it has often done, that a concession or first decree for land, over which no ownership was exercised or possession taken during the existence of the Spanish government, was inoperative, and imposed no obligation on the United States to confirm the title. It was so held in the case of The United States v. Boisdoré, 11 How. 96;

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which has been followed in various other cases since.

With this explanation, I concur in the affirmance of the judgment.

I concur.
(Signed) A. Campbell.

Mr. Justice Daniel, dissenting:

I am unable to concur in the decision of the court in this case.

Waiving, in its consideration, every exception to the proofs of the naturalization of the appellee, and those also taken to the locality of the subject claimed by him as being forbidden territory, there are other grounds of objection which appear to be conclusive against the pretensions of the appellee.

This was an application to the Board of Commissioners, for the confirmation of a grant or title alleged to have been made to the appellee by the Mexican government, anterior to the ces- 14*] sion of *California to the United States. To entitle the applicant to such confirmation, it was indispensable for him to show that he occupied such a position with respect to the Mexican government as would have enabled him to perfect his title, had there been no relinquishment of the sovereignty of the country by the granting power. It cannot be denied that a necessary ingredient in a complete title under the Mexican government, was the approbation of the Departmental Assembly; and the very act itself of the application to the Commissioners for a confirmation of title concedes the position, that without such an approval the title must be defective. I cannot concur with the court in thinking that the excuse offered for not obtaining the approbation of the Departmental Assembly, was a sufficient one; and much less can I suppose that, by such an excuse, an indispensable requisite to the completion of titles could be wholly dispensed with. To tolerate such a position, would render the validity of titles to any and every extent dependent upon the ignorance, the diligence, or the corruption of persons interested in reducing them to such an attitude of uncertainty. Even should it be admitted that there was no particular limit prescribed as to the time of obtaining the sanction of the Departmental Assembly, and that the appellee might have been excusable for omitting or failing in this requisite, for the time being, still, the conclusion remains unshaken, that without such approbation, there could, by the law of Mexico, be no title. If this be true, the objection operates à multo fortiori, if it be shown that not only was that requisite of approbation wanted, but that its obtention was, by the conduct of the appellee himself, rendered impossible; and under this aspect of the case is presented the stronger ground upon which the claim of the appellee should have been condemned and rejected. This is an application for the confirmation of a grant or title alleged to have been made by the Mexican government to the appellee, as one of the citizens of the Mexican Republic.

In order to have invested the appellee with any right as derived from that Republic, had its sovereignty over the country remained unchanged, he surely would have been bound to show the continuation of his allegiance to that Republic, and the maintenance of those relations, and the fulfillment of those duties, in the existence of which the bounty of the State to him had its origin and motive; at all events, he would be compelled to show himself exempt from the violation of the most sacred obligations which any citizen or subject can sustain to that country and government to which his allegiance is owing. Should he violate such obligation, and become a rebel or traitor to that government, he not only can have no merits in the view of that government, *but he becomes obnoxious to the forfeit- [*15 ure of both property and life.

In this case, the appellee seeks the confirmation of a claim derived confessedly from the Republic of Mexico; at the same time, by his own showing, and by the testimony of others, it is established, undeniably, that before his title was perfected, he became a rebel against that Republic, and made every exertion for its destruction. Nay, this case exhibits the inconsistency of urging a right founded on duties sustained to the Mexican Republic, with the assumption at the same time of merit deduced from the admitted facts of hostility and faithlessness to that government. The appellee can have no rights to be claimed from or through the Mexican government, to which he became an open enemy. By his conduct he completely abrogated every such right, and became, as respects that government, punishable as a state criminal; and thus not only failed to obtain that sanction without which his title was defective, viz.: the approbation of the Departmental Assembly of Mexico, but by his own voluntary conduct, rendered its procurement, upon every principle of public law, public or political policy or necessity, or of private morality, altogether impossible.

Were the appellee urging a claim as one deduced from the government of the United States, and originating in services rendered to them, he might then plead his merits with reference to this government in support of his title; but he is claiming a title from Mexico under the stress of Mexican laws; and he proves that by those laws, as they would be under like circumstances by the laws of every country—by the first of all laws, that of self-preservation—his pretensions must be repudiated and condemned. Strange as it may be, we have heard it earnestly pressed as commending this claim to the favorable consideration of this court, that the appellee, after obtaining his incipient grant as a Mexican citizen, and upon the foundation and principles of duty to Mexico, deserted that country when in flagrant war with an enemy, and contributed his utmost exertions for her conquest by that enemy. Were the pretensions of the appellee based upon services rendered to the United States, and were the origin and character of these pretensions to be sought for in the bounty and power of the United States, there might be consistency and integrity in this argument; but so far is this from being true as to the origin and nature of these pretensions, it is shown that these had their origin in that bounty which he has forfeited, and under those obligations which were binding upon the appellee, and which he has deserted and betrayed. The only obligations sustained by the United States to the

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citizens of Mexico are those which, by their substitution for the government of Mexico, 16*] *the former have by express stipulation or by necessary implication assumed.

The appellee, then, having unquestionably forfeited every pretension of right as against Mexico, deserted and assailed by him, the United States, as the successors to the sovereignty of Mexico, can sustain no obligation with respect to him in connection with this claim. I think therefore that the decision of the court below should be reversed, and petition of the appellee dismissed.

Decree of District Court affirmed.

RICHARD R. SESSIONS, Daniel H. Sessions and Sanford C. Faulkner, Appellants,

v.

JOHN M. PINTARD.

(See S. C. 18 How. 106–109.)

Sureties on appeal liable for the amount of decree appealed from.

The sureties upon an appeal bond, the appeal being from a decree, for which land was held as security, are liable for the amount of the decree appealed from, deducting therefrom the proceeds of the land when sold.

They are not entitled to a credit on the judgment on their bond, of the proceeds of such sale, to lessen their liability.

Argued Dec. 24, 1855. Decided Feb. 12, 1856.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The case is stated by the court.

Mr. Albert Pike, for the appellants:

This suit grows out of the case of Thredgill v. Pintard, decided in this court.

See 12 How. 24.

The question in the case may be briefly stated thus: Where, in a suit to enforce a lien on land for the purchase money due the vendor, there is a decree ascertaining the amount due by the vendee, and recognizing the lien and ordering payment or sale of the land, and on appeal from this decree, sureties enter into a bond conditioned to prosecute the appeal with effect and make good all damages and costs, how far does the land stand as their security? If, when it is sold, the amount decreed with interest is more than the penalty of their bond, and the land sells for less than the penalty, in what way are the proceeds to be applied? Shall they be credited upon the aggregate of the decree, perhaps leaving the sureties to pay the whole penalty, or against the penalty or proportionally against the penalty and the excess over it?

The first condition of the bond, to prosecute with effect, was satisfied when the appeal was entered.

Hobart v. Hilliard, 11 Pick. 144.

Bail are to be considered by act of law to all intents and purposes sureties (Rathbone v. Warren, 10 Johns. 595), and are not to be held beyond the precise terms of their agreement.

Ludlow v. Simond, 2 Cai. Cas. 30.

The right of subrogation of a surety, paying a debt for his principal, is founded, not on anything expressed in the contract, but on principles of natural justice.

Union Bank of Maryland v. Edwards, 1 Gill. & J. 353; Dorsheimer v. Bucher, 7 S. & R. 9; McCall v. Lenox, 9 S. & R. 309; Glason v. Morris, 10 Johns. 524; Waddington v. Vredenbergh, 2 Johns. Cas. 227; King v. Baldwin, 2 Johns. Ch. 554.

The general principle that relief by subrogation is never extended to a surety except upon the assumption that the creditor's debt has been paid, or is to be fully paid, is expressly put upon the ground that his further detention of the security or fund, must be against equity and good conscience.

Union Bank v. Edwards, 1 Gill. & J. 365.

Messrs. J. J. Crittenden, J. M. Carlisle and S. H. Hemstead for the appellee.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the Circuit Court of the Eastern District of Arkansas.

Pintard, on the 10th of April, 1847, obtained a decree against Archibald Goodloe for $10,522, with ten per cent. interest per annum on the amount decreed. There was also an order that a certain tract of land should be sold, and the proceeds applied to the payment of the decree.

An appeal was taken from this decree to this court, by which the decree was affirmed. On the 20th of February, 1852, Pintard commenced an action against Sessions and others on the appeal bond, and at April Term, 1853, obtained a judgment on the bond for the penalty thereof, amounting to the sum of $12,000.

At the same time, Pintard procured an order for the sale of the land specified in the decree, which was sold on the 15th of November, 1852, for the sum of $8,025, which, after paying the expense of the sale, left a balance of $7,525 as a credit on said decree, as of the 15th of November, 1852. The interest, with the sum decreed, up to that period, amounted to $16,877. The proceeds of the sale of the land being deducted from this sum, leaves a balance on the decree of $8,912, with interest from the 17th day of April, 1853. The interest on this sum, up to the time judgment was rendered on the appeal bond, makes the sum of $9,283 as the amount to be collected on the judgment.

An execution was issued on the judgment the 14th of May, 1853, for $12,000, with an indorsement of a credit of $2,717. This execution was levied on a number of slaves, of the value of $12,000, as the property of Sessions, the defendant. A delivery bond was taken for the slaves with Daniel H. Sessions as security; but the slaves not being delivered on the day of the sale, an execution was issued against principal and surety on the delivery bond.

At this stage of the proceedings, a bill was filed by the appellants, complaining that the distribution which had been made *of [*108 the proceeds of the sale of the land was inequitable, and that such proceeds should be credited on the judgment entered upon the appeal bond, pro rata, and not exclusively on the decree; and the complainants pray that Pintard may be decreed to enter a credit upon the judgment as aforesaid, as of its date, for the sum of

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$5,323.35; and that a perpetual injunction might be granted to prevent him from collecting any more than the residue of the judgment, after deducting the above sum.

A temporary injunction was granted, Pintard filed his answer, and upon the final hearing, the injunction was dissolved and the bill dismissed, at the costs of the complainants. From this decree an appeal was taken, and that brings the case before us.

The complainants in their bill allege no fraud nor mistake, as a ground of relief. They claim that the money received under the decree for the sale of the land shall be applied, pro rata, in the discharge of the judgment against them, and the balance of the decree which remains after deducting the judgment. This would give to them a credit on the judgment of $5,724; and that Pintard, in claiming the whole amount of the judgment, seeks to recover from them $3,568.99 more than in equity he is entitled to.

This claim of the appellants rests upon the ground that there was a lien on the land sold by the original decree, which operated as an inducement to them to become sureties on the appeal bond. The land, by the original decree, was directed to be sold; consequently, the proceeds of the sale could be applied only in discharge of the decree. On what ground could the appellants claim a pro rata distribution of this fund? They were bound to the extent of the penalty of their bond, on which a judgment was entered. They had a direct interest in the application of the proceeds of the land to the payment of the original decree, including the interest and costs; and so much as such payment reduced the original decree below the amount of the judgment against them, they were entitled to a credit on the judgment. The judgment has been so made, and the credit entered, and beyond this they have no claim, either equitable or legal.

In the argument, a subrogation of the land or its proceeds, for the benefit of complainants, is urged; but on what known principle of equity does not satisfactorily appear. Had the appellants paid the decree in full they might have claimed a control over the land decreed to be sold, or its proceeds. They made no payment, but assert a general equity to have the fund applied, pro rata, on their judgment. This would leave a large amount of the original decree unsatisfied. On what ground could Pintard be subjected to such a loss? He looked 109*] to the land and *the surety on the appeal bond, which more than covered his decree, including interest and costs.

The condition of the appeal bond was, for the prosecution of said appeal to effect, and to answer all damages and costs, if there should be a failure to make the plea good in the Supreme Court. There was a failure to do this, and the penalty of the bond was incurred. Whatever hardship may be in this case is common to all sureties who incur responsibility and have money to pay. Beyond that of a faithful application of the proceeds of the land in payment of the decree, the appellants have no equity. They cannot place themselves in the relation of two creditors having claims on a common fund, which may be distributed pro rata between them. Pintard has a claim on both funds; first on the proceeds of the land, and second, on the judgment entered on the appeal bond for the satisfaction of the original decree.

The decree of the Circuit Court is affirmed, with costs.

Aff'g Hemp. 678.

THE UNITED STATES, Use of JAMES MACKEY et al., Plaintiffs in Error,
v.
RICHARD S. COX.

(See S. C. 18 How. 100-106.)

Administration bond, surety thereon not liable for money coming into his principal's hands as agent of other administrators—the Cherokee's a domestic territory—Agent of Cherokee administrators can receive and receipt for moneys in District of Columbia.

Where one was authorized by power of attorney from administrators of a deceased member of the Cherokee Nation, to settle with the United States for moneys due the deceased, and receipt for the same, and the Treasury Department refused to pay him under the power of attorney, and required him to take out letters of administration, which he did in the District of Columbia, and received the moneys, and then, under the power of attorney as agent of the administrator, executed a receipt to himself as administrator, for the moneys. Held, that a surety on his administration bond was not liable for such moneys.

The money went into the hands of the agent of the administrators, and it would add to the condition of the administration bond to hold the surety responsible for its safe transmission.

The Cherokee people are within our jurisdiction, and bear, in some respects, the relation to our government as a territory did under the ordinance of 1787. It is not a foreign, but domestic territory.

Under the Act of 24th of June, 1812, authorizing administrators appointed in a territory to sue in the District of Columbia, the moneys might and should have been paid to the attorney in fact of the administrators.

The Cherokee letters of administration were valid, and the agent of the administrators could receive and receipt for the money in the District of Columbia.

Argued Dec. 24, 1855. Decided Jan. 14, 1856.

IN ERROR to the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

The case is stated by the court.

Messrs. **Walter Cox** and **Samuel Chilton** for plaintiff in error.

Messrs. **J. M. Carlisle** and **Joseph H. Bradley** for appellee.

Mr. Justice **McLean** delivered the opinion of the court:

This is a writ of error to the Circuit Court for the District of Columbia.

The action was brought against the defendant as surety in the administration bond of Austin H. Raines, administrator of Samuel Mackey, late of the Cherokee Nation.

Raines received from James Mackey, Joseph Talley and Preston T. Mackey, as administrators of Samuel Mackey, deceased, a power of attorney for them and in their names to peti-

NOTE.—Indians, status of. Amenable to what laws. Rights of. What courts have jurisdiction over. Power of Congress over—See note to Worcester v. Georgia, 8 L. ed. U. S. 484.

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tion the Congress of the United States to settle and release the claim of the United States against the said Samuel Mackey, deceased, as principal, and John Drenner, Lewis Evans and Hiro T. Wilson, as securities; and after the 101*] passage of any law in relation *to said claim by Congress, to receive all moneys that may be due the estate of the said Mackey, deceased, from the Treasurer of the United States, and full receipts, acquittances and relinquishments thereof to make in their name; and further, to adjust and settle with the Treasurer of the United States, or other officers of the government, all other claims of said Mackey against the United States, and to receive all moneys due from the United States to said Mackey on any account whatever.

Raines came to Washington and procured a settlement of the accounts between the government and Samuel Mackey, deceased; but the Treasury Department refused to pay him the balance due Mackey upon the power of attorney, and required him to take out letters of administration. He thereupon applied to the Orphans' Court of the County of Washington, in the District of Columbia, for letters of administration, which were granted upon his executing bond, with the defendant and James Reeside as sureties. He then received from the Treasury the sum of $10,513.05, out of which he paid the expense of administration, and for the balance he executed the following receipt:

"7th July, 1841. Received of Austin J. Raines, administrator of Samuel Mackey, deceased, the sum of ten thousand five hundred and thirteen dollars and five cents, being the amount due to the representatives next of kin and distributees of said Samuel Mackey, from said administrator.

(Signed) James Mackey,
Joseph Talley,
Preston T. Mackey.
By their attorney in fact A. J. Raines."

Reeside, the co-obligor in the administration bond, having died several years ago, the process was served only on the defendant.

The declaration contained several counts, stating that the said Samuel Mackey died intestate, leaving Sarah Mackey, his widow, and James Mackey, Preston T. Mackey, William Mackey, George Mackey, Nancy Talley, wife of Joseph Talley, and Corine Mackey, all being citizens of the Cherokee Nation, and that, by the laws of the said Cherokee Nation, the widow and children were distributees of the deceased.

The defendant filed a general plea of performance, on which issue was joined.

On the trial before the jury, among other prayers for instruction, was the following: "If the jury find from the evidence that Austin J. Raines, as administrator of Samuel Mackey, deceased, received from the Treasury of the United States the sum of $10,513.05, and after deducting the expenses of administration there remained in his hands the clear sum of $10,-102*] 505.20½, *and no debts of said deceased are shown payable by said administrator; and James Mackey, Joseph Talley, and Preston T. Mackey were the original administrators of said Samuel Mackey, under the laws of the Cherokee Nation, the burden of proof is on the defendant to show that said Raines paid said sum of $10,505.20½ to said James Mackey, Joseph Talley, and Preston T. Mackey, or the survivors of them; and although the jury may find that the paper offered in evidence, purporting to be a power of attorney from said James Mackey, Joseph Talley and Preston T. Mackey to said Raines is genuine, yet the said Raines had no authority to receipt for said parties by himself, as their attorney in fact, to himself as administrator, and that such receipt is not a payment by him as administrator of said parties; and unless such payment be proved otherwise than by such receipt, the said Raines has not performed the condition of this bond as administrator of Samuel Mackey, and the said defendant is liable in this action to the said James Mackey, Joseph Talley and Preston T. Mackey, or the survivors of them, for the said sum of $10,505.20½, with interest thereon from the date when the same was received;" which instruction was refused, and to which an exception was taken.

There were other exceptions, but this one presents the material points in the case.

By the Treaty made between the United States and the Cherokee Nation, dated March 14, 1835, in article 5, the United States covenanted and agreed that "the lands ceded to the Cherokee Nation in the foregoing article shall, in no future time, without their consent, be included within the territorial limits or jurisdiction of any state or territory. But they shall secure to the Cherokee Nation the right of their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them: provided always, that they shall not be inconsistent with the Constitution of the United States, and such Acts of Congress as have been or may be passed regulating trade and intercourse with the Indians," etc.

The Cherokees are governed by their own laws. As a people, they are more advanced in civilization than the other Indian tribes, with the exception, perhaps, of the Choctaws. By the national council their laws are enacted, approved by their executive, and carried into effect through an organized judiciary. Under a law "relative to estates and administrators," letters of administration were granted to the persons above named on the estate of Samuel Mackey, deceased, by the Probate Court, with *as much regularity and responsibilities [*103 as letters of administration are granted by the state courts of the Union.

This organization is not only under the sanction of the general government, but it guarantees their independence, subject to the restriction that their laws shall be consistent with the Constitution of the United States, and Acts of Congress which regulate trade and intercourse with the Indians. And whenever Congress shall make provision on the subject, the Cherokee Nation shall be entitled to a delegate in the national Legislature.

It is refreshing to see the surviving remnants of the races which once inhabited and roamed over this vast country as their hunting grounds, and as the undisputed proprietors of the soil,

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exchanging their erratic habits for the blessings of civilization.

A question has been suggested whether the Cherokee people should be considered and treated as a foreign state or territory. The fact that they are under the Constitution of the Union, and subject to Acts of Congress regulating trade, it is a sufficient answer to the suggestion. They are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same relation to the federal government as a territory did in its second grade of government, under the Ordinance of 1787. Such territory passed its own laws, subject to the approval of Congress, and its inhabitants were subject to the Constitution and Acts of Congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory—a territory which originated under our Constitution and laws.

By the 11th section of the Act of 24th of June, 1812, it is provided "that it shall be lawful for any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted, by the proper authority in any of the United States or the territories thereof, to maintain any suit or action, and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or administration had been granted in the District." Under this law the money due to Mackey might have been paid, and, indeed, should have been paid, to Raines, the attorney in fact of the administrators of Mackey. But, through abundant caution, letters of administration were required to be taken out in this District, as a prerequisite to the payment of the money by the Treasury Department.

104*] *No question could arise as the validity of the Cherokee law under which letters of administration were granted on the estate of Mackey, and as the power of attorney given by the administrators to Raines seems to have been duly authenticated and proved, a payment to the administrator, by the government, would have been a legal payment. The Cherokee country, we think, may be considered a territory of the United States, within the Act of 1812. In no respect can it be considered a foreign state or territory, as it is within our jurisdiction and subject to our laws.

Although an executor or administrator cannot sue in a foreign court, in virtue of his original letters of administration, yet he may lawfully, under that administration, receive a debt voluntarily paid in any other state. Stevens v. Gaylord, 11 Mass. 256. In Doolittle v. Lewis, 7 Johns. Ch. 49, Chancellor Kent held, that a voluntary payment to a foreign executor or administrator was a good discharge of the debt. Shultz v. Pulver, 3 Paige, 182; Hooker Olmstead, 6 Pick. 481.

This suit is brought in the name of the surviving administrators of Mackey and of the distributees. Regularly, an action by the distributees could not be sustained, unless an application had been made to the Orphans' Court in this District to order a distribution, and authorize or direct the administrator, Raines, to pay the same. This administration being ancillary to that of the domicil of the deceased, the distribution would be governed by the law of the domicil.

There appears to have been no creditors of the estate of Mackey in the District of Columbia, and letters of administration were obtained here, as necessary under the decision of the Treasury Department. This object being accomplished, and the costs of the administration paid, Raines, as agent of the administrators of the domicil, receipted for the money in their behalf, under the power of attorney from the administrators. And the question arises, whether this discharges the defendant as surety on the administration bond of Raines.

Under the power of attorney he was authorized to receive all moneys that may be due the estate of Mackey from the Treasurer of the United States, and receipt for the same. He received and receipted for the money as administrator in this District, and then executed a receipt to himself as agent, under the power of attorney as agent for the administrators.

Under the circumstances, it would be a hardship fraught with injustice, to hold the defendant liable as surety on the administration bond. Raines was the confidential agent of the administrators of Mackey—the money was placed in his hands, under full authority to receive it. It has never been paid over, *it [*105 is said, by reason of the bursting of a boiler, by which Raines lost his life and the money which he had received. But whether this be true or not, the money went into the hands of Raines, who was the agent of the administrators, duly authorized to receive it; and we think, under the peculiar circumstances of the case, the defendant was thereby discharged. Whether for the payment of creditors or distribution among the heirs, the domicil of the deceased was the place to which the money should be transmitted. It would add to the conditions of the administration bond, to hold the defendant responsible for the safe transmission of the money, after it was placed in the hands of the agent of the administrators.

Had the receipt of Raines been duly filed and acted upon, in the Court of Probate, his surety on his administration bond would have been discharged. The action of the Probate Court only is wanting, but we think such action was not essential, and that the equity of the case is equally clear without it. The parties are estopped from denying the agency of Raines.

In Vaughan v. Northup et al. 15 Pet. 6, this court say: "The debts due from the government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicil, but possess in contemplation of law an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicil. On the contrary, the administrator of a creditor of the government, duly appointed in the state where he was domiciled at the time of his death, has

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full authority to receive payment, and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it."

We think there is no error in the ruling of the court, and the judgment of the Circuit Court is, therefore, affirmed.

Mr. Justice **Nelson** and Mr. Justice **Curtis** stated that they concurred in the decision of the court to affirm the judgment of the Circuit Court, upon the ground that, as no final account had been settled by the administrator in the Orphans' Court, and no order had been made by that court, either directing the administrator to pay the balance in his hands to the principal administrators, for distribution by them, or directing a distribution to be made here, there was no breach of the bond. That this being an ancillary administration, it depended upon the discretion of the Orphans' Court, which granted it, whether the money, remaining in the hands of the ancillary administrator, after the satisfaction of all claims in this jurisdiction, should be distributed here, by the ancillary administrator, or remitted to the principal administrators for distribution; and until that discretion shall be exercised, 106*] *and the ancillary administrator directed which of these courses to pursue, he is in no default, and his surety is not liable.

THE UNITED STATES, Appts.,
v.
JOHN C. FREMONT.

(See S. C. 18 How. 30–40.)

Practice—failure to file the record—motion to dismiss.

It is the duty of the appellants to file the record, and docket the cause, within the first six days of the term, when the decree appealed from has been entered sixty days before the commencement of the term.

The appellants having failed to file the record, it was filed by the appellee, which entitles him under the rule, to have the cause dismissed.

Where, after decision in this court, the cause is remanded to the District Court, with directions to proceed therein in conformity to the decree of this court, and a decree is entered in the District Court in pursuance of such mandate, no further action being had thereon, there is no ground for an appeal; a procedendo was issued to the District Court.

Argued Jan. 15, 1856. Decided Jan. 15, 1856.

APPEAL from the District Court of the United States for the Northern District of California.

This court having decided this case in the Dec. Term, 1854, sent down the following mandate to the District Court:

United States of America, ss:

The President of the United States of America.

To the Honorable the Judge of the District Court of the United States, for the Northern District of California, greeting: Whereas lately, in the District Court of the United States for the Northern District of California, before you in a cause between the United States, appellants, and John C. Frémont, claimant and appellee, the decree of the said District Court was in the following words, viz.:

"This cause coming on to be heard at the above-stated term, on appeal from the final decision of the Commissioners, to ascertain and settle private land claims in the State of California, under the Act of Congress approved March 3d, 1851, upon the transcript of the proceedings and decision, and the papers and evidence on which said decision was founded, and also upon the testimony and depositions taken before this court, and the arguments of counsel for the United States and for the claimant being heard, it is ordered, adjudged and decreed, that the decision of the said Commissioners be in all things reversed and annulled, and that the said claim be held invalid and rejected." As by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States, by virtue of an appeal, agreeably to the Act of Congress in such cases made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and fifty-four, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel; on consideration whereof, it is the opinion of this court that the claim of the petitioner to the land, as described and set forth in the record, is a good and valid claim. Whereupon it is now ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court, for further proceedings to be had therein in conformity to the opinion of this court, March 10.

You, therefore, are hereby commanded, that such further proceedings be had in said cause, in conformity to the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

The Honorable Roger B. Taney, Chief Justice of the said Supreme Court, the first Monday of December, and the year of our Lord one thousand eight hundred and fifty-four.

Wm. Thomas Carroll, Clerk of the Supreme Court of the United States.

The above mandate having been filed in the court below, on motion of counsel for Fremont, in the form of the decree in that behalf, excepting the following words: "the said land to be surveyed in the form and divisions prescribed by law, for surveys in California, and in one entire tract," the said court entered a decree upon its record, in pursuance of said motion. Whereupon an appeal was taken to this court in behalf of the United States, from said decree. A further statement of the case appears in the opinion of the court.

Mr. C. Cushing, Atty-Gen., for the plaintiffs.

Messrs. Crittenden and Bibb for the appellee.

*Mr. Justice **McLean** delivered the opin- [*36
ion of the court:

This is an appeal from the Northern District of California.

A final decree was entered in this case at the last term, and a mandate was issued to the

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District Court, directing such further proceedings in conformity to the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had.

This court reversed the decision of the District Court, and ordered, adjudged and decreed, that the claim of the said John C. Frémont to the land as described, and set forth in the record, is a good and valid claim; and that the said claim be, and the same is hereby confirmed to the extent of ten square leagues, the quantity specified in the original grant, set forth in the record, and within the limits therein mentioned, the said land to be surveyed in the form and divisions prescribed by law for surveys in California, and in one entire tract."

The mandate was filed in the District Court, and the counsel of Frémont, moved the court for an order in pursuance of said mandate, in the form of the decree in that behalf elsewhere in the record of the case appearing, excepting the following words, "the said land to be surveyed in the form and divisions prescribed by law, for surveys in California, and in one entire tract," which motion was opposed by the District Attorney of the United States. The District Court entered the decree upon its record, refusing to omit the words, moved by the appellee, and to this refusal his counsel excepted.

No further proceedings were had, as appears from the record; and at a subsequent day of the District Court, the Attorney of the United States applied for an appeal in open court, in behalf of the United States, from the final decision of that court, at the above term, which was granted.

The appeal was allowed the 23d of July, 1855, more than three months before the commencement of the present term of this court; and no record of the case having been filed within six days, after the commencement of the term, as the rule requires, a record of the case being filed by the appellee, a motion is made to dismiss the appeal on the ground that there was no action of the District Court on which an appeal could be taken. And also on the ground that the appellants have failed to file the record within the rule.

It was the duty of the appellants to file the record and docket the cause, within the first six days of the present term; the decree appealed from having been entered sixty days before the commencement of the present term. With the exception of California, Oregon, Washington, New Mexico and Utah, appeals or writs of error allowed, are required to be dock-
37*] eted within the *first six days of the term, if entered or allowed, thirty days before its commencement.

The appellants having failed to file the record, it was filed by the appellee, which entitles him under the rule to have the cause dismissed.

But the counsel for the appellee insist that the appeal should be dismissed, on the ground that it was taken with the intent to bring before this court a review of its decree entered at the last term. As there was no action by the District Court, except the entry of the mandate upon its records, the appeal brings before us only that which was transmitted to the District Court by the mandate. This is an irregular procedure; and it must have been entered without a particular examination by the court.

The appeal is dismissed and the clerk is directed forthwith to certify this decision to the District Court.

Mr. Justice Catron:

I agree that by the 19th, 30th, 43d, and 63d rules governing the practice of this court, the record presented was not filed in time, and that therefore the appeal must be dismissed for want of prosecution. But I do not concur that, on the present motion to dismiss, we ought to decide the question, whether the District Court could or could not allow the appeal on the decree made there on the ground that the decree did not conform to the mandate of this court.

The motion to dismiss for want of prosecution, and the motion to dismiss for want of jurisdiction to entertain the appeal, are different and distinct in their character; the one only dismisses the appeal and allows a second, and the other bars it.

The practice has been, when the record was not filed in time, for the defendant in error, or appellee, to produce a certificate from the clerk, or a copy of the record duly certified, showing that the writ of error or appeal had been taken, and that it operated as a supersedeas, when the cause was docketed and dismissed. But when a motion was made to dismiss the cause for want of jurisdiction in this court to entertain the writ of error or appeal; or, in other words, want of authority in the court below to allow it (which is the question here), then the record was ordered to be printed, briefs filed, and the question discussed in the usual way. Nor has it ever occurred in my experience in this court, to set down a cause to be heard at the same time on both motions. The consequence must be in such a proceeding, that if the plaintiff in error is turned out of court for his neglect, in not filing the record in time, he has no power to move for a certiorari to amend the record, filed by the other *side, and then this [*38 court bars a second appeal by further adjudging that no jurisdiction existed in the inferior court to allow it. And such is the judgment in this case.

Some of the most stringent controversies that have come before us, have arisen on motions to dismiss for want for jurisdiction, and especially in causes brought here from the state courts under the 25th section of the Judiciary Act.

The idea in such cases, that a state court decision should, in effect, be affirmed, and the plaintiff in error barred by dismissing case for want of jurisdiction, on the presentment of a manuscript record, without furnishing the court with even a brief (as was done here), is not only contrary to our established practice, but is calculated to do great mischief to suitors.

In the instance before us, I never saw the papers until after I heard the opinion of the majority of the court read. I deemed it unimportant, on the first question, to read the record, as it had not been filed in time, nor was a valid excuse offered for the delay. On the second question, I had then formed no opinion. In his remarks, the Attorney-General referred us to a letter of the District Attorney of the

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United States for the Northern District of California, which was officially written to the Secretary of the Interior, and presented to us, as part of the Attorney-General's argument, setting forth the reasons why the appeal was prosecuted. These reasons, in substance, are, that this court, in its opinion delivered by the Chief Justice at the last term; (17 Howard, 565), remanded the cause, and directed the court below to enter a decree conformably to that opinion; which opinion (Ibid. 558) declared: "That if any other person within the limits where the quantity granted to Alvarado should be located, had afterwards obtained a grant by specific boundaries before Alvarado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey for Alvarado; and that as between individual claimants from the government, the title of the party who had obtained a grant for the specific land would be the superior and better one."

And it is insisted, in this argument, that the District Court should have inserted in its decree the foregoing conclusions, and have protected individual titles and rights, in the region of country where Colonel Frémont's claim might be located, ordering that such lands should be excluded from the survey as Frémont's land, although they were embraced within its out boundaries. And secondly, that, in the opinion of this court, the District Court was directed to cause the grant to Alvarado to be surveyed, "in the form and divisions prescribed by law for surveys in California." But that it had made no decree as to the form of the survey, and disregarded the instruction, 39*] leaving *it to the surveyor to ascertain the law, and to locate "the land," "according to the law of California." whether it was Mexican or United States law; whereas, it is insisted that the true construction of the grant to Alvarado (as to the manner in which it shall be surveyed), was a judicial question; and that, as the concession was for the purposes of cultivation and pasturage, a survey should be made of land suited to these purposes, and that the District Court ought so to have adjudged and decreed, and to have excluded a survey of barren mountains, including improved gold mines, contrary to the plain intention of the parties to the grant as originally made.

The questions presented were supposed to be of grave importance and much difficulty, and therefore, no imputation of unfair and oppressive conduct should be cast on the officer of the government who prayed this appeal, under the express sanction of the District Court.

It is manifest that Frémont, the appellee, believed he might appeal, if he saw proper to do so. He took a bill of exceptions, and had it signed by the court, to its ruling, that his claim should be surveyed in one tract. As no bill of exceptions lies in cases of this description, an appeal could have been prosecuted, on the affirmative fact, that too much had been inserted in the decree, contrary to the mandate of this court; so, on the other hand, if not enough was put into the decree to execute the mandate, an appeal would equally lie. As a general rule, this is undoubted. It is plainly apparent that both parties and the court, believed that an appeal would lie.

I hold it to be true, however, that the appeal should not have been allowed. By the Treaty of Peace with Mexico, the legal title to the public lands of California was vested in the United States, onerated with private claims to parts thereof. Alvarado's claim was presented as one of this character, and being brought before this court, was pronounced to be a good and subsisting claim; and furthermore, that all the conditions it contained were subsequent conditions, which, by the Treaty, ceased to have any binding force; and therefore they were struck from the grant as being no necessary part thereof. It was also held that the claim, in this condition, was assignable, and properly assigned to Colonel Frémont; and as there was no grant to any specific tract of land, that Colonel Frémont held a common interest in the public lands generally, lying within a large section of country described in the grant.

This decision reduced the claim to the condition of a mere floating land warrant, that could not be located by judicial authority, more than an ordinary floating warrant can be located by the decree of a court; and therefore, when seeking location, *it must, of [*40 necessity, address itself to the executive or legislative power.

The District Court, having entered the decree as directed, had no jurisdiction to take any further step in the cause. It follows that the Executive Department must determine for itself whether any law exists authorizing that branch of the government to ascertain and survey the land, and issue a patent for it, by which the title of the United States will be devested, and transferred to the grantee.

EDWARD C. RICHARDS, Isaac Bassett and Robert W. Aborn, Compts. and Appts.,

v.

SYLVANUS HOLMES, A. H. Harper, and George A. Dwight, et al.

(See S. C. 18 How. 143–149.)

Mortgage foreclosure—power to sell includes power to adjourn sale—bid by auctioneer for mortgagee does not make sale void—covenant.

Where a power of sale, in a deed of trust given to secure a note, authorizes the trustee to sell if the note shall not be paid with the interest, the omission to pay interest is a default, and authorizes the trustee to sell.

A power to a trustee to sell at public auction, after notice, includes the power to adjourn the sale to a different time and place, when he thinks it necessary to obtain a fair price.

The creditor for whose benefit the sale is made, may, through the trustee, request the auctioneer to bid a certain sum for him, and the latter may do so. This will not make the sale void, though the property be struck off to the creditor on that bid, it being the highest.

A covenant that the note shall be entitled to payment out of the sale before another note specified, and shall have a prior lien, does not impose a liability on the covenantor that the note shall be paid out of the sale.

Argued Jan. 2 and 4, 1856. Decided Jan. 15, 1856.

NOTE.—Right to enforce mortgage for interest in default—see note, 37 L.R.A. 739.

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APPEAL from the Circuit Court of the United States for the District of Columbia.

The case is stated by the court.

Mr. George M. Bibb for the appellants:

1. The sale and purchase of the lots and buildings as charged in the bill and set up in the answers of Fendall and Harper, made Oct. 21, 1847, were unauthorized by the deed of trust and ought to be set aside.

2. The deed of trust cannot be altered and the powers of the trustee enlarged by parol.

3. However honest the circumstances of this particular sale may be, it falls within those general rules established for the purposes of justice, whereby trustees, agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, etc., are laid under certain incapacities and disabilities.

The trustee cannot purchase the estate himself; he cannot buy as the agent of another; he cannot employ the auctioneer to bid for the estate on behalf of Harper.

Ex parte Bennett, 10 Ves. 393; Coles v. Trecothick, 9 Ves. 248; Ex parte James, 8 Ves. 345, 348, 350; Ex parte Lacey, 6 Ves. 625; Lister v. Lister, 6 Ves. 631, 632; Twining v. Morrice, 2 Bro. Ch. Cas. 326; York Build. Co. v. McKenzie, 8 Bro. Par. Cas. Appen. 42; Davue v. Fanning, 2 Johns. Ch. 254, 257, 270.

Such a sale as this cannot stand in a court of equity.

Messrs. P. R. Fendall, Joseph H. Bradley and Tracy, for appellees:

It is denied that the complainants were entitled to notice of the intended sale. But it is a fair inference from the evidence, that in point of fact they had notice of it in Aug., 1847. The sale was advertised according to the terms of the deed, and on terms advantageous to all parties concerned. The trustee did not bid at all; Harper's bid was regular. His rights as a creditor, whose only security for his whole fortune was the property advertised for sale, stood on grounds as strong at least as that of the owner of it. Though it is not lawful for an owner to employ an agent "to take advantage of the eagerness of bidders," to screw up the price, yet, as a "defensive precaution," "a bidder may be privately appointed by the owner, to prevent the estate from being sold at an undervalue."

1 Sug. Vend. 26, 27, 9th Ed.; Fonbl. Eq. Bk. 1, ch. 4, sec. 4, note 10; 1 Madd. Ch. Pr. 324, 325; Smith v. Clarke, 12 Ves. 477; Steele v. Ellmaker, 11 Serg. & R. 86; Jenkins v. Hogg, 2 Const. 821; Wolfe v. Luyster, 1 Hall, 146; Phippen v. Stickney, 3 Met. 384.

Harper made only one bid, that being for "defensive precaution." The bid was made through the auctioneer, the agent of both parties.

Smith's Merc. Law, 301, and cases there cited; Connelly v. Parsons, 3 Ves. 625.

The price was not inadequate; but even if it were "very inadequate," the inadequacy would be no ground for annulling the sale.

1 Fonbl. Eq. 128; 1 U. S. Dig. 344, pl. 33, and cases there cited.

It is contended that the sale was in all respects regular; and that if it were not so the complainants cannot avail themselves of the imputed irregularities.

The assignment was a contract of sale of a promissory note without indorsement, bona fide, for a valuable consideration. The vendor is not liable in law or in equity.

Fenn v. Harrison, 3 T. R. 757; Ex parte Shuttleworth, 3 Ves. 368; Fydell v. Clark, 1 Esp. 446; Bank of England v. Newman, 1 Ld. Raym. 442; Emly v. Lye, 15 East, 7; Hornblower v. Proud, 2 B. & A. 327.

The note was long past due when complainants purchased it. They took it without indorsement. The deed of trust authorized a sale at the maturity of the note. They took it with notice.

Fowler v. Brantley, 14 Pet. 321.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court for the District of Columbia. The appellants filed their bill in that court to set aside a sale, made to satisfy a prior incumbrance on land, upon which they claimed to have a second incumbrance. In the court below some question appears to have been made concerning the priority of the incumbrances; but none is made here, it being conceded, that though that claimed by the complainants was the earliest in date, the other was first recorded, and takes precedence.

The sale in question was under a deed of trust, whereby Holmes, the debtor, conveyed to the defendant, Phillip R. Fendall, in trust, to secure the payment of a promissory note, bearing date May 1, 1846, payable in two years from date, for $2,800 and interest, payable annually.

It is objected that the sale, which was made on the 21st of October, 1847, after one year's interest had become due, but before the principal sum was payable, was premature. This depends upon the meaning and effect of the power of sale contained in the deed. It was competent for the parties to agree to a foreclosure by sale for non-payment of interest, and the question is, whether they did so agree. The event in which the trustee is empowered to sell, is thus described in the deed:

"But if the hereinbefore-described promissory note, with the interest legally due thereon, shall not be fully paid off and discharged when said note shall be due and payable, and payment of the same shall be demanded, or if any note or notes given in substitution for or renewal of the hereinbefore described promissory note shall not be fully paid off and discharged according to the tenor and effect of the said substitute or new note or notes, together with the interest legally due on such substitute or note or notes, so that any default be made in payment of any part of *the [*146 aforesaid debt of $2,800 and interest, then so soon after such default, etc."

The omission to pay the first year's interest was a default within the express words of this power. That interest was part of the interest secured by the note, and a failure to pay it was a "default in payment of part of the aforesaid interest." The deed authorizes the trustee to sell for any such default, and consequently the sale was not premature.

It was argued that the trust deed does not describe the note as bearing annual interest, and consequently, that the subsequent incum-

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brancer has a right to insist that, as against him, there was no power to sell for non-payment of such interest.

It is true the deed does not purport to describe the interest which is to become due on the note; but it clearly shows that it bore interest at some rate, and payable at some time or times, and this was sufficient to put a subsequent incumbrancer on inquiry as to what the rate of interest, and the time or times of its payment were. The deed, in effect, declares, and its record gives notice to subsequent purchasers, that its purpose was to secure the payment of such interest as has been reserved by the note; the amount, and date, and time of payment, of which are mentioned. We do not think the mere omission to describe in the deed what that interest was to be, is a defect of which advantage can be taken by the complainants.

The complainants further insist that the property was not duly advertised. The provision in the deed of trust upon this subject is as follows: "It shall be the duty of the said Philip R. Fendall or his heirs to enter upon the hereinbefore-conveyed piece or parcel of ground and appurtenances, and sell the same at public auction to the highest bidder, or at private sale, for cash or credit, according to his or their discretion, after having given public notice of such sale, by advertisement, at least thirty days previously thereto, in the National Intelligencer, or in some other newspaper printed or published in the City of Washington aforesaid."

Inasmuch as the trustee was empowered to sell at private sale, as well as at public auction, his power extended to a private sale made at any time after thirty days' notice. Having given notice for the space of thirty days that he was about to sell the property, he might, at any time after the expiration of that thirty days, have proceeded to sell it at private sale. But this notice should be such as to call for purchasers at private sale. The notice given was of a sale at public auction. This did not call for purchasers, except at the time and place mentioned in the notice. No sale was made at the time and place designated in the thirty days' notice, published in the National 147*] Intelligencer. *At that time and place the attendance of bidders was so small that the trustee believed an attempt to sell for a fair price would be fruitless; and he adjourned the sale for the space of fourteen days, giving notice of such adjournment in the same newspaper of the next day. At the time and place thus fixed for the adjourned sale, another postponement took place, for the same reasons, for one week; and the place of sale was changed from the premises to the rooms of the auctioneer. Of this postponement, also, public notice was given on the next day, in the same newspaper.

There is no reason to suspect the least unfairness on the part of the trustee, or any one concerned. His conduct seems to have been dictated solely by an honest desire to obtain the best price for the property. Nor is there any ground for believing that either of these postponements prejudiced the interest of the complainants. They stand upon the objection, that though the trustee might have sold on the first day, of which thirty days' notice was given, he could not on that day adjourn the sale.

But we consider that a power to a trustee to sell at public auction, after a certain public notice of the time and place of sale, includes the power regularly to adjourn the sale to a different time and place, when, in his discretion, fairly exercised, it shall seem to him necessary to do so in order to obtain the fair auction price for the property.

If he has not this power, the elements or many unexpected occurrences may prevent an attendance of bidders, and cause an inevitable sacrifice of the property. It is a power which every prudent owner would exercise in his own behalf under the circumstances supposed and which he may well be presumed to intend to confer on another. This power of sale does not undertake to prescribe the particular manner of making the sale. It is to be at public auction, and "after having given public notice of such sale by advertisement at least thirty days;" but it assumes that the sale will be conducted as such sales are usually conducted. A sale regularly adjourned, so as to give notice to all persons present of the time and place to which it is adjourned, is, when made, in effect, the sale of which previous public notice was given.

The courts of several states have gone further in this direction than we find necessary, though we do not intend to intimate any doubt of the correctness of their decisions. They have held that a public officer, upon whom a power of sale is conferred by law, may adjourn an advertised public sale to a different time and place, for the purpose of obtaining a better price for the property.

Tinkom v. Purdy, 5 Johns. 345; Russell v. Richards, 11 Me. 371; Hughes v. Longworth, 4 Barr. 153; Warren v. Leland, 9 Mass. 265.

If such a power is implied where the law, acting *in invitum, selects the officer, a [*148 fortiori it may be presumed to be granted to a trustee selected by the parties.

The remaining objection is, that the defendant Harper, the creditor for whose benefit the sale was made, through the trustee, requested the auctioneer to bid from him the sum of $2,500; that the auctioneer did so, and there being no higher bid the property was struck off to Harper. It is insisted that this renders the sale void.

We do not deem it necessary to examine the numerous and somewhat conflicting decisions upon the subject of by-bidding, or bidding by persons standing in fiduciary capacities. This case stands clear of those decisions and of the principles upon which they rest. No decision lays down a positive rule that such sales, though affected by such bidding, are, per se, and as between all persons, void. They may be avoided by parties whose just interests have been injuriously affected by such misconduct, provided the rights of innocent third persons are not thereby disturbed.

It was for the advantage of these complainants, as subsequent incumbrancers, that this property should sell for the best price which could be obtained. Even improper practices to enhance the price, if any such had been resorted to, could not be complained of by them.

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It is only some practice to prevent bidding, or procure a sale for less than the property would have otherwise brought, which can be relied on by them to avoid the sale. We have no doubt the creditor, for the satisfaction of whose debt the sale was made, had a right to compete fairly at the sale; but whether he had or not, his doing so could not be injurious to the complainants.

It is true he employed the auctioneer to bid for him; but this fact alone could not depreciate the price. Such an authority may be used for fraudulent purposes; but, if fairly used, its tendency is to enhance the price; and in this case there is no evidence that it was intended to be, or in fact was, unfairly used. On the contrary, there seems to be no room for doubt that the price bid by the auctioneer for Harper was more than any other person was willing to give. It must be remembered, that the auctioneer was not employed as the agent of the creditor to purchase the property for him at the least price at which it could be obtained. Such an agency an auctioneer should not undertake. It is inconsistent with his relation to the seller, and with the faithful discharge of his duty to the seller.

But an agency simply to bid a particular sum for a purchaser, amounting to no more than receiving from the purchaser, before the auction, a bid which is to be treated as if made there by the purchaser himself, is not neces-
149*] sarily inconsistent with any duty *of the auctioneer, and does not enable anyone to avoid the sale.

And the same remark applies to the trustee. It was his duty to obtain for the property the best price he could by the use of due diligence in a fair sale. It would have been improper for him, in behalf of the creditor, to employ the auctioneer to buy at anything short of that best price. But there was no impropriety in his employing him to bid a particular sum for the creditor, to prevent a sacrifice of the property.

We have considered all the objections to this sale made by the complainants, and finding neither of them valid, the decree of the court below is, in that respect, affirmed.

As to so much of the complainants' bill as seeks relief against their assignors. in the event of not obtaining satisfaction from the land, we are of opinion that these assignors are under no such liability as is asserted by the complainants. The complainants purchased a negotiable note which was overdue. The assignors did not indorse it, but simply assigned it by deed. They entered into certain specific covenants concerning the subject matter assigned; and their liability depends exclusively on these covenants. Neither of these covenants appears to have been broken. The only one concerning which any doubt has been raised is the following:

"And we do in like manner covenant, promise and agree, that the said note of $3,000 hereinbefore assigned, shall be, and is entitled to payment out of any sale of the premises conveyed in and by the deed of trust aforesaid, before the other note therein specified, and shall have a prior lien on the said premises, or the proceeds thereof."

We think the purpose and effect of this covenant was, not to secure payment out of any sale which might be made by any party under any title to the premises, but only to assure the priority of payment of the note assigned, in preference to the other note, out of any sale made under the particular title to the premises described in the deed of assignment.

The covenant that the note assigned is due, is shown to have been kept by the note itself, in the absence of other evidence. The answer admits the receipt of moneys from the maker on account of other debts, but denies any payment on account of this note; and there is no evidence to the contrary.

The decree of the Circuit Court is affirmed, with costs.

JOSIAH SIDDONS GRIFFITH, James S. Chew, etc., and Mary E. Chew, his Wife, Pl'ffs in Error,

v.

JOHN B. BOGERT, Abraham Myer and Thaddeus Smith.

(See S. C. 18 How. 158-165.)

Time, how reckoned—state construction of state statute conclusive — judicial sale not questionable collaterally.

In reckoning time the day from which an act is to be done, the terminus a quo, should generally be included.

Where a state statute as to time has been construed by courts of the state, in a suit between the parties, their construction will prevail, as to the parties in that suit.

In Missouri and elsewhere a judicial sale and title acquired under proceedings of a court of competent jurisdiction cannot be questioned collaterly, except for fraud in which the purchaser was participant.

Argued Jan. 7 and 8, 1856. Decided Jan. 15, 1856.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This was an action of ejectment, brought in the Circuit Court of the United States for the District of Missouri, by the plaintiffs in error, to recover possession of a certain lot in the City of St. Louis. The trial below resulted in a verdict and judgment in favor of the defendant. Whereupon the plaintiffs brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Messrs. J. J. Crittenden and J. B. Thompson for the plaintiffs in error:

The whole merits of the case, is involved in the question presented by the instruction asked by the defendants, and given by the court, namely: whether the plaintiffs were devested of their title by the deed of the sheriff to C. S. Hempstead.

The plaintiffs contend that they were not so

NOTE.—Computation of time. Days. "After the expiration." "Before." Sundays. "Within." Fractions of a day, when regarded and when not.

There is no general rule in computing time from an act or event that the day is to be inclusive or exclusive. It depends on the reason of the thing according to the circumstances. Lester v. Garland, 15 Ves. 248.

Generally, in computing time, one day is included and one excluded. 2 Browne, Pa., 18; 4 Monr. 464; 26 Ala. N. S. 547; 2 Harr. 461; 5 Blackf. 319; 16 Ohio. 408; 10 Rich. (S. C.) 395.

Excluding the day on which an act is done, when

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devested of their title, and that said deed was null and void.

1. Because the judgments themselves were void so far as they related to or affected the lands, tenements or hereditaments of the intestate; or if not, that the executions issued thereon, under or in virtue of which the sheriff sold the land in question, were illegal, null and void, because issued before the expiration of eighteen months from the date of the letters of administration of the estate of said intestate, and were therefore issued in direct violation of the express provisions of the Act of Jan. 25, 1817. 8 Met. 502.

2. Because the sale, in virtue of which said deed purports to be executed, was made on May 1, 1821, and before the expiration of eighteen months from the date (November 1, 1819) of the said letters of administration, contrary to the express terms of the said Act of 1817, and was therefore illegal and void.

The only questionable part of this proposition is, whether May 1, 1821, is a day after the expiration of eighteen months from the 1st November, 1819, or included in and part of the period. The reasonable and legal rule of computation of time in such cases is to exclude the first day. This is believed to be the rule as now judicially settled in Missouri.

Gantley v. Ewing, 3 How. 707; Kimm v. Osgood, 19 Mo. 60; The Mary Blain v. Beehler, 12 Mo. 477.

3. Because, before the sale by the sheriff, the court had ordered and directed the administrator to make a sale of the real estate of the intestate, and had thereby assumed the control of said fund. The sale and deed were therefore null and void.

14 How. 52. Wiswall v. Sampson.

Mr. H. S. Geyer, for defendants in error:

It has been laid down in many cases, as a generul rule, that where time is to be computed from an event or an act, the day of the event or the performance of the act is to be included,

Norris v. Gawtry, Hob. 139; King v. Adderley, Doug. 463; Castle v. Burditt, 3 T. R. 623; Glassington v. Rawlings, 3 East, 407; Priest v. Tarlton, 3 N. H. 93; Thomas v. Afflick, 16 Pa. 14; Robinett v. Compton, 2 La. Ann. 856; Pearpoint v. Graham, 4 Wash. C. C. 232; Arnold v. U. S. 9 Cranch, 104.

In some cases the rule has been held to be to exclude the day of the act or event from the computation; in others, the day has been included without laying down any general rule.

King v. Cumberland, 4 Nev. & M. 375; Judd v. Fulton, 10 Barb. 117; Wing v. Davis, 7 Me. 31; Ex parte Dean, 2 Cow. 605; Cornell v. Moulton, 3 Den. 12; Snyder v. Warren. 2 Cow. 518; The Mary Blaine v. Bechler, 12 Mo. 477; Kimm v. Osgood's Administrators, 19 Mo. 60.

It has been denied that there is any general rule; that it depends upon the reason of the thing, the context and subject matter.

Lester v. Garland, 15 Ves. Jr. 248; Dowling v. Foxall, 1 Ball. & B. 196; Windsor v. China, 4 Me. 298; Bigelow v. Wilson, 1 Pick. 485; Presbrey v. Williams, 15 Mass. 193; Jones v. Planters' Bank, 5 Humph. 619; O'Connor v. Towns, 1 Tex. 107.

In the computation of time in promissory notes and bills of exchange, the day of the date has generally been excluded; in other instances it is held to be inclusive or exclusive, according to the context and subject matter.

Pugh v. Duke of Leeds, Cowp. 714. and cases there cited and reviewed; Rand v. Rand, 4 N. H. 267; Moore v. Bond, 18 Me. 142; Wilcox v. Wood, 9 Wend. 346.

It appears to have been very generally agreed, that either the first or the last day shall be included in the computation, and in no case are both to be excluded or included, unless the contract or statute upon which the question arises will admit of no other construction.

Ex parte Dean, 2 Cow. 605; Thomas v. Afflick, 16 Pa. 14; Sanders' Heirs v. Norton, 4 Mon. 474.

Upon a review of the cases, it appears that there is no general rule on the subject; but according to the adjudged cases, whether the day in either case is to be included or excluded, depends upon the reason of the thing, the subject matter and the context.

The intention of parties to a contract and of the Legislature in case of a statute, is to govern.

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computation is to be made from such an act. Lester v. Garland, 15 Ves. 248; 1 Ball & B. 193; Homan v. Liswell, 6 Cow. 659; 11 Mass. 204; 1 Pick. 485; 1 Metc. 127; 3 Denio, 12; 1 Mod. 8; 27 Ala. N. S. 311; 19 Mo. 60; 18 Conn. 18; Campbell v. Internat. L. Ins. Soc. 4 Bosw. 298; including it. Doug. 463; Hob. 139; 3 Term, 623; 3 East, 417; 2 Browne, Pa. 18; 15 Mass. 193; 4 Blackf. 320.

There is an exception where the exclusion will prevent forfeiture. Hob. 139; 2 Camp. 294; Cowp. 714; 4 Me. 298.

Time from and after a given day excludes that day. 1 Pick. 485; 7 Marsh. 202; 1 Blackf. 392; 4 N. H. 267; 3 Penn. 200; 1 Nott & McC. 565; and includes the last day of the specified period. Sheets v. Selden, 2 Wall. 177.

Where the statute says "after the expiration" of a time named, that time must fully expire before the act can be legally performed. Marvin v. Marvin, 75 N. Y. 240; Commercial Bank v. Ives, 2 Hill, 355; Butts v. Edwards, 2 Denio, 164.

When two periods are fixed within which an act may be done, it is a general rule that it may be done on any intervening day, unless some day be expressly excluded. Russell v. Ostrander, 30 How. Pr. 93.

When a computation of time is to be made from an act done, the day on which the act is done is included. Arnold v. U. S. 4 Cranch, 104, aff'g 1 Gall. 248; Pearpoint v. Graham, 4 Wash. 232; Ex parte Farquhar, 1 Mont. & McA. 7; Cowie v. Harris, M. & M. 141; S. C. 22, E. C. L. 270; Godson v. Sanctuary, 4 B. & Ad. 255; S. C. 24, E. C. L. 53; 1 Nev. & M. 52. The only exception is, that the day on which a bill of exchange payable at so many days after sight is accepted, is excluded. Pearpoint v. Graham, supra.

Where the statute requires an act to be done so many days at least before a given event, the time must be reckoned excluding both the day of the act and that of the event. Reg. v. Shropshire Justices, 8 A. & E. 173; Reg. v. Middlesex Justices, 2 New Sess. Cas. 73; 3 D. & L. 109; 9 Jur. 758; 14 L. J. M. C. 139; Mitchell v. Foster, 4 P. & D. 150; 12 A. & E. 472; 9 D. P. C. 527; Reg. v. Abedare Can. Co. 14 Q. B. 854; 14 Jur. 735; 19 L. J. Q. B. 251.

In England the general rule of law is that "days" mean "consecutive days," except Sunday is the first or last day. Brown v. Johnson, Car. & M. 440; 10 M. & W. 331. Sunday included. Niemann v. Moss, 6 Jur. N. S. 775; 29 J. L. Q. B. 206; Peacock v. Reg. 4 C. B. N. S. 264; 27 L. J. C. P. 224; Wynne v. Ronaldson, 13 W. R. 899; 12 L. T. N. S. 711. Under Nuisances Removal Act Sunday reckoned in, though it falls on the last day. Simkin ex parte. 6 Jur. N. S. 144; 29 L. J. M. C. 23; 2 El. & El. 392. Excluded under Bills of Exchange Act in days for appearance, if last day. Lewis v. Calor, 1 F. & F. 906. If act is to be done by court and last day falls on Sunday, it may be done on next practicable day. Hughes v. Griffiths, 13 C. B. N. S. 824; 32 L. J. C. P. 47.

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Such construction is to be adopted, if admissible, as will prevent an estoppel, save forfeiture or avoid penal consequences; a construction most beneficial to the party entitled to favor, to secure his rights rather than destroy them, or to save a right intended to be favored by law.

Dyer, 218; Hatter v. Ash, 1 Ld. Raym. 84; Seignorett v. Noguire, 2 Ld. Raym. 1241; Pugh v. Duke of Leeds, Cowp. 714; Lester v. Garland, 15 Ves. Jr. 248, and cases there cited and reviewed; Bigelow v. Wilson, 1 Pick. 485; Wilcox v. Wood, 9 Wend. 346, and cases above cited.

The policy of the law which favors the rights of purchasers at judicial sales, not only authorizes but requires a construction of the statute favorable to the purchasers. There being nothing in the statute requiring a different construction, such mode of computation is to be adopted as will give validity to the sale.

Robinett v. Compton, 2 La. Ann. 856; Pearpoint v. Graham, 4 Wash. C. C. 232; Lytle v. Williams, 15 Serg. & R. 136.

The title of a bona fide purchaser at a judicial sale, is not affected by any irregularities in the proceedings of the officer, or in the process under which he sold. All that is necessary to support the title of a purchaser in an action of ejectment, is the judgment, execution, levy, and sheriff's deed.

Jackson v. Sternbergh, 1 Johns. Cas. 153; Jackson v. Bartlett, 8 Johns. 361; Jackson v. Rosevelt, 13 Johns. 97; Jackson v. De Lancy, 13 Johns. 535; Jackson v. Robins, 16 Johns. 537; Brown v. Miller, 3 J. J. Marsh. 439; Lawrence v. Speed, 2 Bibb, 401; Webber v. Cox, 6 Mon. 110; Day v. Graham, 6 Ill. 435; Swiggart v. Harber, 4 Scam. 364; Ware v. Bradford, 2 Ala. 676; 19 Ala. 132; State Bank v. Noland, 13 Ark. 299; Newton v. State Bank, 14 Ark. 9; Byers v. Fowler, 12 Ark. 218; Wheaton v. Sexton, 4 Wheat. 506; Hart v. Rector, 7 Mo. 531; Reed v. Heirs of Austin, 9 Mo. 722; Landes v. Perkins, 12 Mo. 254; Draper v. Bryson, 17 Mo. 71; Carson v. Walker, 16 Mo. 68; Robinett v. Compton, 2 La. Ann. 856.

The proceedings of a court of competent jurisdiction cannot be called into question collaterally.

1 Baldwin, 246, 266; 6 Ben. 254; 1 S. & R. 101; 8 S. & R. 397.

Errors and irregularities are to be corrected by some direct proceeding, either before the same court or in an appellate court.

Thompson v. Tolmie, 2 Pet. 157; Voorhees v. Bank of U. S. 10 Pet. 473; Grignon v. Astor, 2 How. 343; Lessee of Adams v. Jeffries, 12 Ohio, 272; Lessee of Paine v. Mooreland, 15 Ohio, 443; Reed v. Austin's Heirs, 9 Mo. 722; Landes v. Perkins, 12 Mo. 254.

Mr. Justice Grier delivered the opinion of the court:

The plaintiffs claim the land which is the subject of controversy in this suit, as heirs of Isaac W. Griffith, who died seised of the same in 1819. His estate was insolvent. Judgments were obtained against his administrators in 1820, executions were issued thereon, and the property sold by the sheriff. The defendants claim under the purchaser at this sale.

On the trial, the court below instructed the jury "that the sheriff's deed, read in evidence under the judgments and executions also in evidence, was effectual to devest the title of the heirs of Isaac H. Griffith to the land mentioned in said deed."

It is admitted, that in the State of Missouri the lands of a deceased debtor may be taken in execution, and sold by the sheriff, in satisfaction of a judgment against the administrator. And also that such deed vests in the purchaser all the estate and interest which the deceased had in the property at the time of his death. But it is alleged that this sale is "without authority of law and void," because the execution was issued and sale made before the time limited for stay of execution against the *real estate of a decedent. The law and [*162 the facts on which this objection to the validity of the sale is founded are as follows:

By an Act of 1817, it is provided that "all lands, tenements and hereditaments shall be liable to be seized or sold upon judgment and execution obtained against the defendant or

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Where judge ordered money paid on 25th of each month and it fell on Sunday. Held that the defendant had the whole of Monday to pay the money in. Morris v. Barrett, 7 C. B. N. S. 139; 6 Jur. N. S. 609; 29 L. J. C. P. 102.

Statute forbidding an act to be done on a particular day means the natural day of 24 hours, from midnight to midnight. Pulling v. People, 8 Barb. 384.

"Till" includes the day to which it is prefixed, but "between" is intermediate. Bunce v. Reed, 16 Barb. 347.

"Within." Where an act is to be done within a specified number of days, the day on which the notice is given and the day on which the act is to be done are considered, the one inclusive and the other exclusive, indifferently. So held, of return of process. Gillespie v. White, 16 Johns. 117; of notices in suits. Charles v. Stanbury, 3 Johns. 261; of time fixed by statute. Hoffman v. Duel, 5 Johns. 232; Ex parte Dean, 2 Cow. 605; Snyder v. Warren, 2 Cow. 518; Homan v. Liswell, 6 Cow. 659; Col. T. Co. v. Haywood, 10 Wend. 422; Phelan v. Douglass, 11 How. Pr. 193; where a specific number of days is designated by rule of court. Irving v. Humphreys, Hopkins Ch. 364.

"Within" 30 days, first day excluded and party has whole of thirtieth; "after" 30 days, act cannot be done till thirty-first day. Judd v. Fulton, 10 Barb. 117.

"Within;" day of the act included. People v. Wood, 10 N. Y. Leg. Obs. 61. Contra, day of the act excluded. People v. N. Y. C. & H. R. R. R. Co. 28 Barb. 284.

The manner of computing time is settled in New York by the Code of Civil procedure, sec. 788.

Fractions of a day are not regarded except for the purpose of guarding against injustice. Blydenburgh v. Cotheal, 4 N. Y. 418; S. C. 5 How. Pr. 200; 3 Code R. 216; Jones v. Porter, 6 How. Pr. 286; Reg. v. St. Mary, Warwick, 1 El. & Bl. 816; 1 C. L. R. 192; 17 Jur. 551; 22 L. J. M. C. 109.

Sunday and fractions of a day not regarded. McGill v. Bank of U. S. 12 Wheat. 511; Col. T. Co. v. Haywood, 10 Wend. 422; Hughes v. Patton, 12 Wend. 234; Rush v. Van Benschoten, 1 How. Pr. 149.

The doctrine that in law there is no fraction of a day, is a mere legal fiction, and is true only sub modo, and in a limited sense, whenever it will promote the purposes of substantial justice. Matter of Richardson, 6 Law Rep. 392; S. C. 2 Story, 571.

Where it is necessary to show which of two events first took place, the court may enter into the question of the fractions of a day; therefore the court will regard the particular hour at which a defendant dies, so as to see whether execution issued previously to his demise. Clinch v. Smith, 8 D. P. C. 337.

The law will take notice of fractions of a day when the precise hour becomes material, as in ascertaining the priority of liens. Haden v. Buddensick, 49 How. Pr. 241.

See also note, 49 L.R.A. 193.

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defendants, in full life, or against his or her heirs, executors or administrators after the decease of the testate, or intestate; provided, no such land, tenements, or hereditaments, shall be seized and sold until after the expiration of eighteen months from the death of such ancestor, or the date of the letters testamentary or letters of administration, and execution may issue against such lands, tenements and hereditaments, after the death, testate or intestate, and after the time aforesaid, in the same manner as if such person were living."

The letters of administration, on the estate of Griffith are dated on the 1st of November, 1819. The sale was made by the sheriff on the 1st of May, 1821, on executions previously issued.

It is contended that the term of eighteen months from the 1st of November, 1819, had not expired on the 1st of May, 1821, and consequently the sale was without authority of law, and void.

But we are of opinion that the assumption on which this inference is based is not correct; nor the inference correct, if the assumption were granted.

If the day on which the letters of administration be counted in the calculation, the term of eighteen months had "expired" on the 1st May, 1821.

Whether the "terminus a quo" should be so included, it must be admitted, has been a vexed question for many centuries, both among learned doctors of the civil law and the courts of England and this country. It has been termed by a writer on civil law (Tiraqueau) the controversia controversissima.

In common and popular usage, the day "a quo" has always been included, and such has been the general rule both of the Roman and common law. The latter admits no fractions of a day; the former, in some instances, as in cases of minority, calculated "de momento en momentum." The result of this subdivision was to comprehend a part of the "terminus a quo." But in cases where fractions of a day were not admitted, as in those of usucaption or prescription, a possession commencing on the 1st January, and ending on the 31st December, was counted a full year. It was in consequence of the uncertainty introduced on this subject by the disquisitions and disputes of learned professors, that Gregory IX., in his decretals, introduced the phrase of "a year and a day." in order to remove the doubts thus created, as 163*] *to whether the "dies a quo" should be included in the term. It thus maintained the correctness of the common usage, while it satisfied the doubts of the doctors.

The earlier cases at common law show the adoption of the popular usage as to the general rule, but many exceptions were introduced in its application to leases, limitations, etc., where a forfeiture would ensue. But the cases are conflicting, and have established no fixed rule as to such exceptions. Lord Mansfield reviews the cases before his time, in Pugh v. Leeds, Cowp. 714, and comes to the conclusion "that the cases for two hundred years had only served to embarrass a point which a plain man of common sense and understanding would have no difficulty in construing."

The rule he lays down in that case is, "that courts of justice ought to construe the words of parties so as to effectuate their deeds, and not destroy them; and that, 'from' the date, may in vulgar use, and even in strict propriety of language, mean either inclusive or exclusive."

It would be tedious and unprofitable to attempt a review of the very numerous modern decisions, or to lay down any rules applicable to all cases. Every case must depend on its own circumstances. Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any bona fide transaction or title. The intention and policy of the enactment should be sought for and carried out. Courts should never indulge in nice grammatical criticism of prepositions or conjunctions, in order to destroy rights honestly acquired.

In the present case there is no reason for departing from the general rule and popular usage of treating the day from which the term is to be calculated, or "terminus a quo," as inclusive. The object of the Legislature was to give a stay of execution for eighteen months, in order that the administrator might have an opportunity of collecting the assets of the deceased and applying them to the discharge of his debts. The day on which the letters issue may be used for this purpose as effectually as any other in the year. The rights of the creditor to execution are restrained by the Act, for the benefit of the debtor's estate. The administrator has had the number of days allowed to him by the Statute to collect his assets and pay the debts. The construction which would exclude the day of the date is invoked, not to avoid a forfeiture or confirm a title, but to destroy one, obtained by a purchaser in good faith under the sanction of a public judicial sale.

If the Statute in question were one of limitation, whereby the remedy of the creditor would have been lost, unless execution *had is- [*161 sued and sale had been made within eighteen months, probably a different construction might have prevailed. Yet, even in such a case, the precedents conflict.

See Cornell v. Moulton, 3 Denio, 12; and Presbrey v. Williams, 15 Mass. 193.

But if the correct application of the rule to the present case were doubtful, the fact that this question was raised and decided by the court between the parties to the judgment, and that the court, after considering the question, ordered the sale to be made on the 1st May, would be conclusive, not only as res judicata inter partes, but as evidence of the received construction by the courts of Missouri, which it would be an abuse of judicial discretion now to overturn.

Finally, there is another view of this case which is conclusive, as regards this and all other objections taken by the counsel to the validity of the sheriff's deed. It is the well-known and established rule of law in Missouri and elsewhere, that a judicial sale and title acquired under the proceedings of a court of competent jurisdiction cannot be questioned collaterally, except in case of fraud, in which the purchaser was a participant.

See Grignon v. Astor, 2 How. 319. The cases of Reed v. Austin, 9 Mo. 722; of Landes v. Perkins, 12 Mo. 239; Carson v. Walker, 16

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Mo. 68, and Draper v. Bryan, 17 Mo. 71, show that this principle of the common law is the received and established doctrine of the courts of Missouri.

The sheriff's deed in the present case is founded on a regular judgment in a court of competent jurisdiction, and an execution on said judgment issued by authority of the court, and levied on property subject by law to be taken and sold to satisfy the judgment. The writ authorized the sheriff to sell; a sale was made in pursuance thereof by the sheriff, and a deed executed to the purchaser, which was afterwards acknowledged in open court according to law. At this time, all parties interested could and would have been heard to allege any irregularity in the proceedings that would justify the court in setting it aside. The objections to this sale do not reach the power of the court, or the authority of the sheriff to sell. The issuing of an execution on a judgment before the stay of execution has elapsed, of after a year and a day without reviving the judgment the want of proper advertisements by the sheriff, and other like irregularities, may be sufficient ground for setting aside the execution or sale, on motion of a party to the suit, or anyone interested in the proceedings; but when the objections are waived by them; and the judicial sale founded on these proceedings is confirmed by the court, it would be injurious to the peace of the community and the security of titles to permit such objections to the title to be heard in a collateral action.

165*] *On every view of the case, we are of opinion that the title of the purchaser is protected by the established rules of law, and that there was no error in the instructions given to the jury by the court below.

The judgment of the Circuit Court is, therefore, affirmed.

JECKER, TORRE & CO. et al., Claimants of the Cargo of the Ship Admittance, and Fessenden and Fay, Claimants of the Ship Admittance, Appellants,

v.

JOHN B. MONTGOMERY, Libelant.

(See S. C. 18 How. 110-126.)

In war, subjects of belligerents, enemies to each other—trading between them unlawful—interposition of neutral port no justification—permission of owners of vessel and acts of agents—commander of captor may decide to sell—prize in foreign port—libel in name of captor immaterial if not objected to—proceeds of prize sale may be put in Treasury.

In a state of war, the two belligerent nations and all their citizens or subjects are enemies to each other.

All intercourse and communication between them is unlawful.

A trading with the enemy, except by license, subjects the property to confiscation.

This rule applies to allies.

The interposition of a neutral port between the shipment and the ultimate destination makes no difference.

No communication, direct or indirect can be carried on with the enemy.

The bare permission of the owners of the use of their vessel in hostile enterprises, equally with her employment under their immediate command, renders such vessel liable to capture annd condemnation.

If the owners had not anticipated a violation of this public law, still the fate of this vessel must depend upon the conduct of their agent with whom they have entrusted it.

Whether the captured vessel shall be sent home for condemnation is a question of discretion for the commander of the capturing vessel alone to decide.

If he decide with reasonable discretion and honest purpose to sell her in a foreign country, his omission to send her home will not work a forfeiture of the right of prize.

That the proceedings for condemnation were in the name of the captor, instead of the United States, when the decree was in favor and in the name of the government by whom the proceeds have been received, where this objection was not raised in the court below, is an immaterial irregularity.

It was proper to place the proceeds of the prize sale in the Treasury of the United States.

Argued Dec. 27, 1855. Decided Jan. 17, 1856.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The case is stated by the court.

Messrs. Coxe, Nelson and Dexter for appellants:

The case of The Eole, 6 Rob. 224, is decisive of the present.

All proceedings to condemn property as prize, must be instituted in the name of the government. The proceedings in this case are in direct violation of the law which regulates prize proceedings.

1 Wheat. 495, Appendix; 2 Wheat. Appendix, note 1, 5; 6 Rob. 55, 57 and 58; 2 H. Bl. 541.

The property condemned by the decree is not what the libel asked to be condemned, nor has that been brought into the possession of the court. 4 Rob. 138.

Messrs. Reverdy Johnson and P. B. Key for the appellee.

Mr. Justice Daniel delivered the opinion of the court:

This is an appeal from a decree in admiralty by the Circuit Court of the United States for the District of Columbia, by which decree the ship Admittance, claimed by the appellants, Charles B. Fessenden and Richard S. Fay, as owners, and the cargo of the same ship claimed by the appellants, Jecker, Torre & Co., and Manuel Quintana, were upon a libel filed by the appellee, John B. Montgomery, condemned as prize of war.

It will serve to explain the nature of the present controversy, and the character of the decree of the Circuit Court above mentioned, to refer to the proceedings heretofore had therein upon a libel filed by the claimants of the cargo for restitution, and to the decision of this court upon cross appeals from those proceedings, both by the claimants and the captor, out of which last-mentioned decision the case before us has arisen.

By the decision of this court just referred to (see 13 How. 498), we hold the following propositions to have been expressly ruled:

1. That the Admiralty Court of the District

NOTE.—Commission of captors, when inquirable into. In war, domicil of owner determines character of goods, whether hostile or neutral—see note to The Mary and Susan, 4 L. ed. U. S. 32; and see note to The Frances, 3 L. ed. U. S. 581.

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of Columbia had jurisdiction of the libel for the condemnation of the property in contest, although such property was not brought within its jurisdiction; and if they found the subject liable to condemnation, might proceed to condemn, although not in fact within the custody or control of the court.

2. That the Admiralty Court in the District of Columbia, having jurisdiction of the case, it 112*] was its duty to order the captors *to institute proceedings in that court to condemn the property as prize, by a day to be named in the order; and in default thereof, to be proceeded against upon a libel for an unlawful seizure; because the property of the claimant is not devested by the capture, but by condemnation in a prize court—is not devested until condemnation, though such condemnation will relate back to the capture.

3. That the grounds alleged for the seizure of the vessel and cargo, viz.: that the vessel sailed from New Orleans with the design of trading with the enemy, and did in fact hold illegal intercourse with them, are sufficient, if supported by testimony, to subject both vessel and cargo to condemnation.

4. And if they were liable to condemnation, the reasons assigned in the answer for not bringing the vessel and cargo into a port of the United States for trial—viz.: that it was impossible so to do consistently with the public interest—is sufficient, if supported by proofs, to justify the captors in selling vessel and cargo in California, and to exempt the captors from damages on that account.

5. That to a libel for restitution, probable cause for seizure is no defense; but is so only against a claim for damages in cases in which the property has been restored or lost after seizure.

Under the authority of the rulings just enumerated, and in obedience to the mandate founded thereupon, the libel in the cause now before us was filed; and the case made by the parties presents, as the material questions for consideration, the inquiries: 1st. Whether the vessel sailed with the design of trading with the enemy, and did in fact hold illegal intercourse with them. 2d. Admitting that the vessel and cargo were in the first instance liable to condemnation, whether the reasons assigned for not bringing them within the United States were so supported by proof, as to justify the captor in not bringing them within the United States, and in selling them in California, without a forfeiture of their rights as captors.

As a principle applicable to the first of these inquiries, it may be averred as a part of the law of nations— forming a part, too, of the municipal jurisprudence of every country—"that in a state of war between two nations, declared by the authority in whom the municipal constitution vests the power of making war, the two nations and all their citizens or subjects are enemies to each other. The consequence of this state of hostility is that all intercourse and communication between them is unlawful. Vide Wheaton on Maritime Captures, cap. 7, p. 209, quoting from Bynkershoeck this passage: "Ex natura belli commercia inter hostes cessare, non est dubitandum. Quamvis nulla specialis 113*] *sit commerciorum prohibitio, ipso tamen jure belli, commercia inter hostes esse vetita, ipsæ indictiones bellorum satis declarant."

Upon this principle of public law, it has been the established rule of the High Court of Admiralty in England, that a trading with the enemy, except by a royal license, subjects the property to confiscation. The decisions of that court show that the rule has been rigidly enforced, as, for instance, where the government had authorized a homeward trade from the enemy's possessions, but had not specifically protected an outward trade to the same; and again, in instances where cargoes had been laden before the war, but where the parties had not used all possible diligence to countermand the voyage after the first notice of hostilities; and this rule has been enforced, not only against subjects of the Crown, but likewise against those of its allies in the war, upon the assumption that the rule was founded on the universal principle, which states allied in war have a right to apply to each other's subjects.

Vide Wheaton on Captures, p. 212; and 1 C. Robinson's Adm. 196, The Hoop.

The same rule has been adopted with equal strictness by this court. In the case of The Rapid, reported in 8 Cranch, 155, the claimant, a citizen of the United States, had purchased goods in the enemy's country a long time before the declaration of war, and had deposited them on an island near the boundary line between the two countries. Upon the breaking out of hostilities, his agents had hired the vessel to proceed to the place of deposit and bring away these goods. Upon her return the vessel was captured, and with the cargo, was condemned as prize of war for trading with the enemy. In applying the law to this state of facts, this court said, and said unanimously: "That the universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country. But, after deciding what is the duty of the citizen, the question occurs, what is the consequence of a breach of that duty. The law of prize is a part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it. Condemnation to the use of the captor is equally the fate of the property of the belligerent and of the property engaged in anti-neutral trade. But a citizen or an ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks. Again, the court say: "If by trading, in prize law was meant that signification of *the term [*114 which consists in negotiation or contract, this case would not come under the penalties of the rule. But the object and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent nations. Negotiation or contract has therefore no necessary connection with the offense. Intercourse inconsistent with actual hostility is the offense against which the operation of the rule is directed."

The case of The Joseph, reported in 8 Cranch, p. 451, was that of a vessel owned by citizens of the United States, that sailed from thence before the war, with a cargo, on freight, on a

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voyage to Liverpool and the north of Europe, and thence back to the United States. After arriving and discharging her cargo at Liverpool, she took in another at Hull, and sailed for St. Petersburg. At St. Petersburg she received news of the war with England, and sailed to London with a Russian cargo consigned to British merchants; delivered her cargo and sailed for the United States in ballast, under a British license, and was captured. In the opinion of this court in this case, delivered by Washington, Justice, it is said, that "After the decision in the cases of The Rapid and of The Alexander, it is not to be contended that the sailing with a cargo, on freight, from St. Petersburg to London, after a full knowledge of the war, did not amount to such a trading with the enemy as to have subjected both the vessel and cargo to condemnation as prize of war, had she been captured on that voyage. The alleged necessity of undertaking that voyage to enable the master, out of the freight, to discharge his expenses at St. Petersburg—countenanced, as the master declares, by the opinion of our minister at St. Petersburg, that by undertaking such a voyage he would violate no law of the United States—although these considerations, if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision."

The same course of decision which has established that property of a subject or citizen taken trading with the enemy is forfeited, has decided also that it is forfeited as prize. The ground of the forfeiture is, that it is taken adhering to the enemy, and therefore the proprietor is pro hac vice to be considered as an enemy.

Vide, also, Wheaton on Captures, p. 219, and 1 C. Rob. 219, the case of The Nelly.

Attempts have been made to evade the rule of public law, by the interposition of a neutral port between the shipment from the belligerent port and their ultimate destination in the enemy's country; but in all such cases the goods have been condemned, as having been taken in a course of commerce rendering them 115*] *liable to confiscation; and it has been ruled that, without license from government, no communication, direct or indirect, can be carried on with the enemy; that the interposition of a prior port makes no difference; that all trade with the enemy is illegal, and the circumstance that the goods are to go first to a neutral port will not make it lawful.

3 C. Rob. 22, The Indian Chief; and 4 C. Rob. 79, The Jonge Pieter.

Having thus stated the law with regard to maritime captures, it remains to be ascertained how far the case before us, upon the pleadings and proofs, falls within the scope or the terms of that law.

The libel propounds, that the libelant, as the commander of the U. S. ship Portsmouth, did on the 7th April, 1847, at the port of San José, in lower California, in the Republic of Mexico, seize and take possession of, as lawful prize, a certain ship or vessel called The Admittance —one Peter Peterson being the master—with her cargo, provisions, tackle, and all other appurtenances to the said ship belonging. That the said ship is a merchant vessel belonging to citizens of the United States, and that the cargo of said ship is believed by the libelant to have belonged to certain merchants resident in Mexico. That about the month of October, 1846, the said ship, with her cargo, left the port of New Orleans for a port in the Republic of Mexico, into which port the captain intended to discharge the cargo. That for some time prior to the sailing of this ship, and upon the day of her seizure, open and public war existed between the United States and the Republic of Mexico and its dependencies. That in consequence of said state of war, and in discharge of his duty, the ship Admittance, with her cargo, was seized by the libelant as prize of war.

The libelant further propounds, that Peterson, as master of the said ship, did sail from the United States with the intention of trading, and in fact did trade and otherwise hold illegal intercourse with the enemies of the United States, whereby the said ship, her cargo, tackle and appurtenances became subjects of lawful prize. All which legal intention and acts of the master more fully appear by the papers of the said ship, and by other papers received from the master by the libelant, numbered from one to fifteen inclusive; from the deposition of William Bell, the first mate of the Admittance, and from the log-book—all of which it is prayed may be made parts of the libel; which concludes with a prayer for condemnation of ship and cargo, and for the dismission of the libel previously filed by Torre, Jecker & Co., praying restitution of a portion of the cargo.

To the libel of Captain Montgomery were filed an answer on *behalf of Fessenden [*116 & Fay, who intervened as owners of the ship, and separate answers on behalf of Jecker, Torre & Co., and of Manuel Quintana, as owners of the cargo.

These answers, so far as they are made up merely of general denials of the charges propounded in the libel, require no special animadversion. So far, however, as the specific facts alleged in them by way of exculpation, the compatibility of those facts with the established law of prize, or with the proofs adduced in the case, become a question, the statements in these answers are matters of essential importance, requiring particular examination.

The respondents Fessenden and Fay, have in their answers observed an entire silence with respect to a knowledge on their part as to the destination of the ship or cargo; whilst they are very explicit in the assertion of their belief that the cargo was put on board by the charterer, and that the ship sailed under a full persuasion that a treaty of peace would speedily terminate the then existing war between the United States and Mexico, and that they never were informed, nor do they believe, that the cargo was to be landed or disposed of in Mexico until after the termination of the war. Personally, they say, that they know nothing of what occurred in relation to the ship and cargo in the Pacific, but from what they have learned they believe; and therefore aver that there was no trading with the enemy at any time during the voyage. This statement which implies knowledge in the respondents of the existence of war between the United States and Mexico at the time of chartering their ship, and knowl-

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edge likewise that the cargo put on board was destined for the port of a nation, at the time of the shipment at any rate, in open hostility with the United States, will, as to its verity, be further tested by a comparison with the testimony furnished by the papers found in the captured vessel, and by the examination of witnesses. And in this connection it may be observed, that the bare permission by the owners of the use of their vessel in hostile or piratical enterprises, renders such vessel liable to capture and condemnation equally with her employment in similar offenses under the immediate command of such owners themselves.

Vide the case of The U. S. v. The Brig Maleck Adel, 2 How. 234; The U. S. v. The Schooner Little Charles, 1 Brok. 347; The Palmyra, 12 Wheat. 14; 1 C. Rob. 127; The Vrouw Judith, 1 C. Rob. 150.

Comparing this answer with the papers found on board the captured vessel, we see it expressly stipulated in the charter-party, the very contract by which the ship was hired, and which was signed by these respondents, that the ship shall proceed to New Orleans, and there take from the charterers, Wylie and 117*] *Ygana, 1,100 bales of cotton, to be delivered at the port of San Blas to the order of the shipper, the consignee paying freight for the room occupied in the ship by the cotton, $1,100, payable on delivery of the cargo; the cargo to be received at New Orleans and discharged at San Blas with dispatch. The charter-party further provides, that if on the arrival of the ship off San Blas, the port is blockaded, or other obstructions prevent the discharge of the ship, she shall proceed to the Sandwich Islands, and there remain until the port is open, the said Wylie and Ygana paying in addition to the charter the further sum of $1,000 per month during such detention. We will hereafter state what is conceived by this court to be the proper construction of this phrase, "if the port is blockaded, or other obstructions prevent the discharge of the ship." Independently of this phrase, however, we have, on the face of this contract, the declaration that the shipment was made to an enemy's port; that the delivery was to take place at that port; that the interposition of the neutral Island of Honolulu was not for the purpose of trade with, or transshipment at that island, but solely for the purpose of affording an opportunity to enter into and discharge at a port known to be an enemy's port, in which the consignees of the cargo resided, and the delivery at which port was made a precedent and necessary condition to the payment of freight.

Upon a comparison of the bill of lading with the charter-party, the terminus of the voyage and the destination of the cargo are clearly shown. The language of the bill of lading runs thus: "Shipped in good order and well-conditioned, by Wylie and Ygana, on board the good ship Admittance, whereof is master for the present voyage Peterson, and now lying at New Orleans, and bound for Honolulu, 2,707 small bales of cotton, being marked and numbered as in the margin, and are to be delivered." Where? Not at Honolulu, where there was no consignee, apparent or mentioned —not at San Blas, as an incidental point in the track of the voyage to Honolulu, but "at the aforesaid port of San Blas," the predetermined limit of the voyage, and to Don Lewis Rivas Gongora, resident at San Blas, the correspondent and consignee of the shipper.

Taking, in connection with the charter-party and the bill of lading, the instructions from the respondent, Fessenden, to the master of the ship, before sailing from New Orleans, it seems almost incredible that the owners should have been ignorant of the character of the voyage, and of the hazards incurred by their vessel resulting from that character. How, upon any other view, can be accounted for the extreme caution enjoined upon the *master with [*118 respect to the danger of entering a Mexican port—danger expressly distinguished from that arising from the probability of capture by vessels of the United States; such as it is said might arise from the disposition of the Mexican government, under the plea of the right of war to confiscate the vessel, notwithstanding the consignees might have obtained permission to land the cargo? It is absurd to suppose that this caution could have had any possible reference to a state of re-established amity between Mexico and the U. S., as the vessel of a friendly nation could incur no risk of confiscation by entering the port of a friend. We think that it was to dangers and hazards which might proceed from the Mexican authorities—hazards and dangers incident to an existing and known state of war, which were in the contemplation of the owners when, in the charter-party, they speak of "other obstructions" (beyond that of blockades), "which might prevent the discharge of the ship at San Blas," an enemy's port. This interpretation of the conduct and purposes of the owners and charterers is strongly corroborated by, and explains that portion of the instructions to the master which tells him, "you will perceive from this that you must be very cautious about going into a Mexican port, for although the consignees may have authority to land the cotton, yet they might seize the vessel after being discharged, unless the vessel as well as the cargo had permission from the Mexican government." This language would be unintelligible unless it had reference to a known belligerent attitude of the two nations, forbidding intercourse or traffic between their respective citizens, and to a contemplated dispensation from the existing prohibitions by one of the belligerents. We are, therefore, upon a just construction of the answer of the claimants of the vessel, of the charter-party signed by them, of the bill of lading, and of the instructions to the master, impelled to the conclusion, that these claimants of the vessel were aware of the character of the voyage for which they had hired her, and were willing, nevertheless, to incur the hazards of the enterprise in consideration of the profits it promised them.

Looking next beyond the evidence of intention and knowledge as deducible from the ship's papers proper, to the acts of the master in execution of the objects and purposes of the voyage, the following facts are shown by the testimony of the witnesses, Bell, Martin and Graves, all of them belonging to the crew of The Admittance, and the first-named being the mate of the ship: that she sailed directly to San Blas; that upon her arrival off this

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port, then being an enemy's port, and in the possession of the enemy, she remained before it three days and nights, during which time the master opened an intercourse with the port, 119*] *receiving at different times communications therefrom, to which he replied; that whilst off San Blas the captain showed no American ensign, but after receiving the communications from the shore, he ordered the chief mate not to head the log-book, and also directed the concealment of the ship's name by covering her stern with painted canvas, and proceeded along the coast as far as 18° north, looking for some bay or inlet on the coast of Mexico where the cargo might be delivered; but finding no suitable place, the ship was headed for San José, California. It is further proved by the witnesses, Mesroon and Bell, that The Admittance entered the port of San José before it was captured by the forces of the United States, and when it was still a Mexican port, in the possession of the enemies of the United States; and the witnesses, Bell and Graves, both of the crew of The Admittance, swear that the captain, before the seizure, landed goods at this hostile port. Upon every correct view, then, of the facts of this case, and of the law of prize as applicable to these facts, it is clear that the ship Admittance was properly subject to seizure and condemnation as prize of war.

We have seen, by the authorities cited, that intercourse with the enemy is sufficient cause for personal punishment, and for the confiscation of property; that it is a cause originating in, and inflexibly enforced, by necessity for guarding the public safety. In this cause are established against the claimants of this vessel, not only intercourse, but trading, in its common acceptation. Moreover, it is a settled principle, that if the owners had not anticipated a violation of the public law, the fate of their vessel, with respect to an infraction of that law, must depend upon the conduct of the agent with whom they have intrusted its management.

With respect to the respondents, Jecker, Torre & Co., and Quintana, claimants of the cargo, the written documents found on board the captured vessel, and surrendered to the libelant by the master, fasten upon these claimants not only a knowledge of the design, under the pretext of a voyage to the Sandwich Islands, of trading with citizens of the United States, a belligerent nation, but they fix upon those parties strenuous and active efforts to possess themselves of the fruits of that traffic—the cargo of the ship; and to obtain them, not even by the circuitous voyage to Honolulu, but by direct transit to and within the territory of the enemy's nation. It is a circumstance of much significance, disclosed by these papers, that there appears to have existed a perfect understanding and preconcert between these claimants, the charterers of the vessel and the master. The arrival of the master is antici- 120*] pated and waited for, and no *sooner does his vessel appear on the Mexican coast (the war still continuing) than she is boarded from the shore by the agents of the claimants, bringing assurances of arrangements made for the violation of the law of war, and of the safety with which that violation might be accomplished.

Thus, on the 12th of February, 1847, a letter, from which the following extracts are taken, was addressed by the agent of the claimants, Jecker, Torre & Co., Louis Rivas Gongora, to the master of The Admittance:

"Capt. P. Peterson, Ship Admittance, off San Blas.

Sir: I have been informed of your sailing from New Orleans with a cargo of cotton to my consignment, and have also received a copy of Messrs. Wylie & Ygana's instructions for your guidance; also a copy of your charter-party. But as it will be more for the convenience of all parties concerned, that in case of your not being allowed by the blockading vessels to enter San Blas to Manzanilla, you should not proceed to the Sandwich Islands, which are very distant, but in the first place to San José, near Cape San Lucas, which is in possession of the Americans. I have to request that if you find the port of San Blas blockaded, and should be warned off, you will, as is directed in your instructions, proceed to Manzanilla, where, if you are allowed to enter, you will find an agent meeting you there, who will receive your cargo. If San Blas is open when you arrive, you will come into the bay immediately and anchor, putting yourself under the orders of Don Eustaquio Pasiere, who will proceed to discharge your cargo; and as it is of much importance that the cotton should be on shore as soon as possible, I hope you will do everything on your part to commence and to finish discharging with the least possible delay. If you are permitted to enter San Blas or Manzanilla, you must come in under British colors, the name of the vessel and your own remaining without alteration, still reporting yourself from New Orleans; but you will be careful not to deliver any of the papers of the ship or cargo to anyone except to Don Eustaquio Pasiere."

Again, on the 27th of the same month, this person thus addresses the master from Tepic:

"Capt. P. Peterson, Ship Admittance, off San Blas.

Sir: I had the pleasure to write to you on the 12th of this month, which will be delivered to you along with this. But as, at present, certain circumstances have taken place which, I think, make it too dangerous for you to come into San Blas, I have to request that you will proceed immediately to Manzanilla, and *put yourself under the orders of Don [*121 Manuel de la Quintana, who has gone to meet you there, and who will deliver to you a letter, authorizing him to act as your consignee. He will discharge your vessel, pay your freight, and transact all the business of your vessel the same as if I was present. You will please enter Manzanilla under English colors, and as the war continues, you will take care that it shall not be known that your vessel is American."

In proof of the agency of Rivas, as the representative of Jecker, Torre & Co., and as affecting them by his acts, reference may be made to a communication from that firm, dated Mazatlan, April 1, 1847, addressed to the master of The Admittance, which communication was doubtless prepared on entire ignorance of the seizure of that vessel, which had occurred only three days previously at San José. In this communication it is said: "should this find you at San José, we have to request you to proceed

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at once to San Blas, referring you at the same time to the accompanying letter for you from Don Luis Rivas de Gongora, of Tepic. Mr. Rivas has furnished us with copies of your letters to him, of the dates of the 3d and 4th of March, by which it appears you entertain fears of being seized by an English or American cruiser should you follow his recommendation to discharge under English colors." They then refer the master to Mr. Mott and Mr. Bolton, for assurances that his apprehensions are groundless, and state "that in less than a month previously, an American vessel discharged at San Blas without let or hindrance; that the difficulty with regard to the vessel in a Mexican port had been overcome by an order of the supreme government, by which vessels of any nation were permitted to enter, provided that the captain would make a declaration to the effect that he belonged to a friendly or neutral nation, no papers confirming that assertion being required of him.

We think, then, that by the evidence found in the possession of the master of The Admittance, there is shown a complicity in all the respondents in premeditating, and far as they had power in executing, a scheme for effecting intercourse and trade with the open enemies of the United States—an offense such as rendered all the means and instruments for the accomplishment of such a scheme lawful prize of war.

But it has been insisted, that should it be conceded that there existed originally sufficient grounds for capture and condemnation, still the captor had forfeited all right of prize by omitting to send the vessel and cargo to the United States for adjudication, and by selling them without the justification of necessity in a foreign country. The libelant has alleged, in 122*] justification *of the disposition of the vessel and cargo, "that he was at the time of the capture of The Admittance at a great distance from the United States, and without weakening inconveniently the force under his command in his own ship, he could not have spared a sufficient prize crew and officers to command the captured ship, and to bring her into the United States."

The exception there taken brings up the inquiry, as to the duty and power of a captor to send in his prize for adjudication, and as to the discretion vested in him in deciding upon the extent of that duty, and the feasibility of that power under existing circumstances. This inquiry has been treated with so much force and perspicuity by Mr. Justice Curtis, in a case adjudged by him between a portion of these respondents as claimants of the ship, and the libelants, that it cannot be more clearly and at the same time more succinctly elucidated than it will be by reference to the opinion of that judge in the case alluded to, vide Fay et al. v. Montgomery, 1 Curt. 266. In that case, the judge remarks: "The grounds on which restitution is claimed are thus stated in the libel, 'that the seizure and detention were without any legal, justifiable, reasonable or probable cause; and even if there had been probable cause for the seizure of the said vessel, the said Montgomery was legally bound to send the same to the United States for trial, which *might easily have* been done, but which the *said Montgomery illegally* and unjustifiably omitted to do, and thereby illegally converted the same to his own use.' Here (says the judge) are two distinct grounds: the first being that the seizure was an act of illegal violence; and the second, that, by not sending the vessel to the United States for trial, the respondent had illegally converted it to his own use." After commenting upon the evidence which led his mind to the conclusion that there was properly a question of prize to be tried, the judge remarks: "And this brings me to consider the other ground stated in the libel, that by his omission to send the vessel to the United States for trial, the respondent illegally converted the vessel to his own use. That captors may so act towards prize property as to forfeit their rights as captors, and render themselves liable to make restitution, with or without damages, is clear. But before the court can so declare, a case of forfeiture of rights, free from all reasonable doubt, must be made out. In considering this part of the case, the question is, whether the allegation that the respondent omitted to send the vessel to the United States for trial, when he could safely and properly have done so, and thereby illegally converted the property to his own use, is made out in proof." The answer of the respondent to this part of the libel states: "That it was impossible for him, consistently with the public interests committed to his direction, *to have sent the ship Ad- [*123 mittance to any port of the United States." The judge proceeds to say: "Before considering the facts upon which the forfeiture is asserted, one principle should be stated, which is entitled to an important effect on this part of the case. It is, that an honest exercise of discretion, necessarily arising out of his command, cannot be treated as such misconduct in the commander of a public ship of war as will forfeit his fair title, and render him liable to be treated as a trespasser. This principle is too obviously just to require the support of authority, but it will be found to have been laid down and applied in the case of Dinsman v. Wilkes, in 12 How. 390.

"Now, it must be admitted that the question whether the necessities of the public service will allow the commander of a ship of war, in time of war, upon a remote station on the other side of the globe, to spare one of his officers to go home in command of a prize, is one depending on his discretion, necessarily arising out of his command. In the first instance, he alone has the power to decide the question—he alone has the needful knowledge of facts, and he is bound to exercise his judgment upon them. Certainly his judgment is not conclusive—good faith and reasonable discretion are requisite; but it would not only be a hardship, but injustice, to impose on the commander the duty of determining such a question, and when he has determined it, to attribute to him as an act of misconduct that he did not come to a different conclusion. It is true, that it is a clear duty of a commander to send in his prize for adjudication, but this is not an absolute obligation. It depends on his ability to perform it; and of this, as already said, he must judge in the first instance; and if he decides with reasonable discretion and an honest purpose to do his duty, I cannot consider him as guilty of misconduct which works a forfeiture."

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The judge then, after an examination of the proofs in the case, and of the law as above expounded by him, comes to the following conclusion: "Keeping these principles in view, I am not satisfied that, in omitting to send the vessel to the United States, Captain Montgomery violated any known duty, or acted with so little discretion as to render him liable as a trespasser." And he closes his review of the evidence with this very forcible view of its just import and character: "One of the lieutenants of The Portsmouth was serving on shore—two only remained; and it does not appear that a single passed-midshipman was on board. Lieut. Revere (one of the remaining lieutenants on board) has given an opinion—no doubt an honest one—that he might have been spared; but it is an opinion formed under no responsibility of command; and I am not prepared to say that a sloop of war on that coast, at that time, 124*] officered by only *two lieutenants, ought to have been left with only one, in order to send home a prize—and still less, that the commander erred so grossly, in not detaching this officer on such service, as to forfeit his legal rights thereby."

The facts which are applicable to this part of the case now before us, are essentially, if not literally, those adduced in the trial before the judge whose opinion has been just quoted; and the very clear exposition of those facts, with the legal deductions from them, as set forth in that opinion, command our entire approbation, and are regarded as conclusive against the appellants upon the question of forfeiture by the appellee of his right of prize.

Another exception urged in the argument as fatal to the decree of the Circuit Court demands our notice, and it is this: That the proceedings instituted in the District Court for the condemnation of the vessel and cargo as prize of war were in the name of the libelant, the captor, whereas they should have been commenced and prosecuted in the name of the United States. This irregularity, for such it must be admitted to be, may have proceeded from a misapprehension of the opinion of this court in the case of Jecker, Torre & Co. v. Montgomery, 13 How. 498; in which opinion it is stated to be the duty of the District Court to order the captor to institute proceedings in that court for the condemnation of the property as prize of war, by a certain day to be named by the court. The exception thus urged is not raised in the answers or in any other form of pleading in the court below. The parties have gone to trial upon allegations connected with the merits, and upon such testimony as they have chosen to introduce. It would seem to be a sufficient answer to this exception to say, that after its waiver, or after an omission to urge it in the court below, and after going into an extended range of testimony as applicable to the merits of the case, to permit an exception entirely distinct from the merits, in the appellate court, would be extending an improper license to the party starting such exception, and might be productive of injustice to his opponent. The exception is unquestionably technical or formal. It embraces neither the question of power of the captor to seize, nor that of the character of the subjects of capture as lawful prize of war. Moreover, this exception, if allowable, would seem to have no other object or purpose, but that of securing the ends which the proceedings and decree of the court have in fact accomplished; for it is seen that the libel, though filed in the name of the captor, was founded upon the public authority of the United States, and the decree pronounced in the case is in favor and in the name of the government, by whom it is shown the proceeds of the condemned *subject [*125 have been actually received. It is plain, therefore, that every purpose which the most formal proceeding could have effected, and nothing beyond this has been accomplished by the decree in this case; and the proposal now pressed upon the court is, that in virtue of a formal exception, which either has been waived or omitted in the proper time and place, the merits of this controversy voluntarily submitted, and fully examined, should be entirely lost sight of, and that the party who alone, within the purview of the exception itself, could regularly claim the subject of the controversy, should for the mere form be required to surrender that subject. Such a proposal should be regarded as neither equitable nor reasonable, and should be especially discountenanced by a tribunal which acts upon principles of an enlarged public policy—less fettered, perhaps, than any other by narrow, technical rules.

This case bears a strong resemblance to that of Benton v. Woolsey and the Bank of Utica, reported in 12 Pet. 27, in which the District Attorney of the United States filed an information in his own name, in behalf of the United States, in the District Court for the Northern District of New York, to enforce a mortgage given to the United States by Woolsey, one of the defendants. This court in that case hold this doctrine: "Some doubts were at first entertained by the court whether this proceeding could be sustained in the form adopted by the District Court. It is a bill of information and complaint in the name of the District Attorney, in behalf of the United States. But on carefully examining the bill, it appears to be in substance a proceeding by the United States, although in form it is in the name of the officer; and we find that this form of proceeding in such cases has been for a long time used without objection in the courts of the United States held in New York, and was doubtless borrowed from analogous cases in the courts of the state where the state was plaintiff in the suit. No objection has been made to it either in the court below or in this court, and we think that the United States may be considered as the real party, although in its form it is the complaint of the District Attorney."

The objection which has been made to the deposit in the Treasury of the money arising from the sale of the captured property in this case, appears to be without weight. Since the Act of Congress of the 3d of March, 1849, it appears to be the intention and the positive mandate of Congress, that all prize money arising from captures by vessels of the Navy of the United States, whether received by marshals for the sale of prizes, or in the hands of prize agents, should be deposited in the Treasury of the United States.

Vide sec. 8th of the Act, Stat. at *L. [*126 Vol. IX. p. 378.

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It does not clearly appear in whose hands the proceeds of the sale of The Admittance and her cargo were, at the date of the above Statute. But if they were in the possession of Captain Montgomery at or after that time, either as captor or prize master, or whether they were in the hands of any other person, it was within the scope and objects of the law to place the proceeds of the prize sale in the Treasury of the United States; and accordingly it is shown by the certificate of the Treasurer of the United States, that the sum of $67,000, as the proceeds of the sale of The Admittance, were, on the 26th of December, 1849, by William Speiden, purser of the Navy of the United States, deposited in the Treasury of the United States.

Upon a consideration of the facts and the law of this case, we are of the opinion that the decree of the Circuit Court be affirmed.

ROBERT A. PARKER and Miles White, Appellants,

v.

WILLIAM OVERMAN.

(See S. C. 18 How. 137-143.)

"Residence" and "citizenship" not synonymous —"sufficient," in statute, means "prima facie" evidence only—one claiming under tax sale must show every fact—omissions of things required by statute, invalidate sale.

"Residence" and "citizenship" are not synonymous terms—an allegation of the former in a pleading is not a proper averment of the latter.

In statute which provides that "the deed shall be taken and considered as sufficient evidence of the authority under which the sale was made, etc., the word "sufficient" is a synonym for "prima facie," and not for "conclusive."

In judicial sales, where the owner of the property is a party, and has opportunity to contest every step, objections to the regularity of the proceedings cannot be heard to invalidate the deed in a collateral suit.

But one who claims title under summary proceedings, where a special power has been executed, as in case of land sold for taxes, is bound to show every fact necessary to give jurisdiction and authority to the officer, and a strict and exact compliance with all things required by the statute.

A legal assessment is the foundation of the power to sell; and if the land was not legally assessed, it is fatal to the deed.

The law requiring the officer to file his oath as assessor on or before the 10th of January, or his office shall become vacant, a filing on 15th March is not a compliance, and conferred no power on him to act.

By such neglect to comply with the law, his office became vacated, and any assessment made by him was void and could not be the foundation of a legal sale.

The law requiring him to file his assessment and give immediate notice in order that the owner might appeal, his neglect to do so avoids the sale even if the assessment had been legally made.

Argued Dec. 31, 1855, and Jan. 2, 1856. Decided Jan. 22, 1856.

THIS suit was originally brought by the appellee, Overman, in the Dallas County Court in Arkansas, for the confirmation of a tax title, under ch. 149 of the Revised Statutes of Arkansas, p. 745.

It was removed into the Circuit Court of the United States for the District of Arkansas, on petition of the defendants, upon the ground of citizenship in another state.

The case was heard in the latter court, and a decree of confirmation was passed, from which decree this appeal was taken.

A further statement of the case appears in the opinion of the court.

Mr. Wm. Shepard Bryan, for appellants:

1. By the true construction of the Arkansas Revenue Act, a deed from a sheriff and collector is made evidence only of those facts which are recited in it. To establish a regularity and validity of a sale of land for taxes, the deed should show upon its face that every essential preliminary required by the Statute has been performed.

Pillow v. Roberts, 13 How. 472; Hogins v. Brashears, 8 Eng. 242; James v. Stiles, 14 Pet. 322; Williams v. Peyton, 4 Wheat. 77.

2. The county court is a tribunal of inferior and limited jurisdiction. Facts requisite to give it jurisdiction, do not appear upon the face of the transcript offered in evidence, and it is therefore inadmissible.

Constitution of Arkansas, art. 6, secs. 9, 10; Furguson v. Crittenden Co. 1 Eng. 479; Trice v. Crittenden Co. 2 Eng. 159; Heilman v. Martin, 2 Ark. 158; Elliott v. Peirsol, 1 Pet. 328; Walker v. Turner, 9 Wheat. 541; Shriver v. Linn, 2 How. 43; Hickey v. Stewart, 3 How. 750; Williamson v. Berry, 8 How. 495; Hollingsworth v. Barbour, 4 Pet. 466.

Mr. A. H. Lawrence, for the appellee:

The deed which was given in evidence was prima facie, and in the absence of positive proof of irregularity, conclusive evidence of the regularity and legality of the tax sale.

Ch. 128, Rev. Stat. sec. 96, p. 687; Roberts v. Pillow, 13 How. 472.

No objection which is taken to the proceedings in this case has any merit, considered with regard to the intention of the General Assembly.

97th sec. of the Revenue Act, p. 687, Rev. Stat.

Mr. Justice Grier delivered the opinion of the court:

As some doubts were entertained, and have been expressed by some members of the court, as to its jurisdiction in this case, *it will be necessary to notice that sub- [*140 ject before proceeding to examine the merits of the controversy. It had its origin in the State Court of Dallas County, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object is to quiet the title. The purchaser at such sales is authorized to institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold and "calling on all persons who can set up any right to the lands so purchased, in consequence of any informality, or any irregularity or any illegality connected with the sale, to show cause why the sale so made should not be confirmed."

In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But

NOTE.—Sale of land for taxes—strict compliance with the statute necessary. See note to Williams v. Peyton, 4 L. ed. U. S. 518.

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if opposition be made, and it should appear that the sale was made "contrary to law," it became the duty of the court to annul it. The judgment or decree, in favor of the grantee in the deed, operates "as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings."

It is a very great evil in any community to have titles to land insecure and uncertain; and especially in new states, where its result is to retard the settlement and improvement of their vacant lands. Where such lands have been sold for taxes there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a lawsuit, or risk the loss of his money and labor upon a litigious title. The Act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property; and like a proceeding in rem, it becomes conclusive against the absent claimant, as well as the present contestant. As was said by the court in Clark v. Smith, 13 Pet. 203, with regard to a similar law of Kentucky: "A state has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature, having its origin in the peculiar condition of the country. The state Legislatures have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes of proceeding on the chancery side of the 141*] federal courts, no *reason exists why it should not be pursued in the same form as in the state court."

In the case before us, the proceeding, though special in its form, is in its nature but the application of a well-known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another state. He is therefore entitled to have his suit tried in this court, under the same conditions as in other suits or controversies.

In the petition to remove this case from the state court, there was not a proper averment as to the citizenship of the plaintiff in error; it alleged that Parker "resided" in Tennessee, and White in Maryland. "Citizenship" and "residence" are not synonymous terms; but as the record was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this court have, undoubted jurisdiction of the case.

What we have already stated sufficiently shows the nature of the present controversy. The decree appealed from "adjudges the absolute title to the land to pass and be confirmed to, and vest in, said William Overman, his heirs, etc., free, clear, and discharged from the claim of said defendants, and all persons whatsoever; and that the said sale thereof for taxes, so made by the sheriff of Dallas County to said Overman is hereby confirmed in all things, and said defendants perpetually enjoined from setting up or asserting any claim thereto, etc."

The plaintiffs in error allege that this decree is erroneous, and should have been for defendants below.

Much of the argument of the learned counsel in this case was wasted on the effect to be attributed to the recitals in the deed, and the decision of this court in the case of Pillow v. Roberts, 13 How. 472.

That was an action of ejectment, in which this court decided, that under the 96th section of the revenue law, the sheriff's or collector's deed was made prima facie evidence of the regularity of the previous proceedings. The effect of that section of the Act, and of the decision in that case, was to cast the burden of proof of irregularity in the proceedings on the party contesting the validity of the deed; but as the present controversy is for the purpose of giving an opportunity "to all persons who can set up any right or title to the land so purchased, in consequence of any informality or illegality connected with such sale," to contest its validity, it would be absurd to make the deed, whose validity is in question, conclusive evidence of that fact. Consequently, the statute enacts, that in this proceeding "the deed shall be taken and considered by the court as sufficient evidence of the authority under which said sale was made, the description of *the land, [*142 and the price at which it was purchased. The deed is to be received as prima facie evidence of these three facts, and casts the burden of proof as to them on the defendant. The term "sufficient" is evidently used in the Statute as a synonym for "prima facie" and not for "conclusive."

In judicial sales under the process of a court of general jurisdiction, where the owner of the property is a party to the proceedings, and has an opportunity of contesting their regularity at every step, such objections cannot be heard to invalidate or annul the deed in a collateral suit. But one who claims title to the property of another under summary proceedings where a special power has been executed, as in case of lands sold for taxes, is bound to show every fact necessary to give jurisdiction and authority to the officer, and a strict compliance with all things required by the Statute.

The principal objection to the regularity of the sale in this case, and the only one necessary to be noticed, is, that the land was not legally assessed. A legal assessment is the foundation of the authority to sell; and if this objection be sustained, it is fatal to the deed.

In order to qualify the sheriff to fulfill the duties of assessor, the Statute requires, that "on or before the tenth day of January, in each year, the sheriff of each county shall make and file in the office of the clerk of the county an affidavit in the following form," etc.: "And if any sheriff shall neglect to file such affidavit within the time prescribed in the preceding section, his office shall be deemed vacant, and it shall be the duty of the clerk of the county court, without delay, to notify the Governor of such vacancy," etc.

The Statute requires, also, "that on or before the 25th day of March, in each year, the assessor shall file in the office of the clerk of the

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county the original assessment, and immediately thereafter give notice that he has filed it," etc. This notice is required, that the owner may appeal to the county court "at the next term after the 25th day of March and have his assessment corrected if it be incorrect." If the assessor shall fail to file his assessment within the time specified by this Act, he is deemed guilty of a misdemeanor and subjected to a fine of $500.

These severe inflictions upon the officer, for his neglect to comply with the exigencies of the Act, indicate clearly the importance attached to his compliance in the view of the Legislature, and that a neglect of them would vitiate any subsequent proceedings, and put it out of the power of the sheriff to enforce the collection of taxes by a sale of the property.

The record shows that Peyton S. Bethel, the 143*] then sheriff of *the County of Dallas, did not file his oath as assessor on or before the 10th of January, as required by law. He did file an oath on the 15th of March, but this was not a compliance with the law, and conferred no power on him to act as assessor. On the contrary, by his neglect to comply with the law, his office of sheriff became ipso facto vacated, and any assessment made by him in that year was void, and could not be the foundation for a legal sale. The neglect, also, to file his assessment and give immediate notice on the 25th of March, so that the purchaser might have his appeal at the next county court, was an irregularity which would have avoided the sale even if the assessment had been legally made.

The Statute makes the time within which these acts were to be performed material; and a strict and exact compliance with its requirements is a condition precedent to the vesting of any authority in the officer to sell.

We are of opinion, therefore, that the sale of the land of the appellants was "contrary to law," and that the deed from Edward M. Harris, Sheriff and Collector of Dallas County, to William Overman, set forth and described in the pleadings and exhibits of this case, is void, and should be annulled.

WILLIAM JONES and Schylvester Marsh, Plffs. in Err.,
v.
WILLIAM S. JOHNSTON.

(See S. C. 18 How. 150–158.)

Parol evidence inadmissible to show error in plat referred to in deed—remedy is to reform deed—plat will control although not conformable to statute—land outside of boundaries cannot be acquired as appurtenance—accretions belong to adjoining owner—will not pass as appurtenance, unless included in the boundaries—rule as to accretions.

Where lots are conveyed with express reference to a recorded plat, evidence to control, or in any way affect the plat, is inadmissible in ejectment.

If there was any error or mistake in this reference by way of description of the premises, the remedy was in chancery, to reform the deed.

So long as that remained unreformed, the description of the lot by reference to the plat was conclusive on the parties.

It is not material that the plat recorded did not conform to the requirements of the statute. The title passed by the deed, whether the plat conformed or not.

A grantee can acquire by his deed only the lands described in it by metes and bounds, and cannot acquire lands outside of the description by way of appurtenance.

Land cannot be appurtenant to land.

Land gained from the sea by alluvion or derelection, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining.

Accretions belonging to the adjoining owner, and made at the time of the deed, will not pass by the deed as appurtenant or incidental to the land granted, unless included in the boundaries contained in the deed.

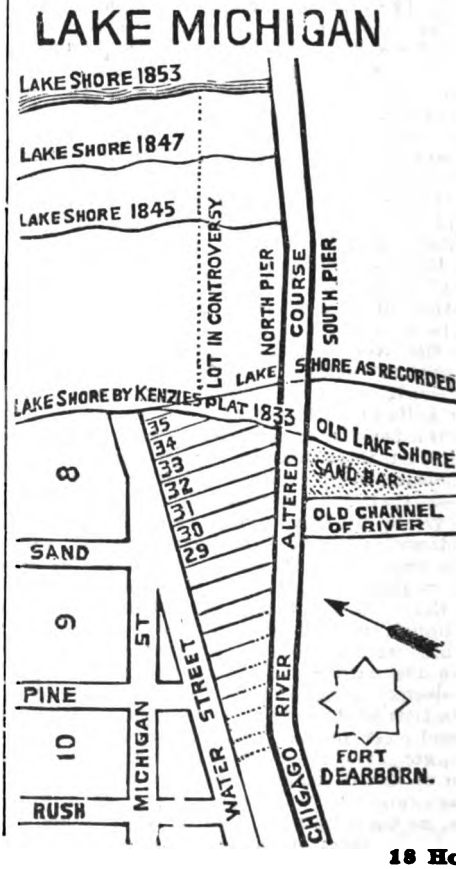
Any past accretions belonged to the then owner, and whoever sets up a title to them must show a deed of the same as in the case of any other description of land.

The true inquiry as to a claim to accretions is, whether the land conveyed had any water front at the time of the deed, not whether it had a water front at the time it had been originally platted.

Rule of division of accretions commented on.

Argued Jan. 3, 1856. Decided Jan. 22, 1856.

THIS was an action of ejectment, brought in the Circuit Court of the United States for the District of Illinois, by the defendant in error (owner of lot 34, shown in the map given below), to recover a certain parcel of land formed by alluvion from Lake Michigan.



NOTE.—Alluvion or accretion and relection, right to and ownership of. By what law title to is determined. Rule of division among riparian owners.—See notes, 12 L. ed. U. S. 829; 23 L. ed. U. S. 59. The law of accretions to shore lands,—see notes, 58 L.R.A. 193; 33 L. ed. U. S. 872.

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The defendants resisted, claiming that lot 34 had in fact no front upon the lake, and that Jones, as owner of lot 35, which, as he alleged, lay between lot 34 and the lake, was entitled to the whole benefit of the alluvion.

Judgment in the court below was for the plaintiff, and the defendants brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Messrs. J. Y. Scammon, Reverdy Johnson and E. B. Washburne, for plaintiffs in error:

It is submitted that the map is a literal compliance with the Act of 1825. By this Act it was enough if the size of the lots could be ascertained "by reference to the plat of the town."

But independent of the statutory regulation, the law is well settled that "where a deed refers to a map or plan, its lines, courses, etc., are to be regarded as expressly mentioned in the deed, whether actually annexed or not."

2 Hilliard on Real Property, 366, sec. 108; Davis v. Rainsford, 17 Mass. 211; Lunt v. Holland, 14 Mass. 149; Doe v. Cullom, 4 Ala. 576; Thomas v. Hatch, 3 Sumn. 180; Thomas v. Patten, 1 Shepley, 329; Blaney v. Rice, 20 Pick. 62; Harris v. Maxwell, 4 Dev. & B. 242; Llewellyn v. Jersey, 11 Mees. & W. 183; Taylor v. Parry, 1 Man. & G. 604; Otis v. Moulton, 2 Appl. 205; Heaton v. Hodges, 2 Shepley, 66; Magoun v. Lapham, 21 Pick. 135; 1 Greenl. 223.

In the construction of a grant the court will take into view the attendant circumstances, the situation of the parties, and of the thing granted.

Hadden v. Shoutz, 15 Ill. 581.

Where a description is given which has not acquired a fixed legal construction, or a boundary is referred to which is variable, parol evidence is admissible to ascertain the meaning and construction of the deed.

Waterman v. Johnson, 13 Pick. 261; see, also, Clough v. Bowman, 15 N. H. 504.

Where a word is used having a fixed meaning, but varying according to the subject contemplated by the parties, parol evidence may be used to show what was contemplated.

Harding v. Suffolk, 1 Rep. In. Ch. 74; Wing v. Burgess, 2 Shepley, 111; Collins v. Lemartin, 2 Bai. 141; Coit v. Starkweather, 8 Coms, 289; Crafts v. Hibbard, 4 Met. 438; Atkinson v. Cummins, 9 How. 479; Barton v. Morris, 15 Ohio, 408.

Here it was proper to show that it was not the lake front, but the pier front, that was intended.

Messrs. S. P. Chase and A. H. Lawrence, for the defendant in error:

Land formed by accretion is to be divided between the owners of the shore according to their respective water fronts, so as to secure to each the benefits which his original water front gave him.

Waterman v. Johnson, 13 Pick. 261; State v. Gilmanton, 9 N. H. 461; Canal Com'rs v. People, 5 Wend. 423; Blundell v. Catterall, 5 B. & Ald. 268.

It is a universal rule, that course and distance are controlled by permanent objects and by fixed monuments.

Preble v. Van Hoozer, 2 Bibb. 118; McIver v. Walker, 9 Cr. 173; 4 Wheat, 444; Newsom v. Pryor, 7 Wheat, 7; Croghan v. Nelson, 3 How. 193; Jackson v. Frost, 5 Cow. 346.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Illinois.

The suit below was an action of ejectment, brought by Johnston, against Jones and Marsh, to recover a tract of alluvial land in the City of Chicago, formed in Lake Michigan, adjoining the north pier of Chicago harbor, and which is claimed as an accretion to water lot No. 34, in Kinzie's addition. The defendant, Jones, is owner of lot No. 35, in said addition, lying east, and adjoining 34, and between that and the lake.

Both parties claim under Robert A. Kinzie, the patentee of the north fractional section 10, in township 39, which was situate in the bend of the Chicago River, at its mouth, and bounded southerly by that river, and easterly by the Michigan Lake. Kinzie, the patentee, in February, 1833, laid out an addition to the Town of Chicago upon this fractional section, and made a plat of the same, which was recorded in the Recorder's office of the county, on the 18th of January, 1834, according to the requirements of the laws of the State of Illinois. On this plat, lot No. 34, is one of a series of water lots bounded on the south side of North *Water street sixty feet, as its north- [*152 erly boundary, and is included within lines dropped from the fixed corners on that street at right angles with the same, and extended until they intersect the lake shore. Lot No. 35 is the next lot east, of the same width, on Water Street, and extended in like manner to the lake, its west line being the east line of 34.

On the 25th of February, 1833, R. A. Kinzie conveyed to John H. Kinzie, several lots in this addition, and among others, lot No. 35. And on the 1st September, 1834, John H, conveyed the same to Jones, the defendant, describing it in the deed as in Kinzie's addition, and as "being water lot No. 35," etc, "agreeably to the town plat, recorded in the office of the Recorder of the said County of Cook, to which reference may be had if necessary."

On the 22d of October, 1835, R. A. Kinzie conveyed to Johnston, the plaintiff, lot No. 34, describing it as lying in Kinzie's addition, and known as water lot No. 34, "as will more fully appear, reference being had to said plat as recorded in the Recorder's office of the Town of Chicago, in the County of Cook," etc.

In the summer of 1833, the general government commenced the construction of the harbor of the City of Chicago, which is formed by an erection of two piers across this fractional section 10, from the curve of the Chicago River, as it takes a direction southerly to the lake, and for a considerable distance into the lake, the effect of which was to turn the river from its sweep southerly across the sand bar to the walls of the lake between the two piers, and thus opening the passage for vessels into the town.

The south pier was built in 1833, and the north in 1834. The harbor thus constructed divided several of the lots in Kinzie's addition that bounded on Water Street, east and west,

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and among others, as is claimed by the defendant, No. 34, leaving a part of it as originally laid out, south of the harbor.

Since the construction of the harbor and extension of the piers into the waters of the lake, the shore above, or north of the piers, has greatly changed, the firm land having increased by the washing up of sand and earth, and the recession of the waters to the extent of some twelve hundred feet in width, and for a considerable distance in length northward along the shore. The present suit is brought to recover a portion of this alluvion or new-formed land, as an increment or accession to lot No. 34. The plaintiff claims that a part of its southern termination on the lake was north of the piers, and contiguous to the new-formed land, and therefore entitled to its share of the increment. The defendant contends that no part of its 153*] boundary was on *the lake north of the harbor, and therefore no part connected with or adjoining this land newly formed. On the contrary, that part of his own lot, No. 35, which lies between 34 and the lake, was bounded on the lake south of the north pier, and hence cut off No. 34 from any portion of the alluvial accession.

The plaintiff insisted, on the trial, that the plat of Kinzie's addition, as recorded in the Recorder's office in January, 1834, was incorrect, and produced what was claimed to be the original, but which was not recorded when the conveyances of the lots in question were executed. According to this original plat, as the side lines were laid down, lot No. 34 appeared to be partially bounded on the lake north of the harbor. In this respect, it differed from the plat recorded; as, according to the side lines as there extended, its entire boundary on the lake was south of the harbor.

In laying out the addition by the surveyor in 1833, the only lines of the lots run out or measured on the ground were those butting on Water Street, the north lines of the lots. The side lines depend upon their protraction on the plat of the addition; and which, as we have already said, were formed by dropping them at right angles from the corners on Water Street and extending them till they intersected the lake. And even the lake shore, as laid down on the plat—as appears from the testimony of the surveyor—was ascertained without survey or measurement, and with little more accuracy than could be obtained from the eye.

The case was a good deal embarrassed on the trial, arising out of the evidence in respect to this original plat, and some consideration and effect were given to it by the court in submitting it to the jury. We think the court erred in admitting it as evidence to control, or in any way to affect, the recorded plat. Both lots in controversy were conveyed with express reference to that, and without such reference there is not a sufficient description given in the deeds of the boundaries to admit of a location of either.

If there was in fact any error or mistake in this reference, by way of description of the premises conveyed, the remedy was in chancery to reform the deed. So long as that remained unreformed, the description of the lot by the reference to the recorded plat was conclusive upon the parties.

The acts of the State of Illinois regulating the laying out of town lots, and the recording of the plats of the same, were supposed by the court below to have a bearing upon the questions involved, and influenced the instructions given and refused to the jury. It seemed to be admitted that the plat recorded did not conform in all respects to the requirements of the statutes.

*But it is not pretended that the [*154 omission in any way operated to invalidate the deeds, or affect prejudicially the rights of the parties under them. Both parties stand upon the same footing in this respect, as each claims under the same survey of the town, and by reference to the same plat. We do not perceive that these acts of the State have any material bearing upon the case, and should not have been allowed to influence the trial. If the description in the deeds was sufficiently certain, by a reference to the plat on record, to identify and locate the lots, the title passed to the grantees, whether the plat conformed to the Acts of the Legislature or not. This is all that was material so far as the plat is concerned.

The court, in instructing the jury, observed that the controversy turned upon the length of the line dividing lot 34 from 35, before the north pier was constructed—that whether in point of fact it touched the shore of the lake before it reached the pier or the place where the pier was; in other words, whether there was any water line of lot 34 north of the north pier, and if so, what was the extent of the water line.

Again; the court charged, after adverting to the recorded plat, and to the question whether or not it was made in conformity to the Statutes of Illinois, that, if the jury should find the plat was not so made and recorded, then they should determine, under all the evidence in the case, whether or not, prior to the construction of the north pier, the dividing line between lots 34 and 35 touched the water at a point north of where the north pier was subsequently placed; if it did, then the court was of opinion that the owner of 34 had a right to follow the water as the accretions were formed on his water line.

In these instructions we think the court erred.

As we have seen, this lot No. 34 was conveyed to the plaintiff the 22d October, 1835, and described as included within side lines dropped at right angles from the northwest and northeast corners on Water Street, which were sixty feet apart, and fixed, and extended in right lines till they intersected the shore of the lake below. The boundaries, therefore, including and locating the lot were specific and complete. The north boundary was marked on the south side of Water Street; the side lines extended according to the plat at right angles from Water Street to the lake; the lake was the southern boundary which closed the lines of the lot.

Now, in order to determine what land was conveyed to the plaintiff by his deed of 22d October, 1835, all that was necessary was to locate the lot upon the ground, in conformity to the description at that date. The calls in the deed having reference to the plat, furnished the necessary data for the location. There *was the fixed line north on the ground. [*155

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the lake a natural object south, and the lot inclosed between two lines extending at right angles from the corners on Water Street to the lake.

If the call for the southern boundary, instead of being a lake, which is a shifting line, had been a permanent object, such as a street or wall, there could not be two opinions as to the location. And yet the water line, though it may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as the former. I speak not now of sudden and considerable changes, which are governed by different principles.

The court below, as appears from the instructions referred to, assumed the lot No. 34 should be located on the ground as of the time of the survey and plat of February, 1833, some two years and nine months previous to the conveyance to the plaintiff, and not at the date of that conveyance; and if at that time the dividing line between 34 and 35 would strike the lake north of where the north pier of the harbor was subsequently built, so as to give a lake boundary at that time above the pier, the plaintiff would be enabled to take under his deed not only lot 34, as laid down on the plat, but all subsequent accretions by alluvion or dereliction, whatever might be the extent of the new-formed land. By the like assumption and process of reasoning, if the present plaintiff should convey the lot with the same specific boundaries, the north line sixty feet on Water Street, and side lines extending at right angles to the lake, the deed would carry with it the whole of the new-made land outside the lines of the deed which is now in dispute—it being a tract from one hundred and thirty, to two hundred and twenty-two feet one way, and some twelve hundred the other.

Now, one answer to this assumption is, that a grantee can acquire by his deed only the lands described in it by metes and bounds, and with sufficient certainty to enable a person of reasonable skill to locate it, and cannot acquire lands outside of the description by way of appurtenance or accession.

Lord Coke says: "A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." Coke Litt. 121, B.

And this court, in Harris v. Elliot, 10 Pet. 54, after approving of the maxim of Coke, observed, that, according to this rule, land cannot be appurtenant to land. In the case of Jackson v. Hathaway, 15 Johns. 454, the court say, a mere easement may, without express words, pass as an incident to the principal object of the grant; but it would be absurd to allow the fee of one piece of land not mentioned in the deed to pass as appurtenant to another distinct parcel which is expressly granted by precise and definite boundaries.

See, also, 7 Mass. 6.

156*] *Land gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining. 2 Bl. Com. 261, 262. If, therefore, the rule be as supposed by the court below, that the boundaries of lot 34 must be taken as it would have been located at the time of the plat, and the southern limit to stop at the water line as it then existed, and the subsequent gain by alluvion or dereliction to pass as appurtenant to the land conveyed, the grantee would find it difficult upon this construction to reach the lake at all. Certainly he could not, if the water line as it then existed is to be deemed the southern limit as described in the deed, provided alluvial accretions had taken place between the survey and plat and the date of the deed. The land thus formed belonged to the adjoining owner for the time being, and we have seen that the deed would not pass it as appurtenant or incidental to the land granted.

But the true answer to the position assumed, and which governed the trial below, is, that the water boundary on the lake is to be deemed the true southern boundary of the lot at the date of the conveyance, as much so as North Water Street was its northern boundary. And the plaintiff is carried by his deed to it, not because of the alluvial deposit, if any, between the water line at the time of the survey and plat and the line at the date of the deed, having passed as appurtenant to the lot, but because one of the calls given in the deed requires that the side lines should be thus extended. Any alluvial accretions since the deed belong to the plaintiff as owner of the adjoining land. Any past accretions belonged to the then owner, and whoever sets up a title to them must show a deed of the same as in the case of any other description of land.

The case of Robert M. Lamb v. Thomas C. Rickets, 10 Ohio, 311, exemplifies the principle for which we are contending. The defendant had agreed to convey a piece of land called the Hamlin lot, containing forty-two acres more or less, and also two other small lots of ten acres, with a proviso if the Hamlin lot and the two others contained more than fifty-two acres the excess was reserved. The defendant conveyed the Hamlin lot and refused to convey the other two. A bill was filed to compel a conveyance. The Hamlin lot was bounded by one of its lines on the bank of the Tuscarawas River, and had been originally conveyed to the defendant, and by him to the plaintiff, as containing forty-two acres, more or less.

The defense set up to the bill was, that before the defendant conveyed the lot to the plaintiff large accessions had been made from the river to the lot, and that these alluvial formations made up the quantity of fifty-two acres.

*The plaintiff claimed that the quan- [*157 tity should be determined according to the old boundary of the lot upon the bank of the river, which would be but some forty-two acres. But the court held that the question was not as the bank of the river was twenty-five or thirty years ago, but as it was when the Hamlin tract was conveyed to the plaintiff, and estimated the quantity of land conveyed accordingly.

The case of Giraud's Lessee v. Hughes et al. 1 G. & J. 249, asserts a similar principle. There Gist's inspection, a grant as early as 1732, was bounded by one of its lines in the waters of the Patapsco River, afterwards a basin of Baltimore; the lines, however, were given in the grant by courses and distances, and did not call for the river. Hughes held under this grant by deed in 1782.

Before 1812, the waters of the Patapsco had

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gradually receded, and formed a body of firm land, which had been surveyed and patented by the State to the plaintiff. The question was, whether or not Hughes was entitled to this alluvial deposit as the adjoining owner to the river. It was not doubted by the counsel or court but that, if the grant of Gist's inspection had been bounded on the river, this boundary of the tract would have included the land made by the recession of the water; and the court even held, that as the original location of the tract extended into the river, it entitled those holding under it to the land, on the ground that the principle governing these alluvial accretions gave them to the adjoining owner. In other words, the description in the original grant gave, in legal effect, to the grantee a water boundary; and if so, the boundary included the accretions.

The jury, therefore, in this case, should have been directed to inquire whether or not, at the time of the deed to the plaintiff, lot No. 34 had a water line upon the lake north of the north pier of the Chicago harbor; in other words, whether the line between that lot and No. 35 struck the shore of the lake before it reached this pier. If it did, then the question would properly arise in respect to its right to a share of the alluvial accretions formed since that period. If it did not, then no question of the kind could arise in the case.

We think the court also erred in the rule laid down to govern the jury in the division of the new-made land. That was, the jury should ascertain the extent of the water line of 34 between the piers and the point where the line dividing 34 and 35 touched the water. They should also ascertain the extent of the water line of the fraction of land south of North Water Street and east of 35, and also of 35 to the point dividing 34 and 35; they would then have the plaintiffs' and the defendant's 158*] *front on the lake. They must then ascertain the front on the lake shore, as it at present exists, and divide that into as many equal parts as there are feet on the old shore from North Water Street to the piers, and give to each of the parties as many of these parts as he had feet on the old shore, and then draw a straight line from the point of division on the old lake shore to the point thus determined as the point of division on the present one.

We do not perceive why North Water Street should have been adopted as the northern limit upon the old shore, as the basis in making the division, as it appears from the evidence and maps that the alluvial accretions extended much farther north. The northern limit on the old shore should have been carried as far as the new-made land extended, as each riparian proprietor was entitled to his proper share, and it was essential that the entire line be regarded, in order that each might obtain his proportional part. Neither do we perceive any reason for excluding the pier shore of the lake—that is, the shore along the line of the piers—from measurement, in ascertaining the extent of the newly-made shore. If we disregard the artificial construction, which occasioned the accretions, the lake there is as much new shore as any other portion of it, and should have been taken into the estimate.

As no question was made below whether or not the alluvial accretions in question were formed under such circumstances as gave to adjoining owners a title to them, we do not intend to express any opinion upon that question.

The judgment of the court below is reversed, with directions that a venire de novo issue.

JACOB KISSELL, Plaintiff in Error,

v.

THE BOARD OF THE PRESIDENT AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS.

(See S. C. 18 How. 19-28.)

School lands—title of the City of St. Louis in, superior to that of prior pre-emption claim—title complete upon survey—the survey cannot be revised by courts.

When Louisiana was acquired, the lands included in the out boundary survey, comprising St. Louis, its fields and commons, were held by imperfect rights, the legal title to which became vested in the United States.

Congress could prescribe the terms on which those who sought titles therein must obtain them.

The U. S. Goverment reserved to itself the power to designate, by its survey, the school lands within such out boundary survey.

Upon the survey being completed by the Surveyor-General, designating the school lands, they became vested in the authorities of Missouri.

Until such survey was completed, the towns had an imperfect title, under the Acts of Congress, to such school lands. Their claims depended, for their specific identity, on surveys to be executed by the government.

Until a designation, accompanied by a survey or description, was made by the Surveyor-General, the title attached to no land, nor had a court of justice jurisdiction to ascertain its boundaries.

The certificate of the Surveyor-General, which was accepted by the grantees, is record evidence of title, by the recitals in which, the government and the Board of School Directors are mutually bound and concluded.

Courts of justice have no power to revise the acts of the Surveyor-General, as respects the school lands, and cannot inquire whether the lands set apart were or were not lots, of the description referred to in the statutes.

The title of the Board of Public Schools, under the certificate of the Surveyor-General, setting apart the land in dispute to the plaintiffs below, is superior to the defendant's title under a prior entry made with the Register and Receiver, under the pre-emption laws.

Such land, by the Acts of 1812 and 1831, was appropriated for the purposes of education, and its title vested in the city, and was not the subjects of sale.

Argued Dec. 17, 18, 19 and 20, 1855. Decided Jan. 23, 1856.

THIS was an action of ejectment brought in the St. Louis Circuit Court, by the defendants in error, to recover a certain lot in the City of St. Louis. The judgment of the said court in favor of the plaintiffs was affirmed by the Supreme Court of Missouri, and the case is now here on a writ of error to that court.

A further statement of the case appears in the opinion of the court.

Messrs. **A. H. Lawrence, R. Johnson** and **Thomas C. Johnson**, for plaintiff in error:

It is claimed on behalf of the plaintiff in error:

1st. That by the terms of the Act of June 13, 1812, lots reserved for school purposes

NOTE.—Missouri private land claims. See note to Les Bois v. Bramell, 11 L. ed. U. S. 1051.

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were such only as had a previous existence under the Spanish government.

Hammond v. The Schools, 8 Mo. 83; Eberle v. Schools, 11 Mo. 262; Wear v. Bryant, 5 Mo. 164; Trotter v. Schools, 9 Mo. 86; Strother v. Lucas, 12 Pet. 410.

This court will adopt the construction of the Supreme Court of Missouri on questions arising on the Act of 1812.

Gamache v. Piquignot, 16 How. 468; Guitard v. Stoddard, 16 How. 509.

2d. That it was to the limits of Spanish, and not to the limits of the American town, that reference is made in the proviso to the second section, limiting the lots reserved for the support of schools to one twentieth of the land within such town or village.

3. That by the term "out boundary," used in the first section, reference is not made to a continuous out boundary or "ring survey," but to the out boundary respectively of the town, common fields and commons, separately.

From the evidence, the piece of ground in question was not a town or village lot under the Spanish government. It lies entirely outside of the town. The designation and setting apart of it to the schools, was illegal, and conferred no title on them, and they have no right to recover in this action.

Messrs. **Geyer** and **Holmes**, for defendants in error:

The Act of Congress of June 13, 1812, and the Acts supplementary thereto, of May 26, 1824, and June 27, 1831, together with the certificate of the Surveyor-General of the survey, that the designation and setting apart of the land in controversy for the support of schools constitute a complete legal title equivalent to a patent, conclusive upon the United States, to which the mere entry of the same land with the register and receiver must yield.

The presumption is in favor of the validity of every patent issued by competent authority. It is the completion of the title, and establishes the performance of every prerequisite. No inquiry into the regularity of the preliminary proceedings which ought to precede it, is made at law, where no facts beyond the patent are examinable. Its validity can only be impeached for causes anterior to its issue, in a court of equity.

Green v. Liter, 8 Cr. 230; Polk's Lessee v. Wendell, 9 Cr. 87; 5 Wheat. 303; Stringer v. Lessees of Young, 3 Pet. 320; Boardman v. Lessees of Reed, 6 Pet. 328; Bagnell v. Broderick, 13 Pet. 450; Wilcox v. McConnell's Lessee, 13 Pet. 511; Bouldin v. Massie's Heirs, 7 Wheat. 151; Patterson v. Winn, 11 Wheat. 380; Landes v. Brant, 10 How. 348; Foley v. Harrison, 15 How. 450; West v. Cochran, 17 How. 403.

A grant may be made by law as well as by a patent pursuant to law, and a confirmation by a law is as fully, to all intents and purposes, a grant, as if a grant in terms.

Strother v. Lucas, 12 Pet. 454; Grignon's Lessees v. Astor, 2 How. 319.

The first section of the Act of June 13, 1812, operated as a present grant of the premises in question, and the legal title became complete and paramount to a subsequent grant or confirmation.

See Chouteau v. Eckhart, 2 How. 345; Les Bois v. Bramell, 4 How. 449; Guitard v. Stoddard, 16 How. 499.

The case of Lessieur v. Price, 12 How. 59, 76, establishes the proposition, that a present grant of land by Act of Congress without a designation of law, becomes complete, and vests title to a particular tract of land, after selected in pursuance of any law of the United States, and such title is equivalent to a patent. On principle, the effect must be the same, whether the authority to make the designation is given by the Act making the grant, as in Rutherford v. Green's Heirs, 2 Wheat. 196, and Lessieur v. Price, or by a subsequent Act, as in the cases of private lots and commons confirmed by the Act of 1812.

Janis v. Gurno, 4 Mo. 458; Gurno v. Janis, 6 Mo. 330; Soulard v. Allen, 18 Mo. 590; Les Bois v. Bramell, 4 How. 449; or was conferred by a law previously enacted and continuing in force, as in case of school lots as well as private lots and commons, by the Act of 1824.

2. The survey of the out boundaries of the town of St. Louis given in evidence, having been made and certified by the Surveyor-General in pursuance of authority vested in him by law, neither its accuracy nor validity was open to question in the case at bar.

Under the Act of 1812, no vacant land within the district to be surveyed was open to settlers, nor to pre-emption or entry, as unappropriated land under the general laws.

Wilcox v. McConnell's Lessees, 13 Pet. 511; Reynolds v. McArthur, 2 Pet. 429.

3. The certificate of the Surveyor-General of the survey designating and setting apart the land in question, is conclusive evidence that it is within the out boundaries; that it was at the time of the designation a vacant lot reserved by the Act of 1812; that it would not be selected for military purposes by the President, and that, with the lands before assigned, it does not exceed the maximum limit, unless it appeared that the United States had no title, or the Surveyor General no authority to make the survey and designation.

4. The "plat and description of the survey of the out boundaries of the Town (now City) of St. Louis," made and certified by the Surveyor-General, if not absolutely conclusive, is at least prima facie evidence that it is in conformity with the requirements of the Act of 1812, and for the purpose of this case, that is all sufficient.

5. If the survey and designation of the lot in question to the use of schools shall be held to be subject to review in a collateral action at law, still it requires the production of no evidence in aid of it. It stands for proof until it is rebutted, and in this case there is no testimony produced by the defendants below, competent to repel or impair its force.

That it is a lot of the description reserved by the Act of 1812, and granted by that of 1831, is established (prima facie at least) by the certificate of survey and designation. And there being no proof that it was not such a lot, the title of the defendants in error is clear.

Mr. Justice **Catron** delivered the opinion of the court:

In this case the school commissioners were

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plaintiffs in their corporate capacity, and in order to eject the defendant below, were bound to produce a legal title to the land claimed. Their title depends on three Acts of Congress, 22*] passed in 1812, 1824, *and 1831. The Act of 1812 confirmed, to private owners at St. Louis and other villages in Missouri, town lots, out lots and common field lots, in, adjoining and belonging to the towns, and it also confirmed to the towns their commons.

This Act made it the duty of the principal surveyor to survey, or cause to be surveyed and marked (where the same had not already been done according to law), the out boundary lines of the said several towns and villages, so as to include the out lots, common field lots and commons thereto respectively belonging.

The second section provides, "that all town or village lots, out lots or common field lots included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be, and the same are thereby reserved for the support of public schools in the respective towns and villages: Provided, the whole quantity of land contained in the lots reserved for the support of schools shall not exceed one twentieth of the whole lands included in the general survey of any town or village."

The 1st section of the Act of the 26th of May, 1824, requires the owners of lots which are confirmed by the Act of the 13th June, 1812, within eighteen months after the passage of the Act, "to designate their said lots by proving, before the Recorder of Land Titles, the fact of inhabitation, cultivation or possession of the said lots, and the boundaries and extent of each claim, so as to enable the Surveyor-General to distinguish the private from the vacant lots appertaining to said towns and villages."

The second section of this Act makes it the duty of the Surveyor-General, immediately after the expiration of the time allowed for private owners to prove the inhabitation, cultivation and possession of their lots, "to proceed, under the instruction of the Commissioner of the General Land Office, to survey, designate, and set apart to the said towns and villages, respectively, so many of the said vacant town or village lots, out lots and common field lots, for the support of schools in said towns and villages, respectively, as the President shall not, before that time, have reserved for military purposes, and not exceeding one-twentieth part of the whole lands included in the general survey of such town or village, according to the provision of the second section of the Act of 13th June, 1812; and also to survey and designate, as soon after the passage of this Act as may be, the commons belonging to the said towns and villages, according to their respective claims and confirmations under said Act of Congress, where the same has not already been done."

23*] *By the third section of the Act, the Recorder of land titles is required to issue a certificate of confirmation for each (private) claim confirmed, "and as soon as the said term (eighteen months) shall have expired, furnish the Surveyor-General with the list of lots proved to have been inhabited, cultivated or possessed, to serve as his guide in distinguishing them from the vacant lots to be set apart as above described (for the use of schools), and shall transmit a copy of such list to the Commissioner of the General Land Office."

On the 27th January, 1831, an Act of Congress was passed, for the purpose of transferring the title of the United States (if any) remaining in the property belonging to the several towns and villages embraced by the Act of the 13th June, 1812.

The first section relinquishes to the inhabitants of the several towns and villages all the right, title and interest of the United States in and to the town and village lots, out lots and common field lots confirmed to them by the first section of the Act of the 13th June, 1812. The second section relinquishes all right, title and interest of the United States in and to the town and village lots, out lots and common field lots reserved for the support of schools, by the Act of 1812, in the respective towns and villages, and provides that "the same shall be sold or disposed of, or regulated, for the said purpose, in such manner as may be directed by the Legislature of the State of Missouri."

The defendants in error were incorporated by a public Act of the Legislature of Missouri, approved the 13th February, 1833, entitled "An Act to establish a corporation in the City of St. Louis, for the purpose of public education." By the ninth section of this Act, the title, possession, charge and control of all lands and lots in or near St. Louis, granted to the inhabitants for school purposes by any Act of Congress, is vested in the Board of School Commissioners, with power to dispose of and apply the same to the purpose of education.

At the trial, the (then) plaintiff gave in evidence the following documents among others:

1. A plat called and known as map X, being certified by the Surveyor General to be "a plat and description of the survey of the out boundary lines of the Town (now City) of St. Louis, in the Territory (now State) of Missouri, as it stood incorporated on the 13th June, 1812, including the out lots, common field lots and commons thereto belonging, made in pursuance of the 1st section of the Act of Congress approved the 13th of June, 1812, entitled 'An Act making further provision for settling the claims to land in the Territory of Missouri,' which was approved and certified by the Surveyor-General, December 8, 1840."

*2. A certificate of the Surveyor-General, in pursuance of instructions of the Commissioner of the General Land Office, as follows: [*24

"Assignment and Survey No. 367."

"Office of the Surveyor of Public Lands in the States of Illinois and Missouri, St. Louis, 15th June, 1843."

"Under the instructions of the Commissioner of the General Land Office, the piece of land, the survey of which is herein platted and described, has been legally surveyed, and under the instructions aforesaid, it is hereby designated and set apart to the Town (now City) of St. Louis, for the support of schools therein, in conformity with the second section of the Act of Congress approved the 26th of May, 1824, entitled 'An Act supplementary to an

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Act passed on the 13th day of June, 1812, entitled 'An Act making further provisions for settling the claims to land in the Territory of Missouri;' the said piece of land hereby designated and set apart as aforesaid, is situated within the bounds of the survey directed to be made by the first section of the Act of the 13th of June, 1812, aforesaid, so as to include the town lots, common field lots and commons of the Town of St. Louis; and is also within the limits of the said Town of St. Louis, as it stood incorporated on the 13th day of June, 1812; and does not, together with all other land designated and set apart to the Town of St. Louis for the support of schools, under the aforesaid second section of the Act of Congress of the 26th of May, 1824, amount to one twentieth of the whole lands included in the general survey directed to be made of said Town of St. Louis, by the aforesaid first section of the Act of Congress of the 13th day of June, 1812; the said piece of land was not, so far as the records of the office show, rightfully owned or claimed by any private individual on the said 13th day of June, 1812; nor was it held as common belonging to the said town of St. Louis; neither has it been reserved by the President of the United States for military purposes."

Similar certificates are found in the record for other parcels of lands assigned to the use of schools, but not involved in controversy.

When Louisiana was acquired, the lands included in the out boundary survey, comprising St. Louis, its fields and commons, were held by imperfect rights, the legal title being vested in the United States, as they had previously been in the government of Spain. As this government could not be sued in its own courts, nor coerced to perfect equitable claims and 25*] rights, claimants *had to rely on its justice; and as Congress had the full and sole power by the Constitution to dispose of the public lands, and to make needful rules and regulations for that purpose, it followed that those who sought titles must obtain them on the terms that Congress might prescribe; and more especially were the donations made by the Act of 1812, to promote education, regulated by this rule.

By the Act of 1812, the towns acquired the promise of, and an imperfect title to, certain vacant lands that might be found to exist within an out boundary survey, but the government reserved to itself the power to make this survey, and the Board of School Directors was therefore compelled to remain passive until it was completed, and the private claims within it ascertained, and until the United States designated the school lands comprehended within it.

This survey was completed in 1840 by the Surveyor-General, and in 1843 he fulfilled the duty of designating the school lands, whereby they became vested in the authorities of Missouri. These proceedings exhausted the powers of the Surveyor-General under the Acts we have quoted; and whatever controversies may now arise, in reference to these lands, must be subject to judicial cognizance.

Our opinion is, that the school lands were in the condition of Spanish claims after confirmation by the United States, without having established and conclusive boundaries made by public authority, and which claims depended for their specific identity on surveys to be executed by the government. The case of West v. Cochran, 17 How. 413, lays down the dividing line between the executive and judicial powers in such cases, to wit: That until a designation, accompanied by a survey or description, was made by the Surveyor-General, the title attached to no land, nor had a court of justice jurisdiction to ascertain its boundaries.

We are furthermore of opinion that the certificate of the Surveyor-General, above set forth, and which was accepted by the grantees, is record evidence of title, by the recitals in which the government and the Board of School Directors are mutually bound and concluded. And this instrument, declaring that the land prescribed was reserved for the support of schools, and the courts of justice having no power to revise the acts of the Surveyor-General under these statutes, as respects the school lands, it is not open to them to inquire whether the lands set apart were or were not lots of the description referred to in the statutes. The parties interested have agreed that this land was a school lot, and here the matter must rest, unless some third person can show a better title. And the plaintiff in error insists *that he [*26 has shown a better one by the production of Duncan's entry covering the land. It was allowed by the Register and Receiver at St. Louis, May 2, 1836, for the fractional section No. 26, by virtue of a pre-emption claim set up by Duncan.

Of this land, the designated school lot claimed by the plaintiff below includes $5\frac{66}{100}$ acres.

The entry was contested, and was brought to the consideration of the Commissioner of the General Land Office, and upon August 1, 1845, he instructed the Register and Receiver that only $8\frac{20}{100}$ acres was vacant at that spot; the residue of the $35\frac{49}{100}$ acres surveyed as fractional section 26, had been located on private claims; nor was there evidence that any part of the $8\frac{66}{100}$ acres had been inhabited as required by the pre-emption laws. This inquiry, he remarks was, however, unnecessary, because the $8\frac{66}{100}$ acres had been reserved for the support of schools in the town of St. Louis by the Act of 1812, and a selection of said land, for that purpose, having been made under the Act, "it cannot, therefore, be subject to the operation of the subsequent pre-emption laws of 1814 and 1816."

He further declared: "In addition to the above objection, the said land is within the corporate limits of the City of St. Louis, as established in 1809, and if not so reserved, would not have been subject to pre-emption subsequent to that time—the principle having been early settled in a pre-emption case for land within the limits of the Town of Mobile, that the right of pre-emption, designated for the benefit of agriculturists, could not be regarded as applicable to residents within the bounds of an incorporated city or town." For the foregoing reasons, the entry of fractional section 26, for $35\frac{49}{100}$ acres, was canceled, and the Register and Receiver were ordered to refund the purchase money.

On these facts, the Circuit Court gave to the jury the following charge:

"The court is asked to instruct you, that the

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claims of the respective parties to the land in controversy must depend mainly upon the question whether the land was reserved for the use of schools by the Act of the 13th of June, 1812. In this view the court concurs; but without advising you more at large upon that subject, as requested, gives the case the direction indicated by two of the propositions submitted, one on either side, designed to effect a comparison between the titles of the parties. These are as follows:

On the part of the defendant, 'that the pre-emption of Robert Duncan conferred a valid claim under the pre-emption laws, and that he, having settled upon the land before any survey thereof was actually made, is entitled to hold 27*] it, and that the persons *deriving title from said Duncan have a title superior to the plaintiffs.'

On the other hand, it is insisted 'that the title of the plaintiffs, under the act of the Surveyor-General, designating and setting apart the ground in controversy to the plaintiffs, is superior to the title of the defendant, under an entry with the Register and Receiver of the Land Office;' and of this opinion is the court. The jury is therefore instructed, that upon the titles exhibited in testimony by the parties, the plaintiff is entitled to recover.

The court adds that the defendant has the right to impeach the title of the plaintiff, the same and to the same extent as if the entry of Duncan, under which he claims, had not been vacated by the Commissioner of the General Land Office. And the court further instructs the jury, that no evidence has been adduced on the part of the defendant competent to invalidate or overthrow the plaintiff's title, and therefore the jury should find for the plaintiff."

The conflicting titles both depend on Acts of Congress, and are submitted to this court on the whole record; and which we are called on to compare as was done in the cases of Matthews v. Zane, 4 Cranch, 382; Ross v. Barland, 1 Pet. 664, and Wilcox v. Jackson, 13 Pet. 509. This follows from the instruction given, which maintains that the title of the Board of Public Schools, under the certificate of the Surveyor-General, setting apart the land in dispute to the plaintiffs below, was superior to the defendants' title under Ducan's entry with the Register and Receiver; and that, therefore, the jury was directed to find for the plaintiff. This general instruction raises the question, whether the land was subject to sale, to one claiming a preference of entry under the pre-emption laws.

To which it may be answered, that when the Act of 1812 dedicated certain lands for the purposes of education to the use of the Village of St. Louis, and the Act of 1831 vested the title to these lands in the City, such lands were appropriated, and not subject to sale; they were beyond the reach of the officers of the government, nor could their action lawfully extend to them, with the exception that they could be ascertained and designated within the power reserved. Nor could Duncan be heard to say that he did not know that this parcel of land was reserved. The same excuse might be made, and with a much greater claim to justice and propriety, by one who obtained an entry on land reserved from sale for military purposes, or for some other public use, by the President; the fact of which reservation was hardly known beyond the general and local land offices; yet such entries have been constantly set aside as absolutely void, or as *voidable, by the Department of Public [*28 Lands. The case of Wilcox v. Jackson, 13 Pet. 509, was an instance of the first kind, where the entry was pronounced as absolutely void, it being in the notorious limits of a reservation for military purposes; and so here the entry of Duncan was within the notorious limits of the City of St. Louis, according to the record of incorporation made by the Court of Common Pleas for St. Louis County, in 1809, and which city limits are recognized by the Department of Public Lands and by the out boundary survey, as the existing limits when the Act of 1812 was passed.

This appears from the documents offered in evidence, on which the instruction to the jury was founded. We therefore concur with the views expressed by the state courts and those of the Commissioner of the General Land Office, that Duncan's entry was invalid.

As this concurrence with the state courts is conclusive of the controversy, we do not deem it necessary to examine further into the titles and instructions given to the jury.

It is proper to remark that we are here dealing with the survey (marked X), and ascertaining its effect as regards the lands granted and allotted for school purposes, and are not to be understood as having expressed any opinion on that effect of this out boundary survey on titles situated beyond it, and claimed to have been confirmed by the Act of 1812, on which were subject to be identified by the Recorder of Land Titles, under the Act of 1824.

For the reasons above stated, it is ordered that the judgment of the Supreme Court of Missouri be affirmed.

Aff'g 16 Mo. 553.

EDWIN C. LITTLE and Oliver Scoville, App'ts,
v.
LEVI W. HALL, Anthony Gould, David Banks, William Gould, and David Banks, Jr.

(See S. C. 18 How. 165–172.)

Copyright—contract with reporter—not good beyond his term of office.

Comstock was appointed reporter of Court of Appeals in 1847, and in April, 1850, plaintiffs made contract with him, and the Comptroller and Secretary of State, that plaintiffs should have the publication for five years of the decisions of that court, and the exclusive benefit of the copyright, and that instrument was declared to be an assignment of the copyright.

Comstock's term of office expired Dec. 27, 1850, and his successor, Selden, was immediately appointed to succeed him, who consented that Comstock should publish another volume from opinions he had and from those delivered during the first term of Selden's office.

Comstock sold the copyright to defendants, who published it. On bill filed by plaintiffs, to enjoin defendants from selling their edition; held that under the changed relation of the parties, the plaintiffs were not the legal owners of the manuscript within the copyright law.

NOTE.—Conditions and extent of copyright—see note, 36 L. ed. U. S. 514.

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Whatever obligation under the contract exists against Comstock, it is for failure to furnish the manuscript to the plaintiffs, and of such a case this court has no jurisdiction.

Argued Jan. 8 and 9, 1856. Decided Jan. 24, 1856.

THE bill in this case was filed in the Circuit Court of the United States for the Northern District of the State of New York, by appellants, to enjoin the defendants from publishing and selling the fourth volume of Comstock's reports.

The Circuit Court having dismissed the bill with costs, the plaintiffs took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. William H. Seward and R. H. Gillett, for appellants:

1. Comstock, by accepting the office of State Reporter and acting under it, and by uniting with the Secretary of State and Comptroller in the contract with the appellants, of April 20, 1850, must be deemed to have accepted the terms and conditions of the Act of April 11, 1848, and of April 9, 1850. Those statutes operated, by reason of such acquiescence on his part, to vest in the State of New York all the interest and right which he might have as author in any reports of decisions of the Court of Appeals which should be prepared by him as reporter; and the State became the absolute owner thereof.

Comstock, as such author, could transfer whatever right or interest he had to the State or to any other person. Whatever an author can rightfully own under the copyright laws, he can lawfully assign either before or after the works are written or produced, and the State could take from Comstock such an assignment.

The matter prepared by the reporter, by operation of his acceptance of the office of reporter under the Statute, became the property of the State. The contract is explicit on this point.

2. By the contract made by the State Reporter, the Secretary of State and the Comptroller, on behalf of the State, with the appellants, the interest of the State in all matter constituting the reports to be made by Comstock as reporter, was equitably and legally vested in the appellants, for the purpose of being published exclusively by them during the term specified in the contract.

The contract does not purport to give an exclusive right to the appellants to publish the decisions and opinions of the judges of the Court of Appeals. But it expressly vests in them the exclusive benefit of the copyright to be taken out in behalf of the State of the notes, references and other matter furnished by the reporter, connected with the decisions. And the appellants, by the operation of the contract and the laws of the State under which it was made, became the legal assignees and proprietors of the manuscript matter prepared by Comstock as State Reporter, under the 9th section of the Law of Congress of 1831, which right was exclusive of all others during the continuance of the contract.

3. Volume IV. of Comstock's reports was covered by the contract and was subject to the exclusive right of the appellants to the manuscript matter prepared by the reporter.

Here the controversy between the parties opens.

While the appellants insist that the matter in this volume, which is the subject of the copyright, was prepared officially by Comstock as reporter, the respondents insist that he prepared it as a private person, and that it belonged to him in his individual right as an author.

Comstock received the materials for the preparation of the volume in question from the State by virtue of his office as State Reporter, while in that office and subject to the operation of the contract.

What he thus received, as agent and bailee of the appellants, he had no right to apply to any other use than that of his principals.

The expiration of Comstock's term of office did not alter his liability in this respect. True, he could not be required to prepare the decisions for publication; but if he did not do this, he must hold the materials subject to the order of his successor: or if he did use them, then the materials and additional matter being incorporated together, and so prepared according to the contract, must pass the appellants.

Had Comstock died during his term of office, the trust and bailment would have remained attached to the materials in the hands of his executors. A trust would have resulted to the State and a right of action legal, or equitable, to the appellants.

2. Fonb. 118.

As Comstock had received an equivalent in advance for the labor to be performed for the appellants under the contract, either the labor must be done for their benefit or not at all.

In point of fact, he received these specified materials as a trustee and bailee, and he must be held to the obligations they created.

Hill on Trustees, 172-282, 509; 2 Ves. 498; Taylor v. Plummer, 3 Maule & S. 562, 567, 574; Adair v. Shaw, 1 Sch. & Lef. 262; Story Eq. Jur. sec. 533, etc. 1257, 1258, 1261; Kane v. Bloodgood, 7 Johns. Ch. 110.

Here it is held that every deposit is a trust and the party receiving it a trustee. So the principle adopted in the case of a tenant, that he cannot deny the title of his landlord so long as he retains possession, is founded on the personal contract of tenancy itself.

Phelan v. Kelly, 25 Wend. 392; Massey v. Davies, 2 Ves. Jr. 318, 320; East India Co. v. Hinchman, 1 Ves. Jr. 289.

The expiration of Comstock's term of office as reporter without having executed his trust, does not change the rights of the State or of the appellants. When his office expired, they had no right to require him to execute it; but they had a right to require his successor to do so; and for that purpose to require Comstock to surrender the materials to his successor.

The appellants were entitled by their contract to print all the official reports of the State Reporter during the specified term. It was a part of the contract that the reports should be furnished them for that purpose; and it was immaterial to them whether they were furnished by Mr. Comstock or Mr. Selden.

The work done by Comstock after the expiration of his term of office, on the legal principle of relation, connects itself with his previous

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assumption while in office, to prepare and publish Volume IV; and all the work and labor done after as well as before the expiration of his term of office, constitute but one act, and relate back to the original undertaking.

Tomlins' Law Dict., "Relation"; Burns' Law Dict., "Relation"; Hawkins v. Kemp, 3 East, 411, 429; Havergill v. Rare, Cro. Jac. 512.

A sheriff who after levy goes out of office, is authorized to sell and complete what he has begun.

Wood v. Colvin, 5 Hill, 228.

His term of office is extended for that purpose; and having begun the performance of his duty, he must finish it.

Mason v. Sudam, 2 Johns. Ch. 172.

One exercising an office, even without authority, obliges himself to discharge the duties annexed to it, and is estopped from denying that he is such officer.

Com. Dig. Office, E. A; Ld. Kenyon in 5 T. R. 607, 623.

Comstock having received these materials under the law, for a specific purpose, defined by law and assented to by himself, whatever he did upon or with the materials, is to be deemed as done under the law, and for that purpose; and he is estopped from denying it.

Wood v. Livingston, 11 Johns. 36; Dezell v. Odell, 3 Hill. 215.

The materials for the 4th volume of Comstock's reports belong to the State. By expending his individual labor upon them, Comstock has confused the property and dedicated his labor to the owner of the materials.

Silsbury B. McCoon, 3 Const. 379; Story's Eq. Jur. sec. 942.

4. It is in evidence that Mr. Comstock has commenced, and still has pending, an action to establish his right to the office of state reporter at this time. This claim of continuance in office is utterly inconsistent with the position of individual and private right in regard to Vol. IV., set up by respondents, and is conclusive against him and them, that Vol. IV., was prepared by him as state reporter, subject to the operation of the contract.

Lord Chancellor, 2 Ves. Jr. 696; 1 Swanston, note A, 381; Com. Dig. Election, C. 1.

5. There is no proof of acquiescence by the appellants in the claim of Mr. Comstock, by which he was misled and induced to incur expense.

It was not necessary that the appellants should apprise the respondents of their claim to Vol. IV. He was officially and personally a party.

Mr. S. G. Haven, for appellees:

1. There is no question of copyright or of property in manuscripts involved in the case, and the plaintiff's claim does not fall within the provisions of any of the Acts of Congress, and this is fatal to this case.

The plaintiffs not being the "author," must deduce from a legal right and title to the book or manuscript, or they cannot sustain their bill in the federal courts. The opinion of the Circuit Court proceeds very much on this ground.

See, also, Laws of U. S. 2 Sess. 21 Cong. 1831, p. 11, sec. 1, 9; 2 Kent's Com. 6th ed. 379; Clarke v. Price, 2 Wils. Ch. 157; Jollie v. Jaques, 1 Blatchf. 618, 627.

2. The strongest statement of the plaintiffs' case is to allege that the notes, references and manuscript matter composed by Mr. Comstock, and contained in the book in question, fall within the purview of their contract for the publication of the state reports, to be composed by the state reporter. The plaintiffs, under their contract with the state officers, could not have any interest in the labors of Mr. Comstock or anyone else, as a private reporter.

3. At the time of the contract, no part of the work was composed. The agreement, therefore, was simply executory, and could vest no title or actual property in that which had no existence. An executory agreement is not a sale and the agreement is in its nature executory where the article has no existence, but is to be produced by labor. It is a mere contract for labor.

Blackburn on Sales, 120, 122, 126, 146; Atkinson v. Bell, 8 Barn. & C. 277; Mucklow v. Mangles, 1 Taunt. 318; Hague v. Porter, 3 Hill, 141; 2 Kent's Com. 468, 469; 2 Bouvier's Law Dic. 485.

4. But the case is not such as has been thus far assumed. In fact, Mr. Comstock was not in the service of the State. Mr. Comstock at no period of his labors on this book pretended to be acting for the State or the plaintiffs.

5. Neither the State nor its vendees can have any property in, or exclusive right to publish the decisions of the Court of Appeals. Upon general principles, no person can have property in judicial decisions. Mr. Comstock, like any other citizen, was free to publish any and all of these decisions.

Constitution of N. Y. art. 6, sec. 22; Statute of 1850, p. 479, Par. 3; Wheaton v. Peters, 8 Pet. 591.

6. The office of reporter does not admit of a plurality of incumbents. Mr. Selden being in the office under color of a lawful appointment, was reporter de facto, and his acts being valid as concerns the public, the office was full.

People v. Stevens, 5 Hill, 616; Greenleaf v. Low, 4 Den. 168; Leonard v. Barker, 5 Denio, 220.

7. The position that the reporter, who is compensated by an annual salary, is liable on going out of office to prepare reports of the decisions then made, is quite untenable.

Richards v. Porter, 7 Johns. 137; Mason v. Suydam, 2 Johns. Ch. 180.

8. The doctrine of relation has no application to this case. It is never applied when it works wrong or injustice.

Butler and Baker's case 3 Co. 35, ch. 35, A; Frost v. Beekman, 1 Johns. Ch. 297.

9. The complainants are equitably estopped from claiming the relief asked for in their bill. They had notice from Mr. Comstock of his intention to prepare and publish the claim in question. They acquiesced in this until the volume has been published, and now commence a republication of it. This amounts to a waiver of their right, if any they had.

10. This court, in copyright cases, proceeds "according to the course and principles of courts of equity," and by those principles it is well established, that where a party having a right to a particular subject matter stands by and sees another expend money, labor or other

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valuable thing upon that subject, without asserting his claim, he is deemed to waive the right and cannot afterwards set it up. The waiver may be manifested by language or conduct or by preserving silence, when good faith requires the party to speak.

Qui tacet consentire videtur, Act of Congress, 1819; 3 Story's Stat. 719.

Wendell v. Van Rensselær, 1 Johns, Ch. 344, 345; Storrs v. Barker, 6 Johns. Ch. 166; Town v. Needham, 3 Paige, 545, 555; L'Amoureaux v. Vischer, 2 N. Y. 278; Saunders v. Smith, 3 Myl. & C. 711, 732, 733.

Immediately after Mr. Comstock surrendered the office of reporter, he informed the complainant that he was about to prepare a volume of reports for his own benefit as a private reporter. The Complainants acquiesced in this and made a conditional agreement with Comstock for the copyright.

6 Hill, 534; Story on Agency, secs. 135, 136, 137; Thallhimer v. Brinckerhoff, 4 Wend. 394; Annesley v. Simeon, 4 Madd. 390; Hazard v. Lane, 3 Meriv. 285; Southey v. Sherwood, 2 Meriv. 437; Macklin v. Richardson, 2 Amb. 694.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court of the United States for the Northern District of New York.

A want of jurisdiction to sustain this appeal was alleged by counsel, as it does not appear from the record that the amount in controversy exceeds the sum of $2,000; but this objection was obviated by an affidavit, which stated that the amount claimed by the plaintiffs exceeds that sum.

This bill was filed under the copyright Act, to enjoin the defendants from publishing and selling the fourth volume of Comstock's Reports.

The plaintiffs, who are publishers and booksellers at Albany, New York, represent that on the 20th of April, 1850, they entered into an agreement with Washington Hunt, Comptroller, Christopher Morgan, Secretary, and George F. Comstock, Reporter, of the State of New York, as required by statute, that they should have the publication, for the term of five years, of the decisions of the Court of Appeals, and the exclusive benefit of the copyright, to be taken out in behalf of the State, of the notes, references, and other matter furnished by the reporter, connected with said decisions; and that instrument was declared to be an assignment and transfer of the copyright of the matter so published, which should consist of volumes of not less than five hundred pages each.

On the 27th of December, 1847, George F. Comstock was appointed State Reporter for three years, and until his successor was appointed and qualified, at a salary of $2,000 per annum. He was to have, under the law, no interest in the reports, but the copyright of his notes, references and abstracts of arguments, was to be taken in the name of the Secretary of State, for the benefit of the people of New York. The law forbids the reporter and all other persons from acquiring a copyright in the reports, but declared they might be republished by any person.

Mr. Comstock's term of office expired on the 27th of December, *1850, and his suc- [*170 cessor, Henry R. Selden, Esq., was appointed to succeed him on the 17th of January, 1851. Mr. Comstock questioned the validity of his appointment, and the matter was referred to the judges of the Court of Appeals, then in session at Albany, who decided that Mr. Selden was duly appointed. He took the oath on the 21st of January, 1851, and immediately entered upon the duties of his office.

Mr. Comstock published three volumes of his reports; and having in his hands, at the expiration of his office, opinions of the court to make half or more of another volume, on the suggestion of the judges, and with the consent of Mr. Selden, the opinions of the January Term were delivered to him, that he might complete his fourth volume. At the time of this arrangement, he had made no preparation, by notes, etc., for this volume, and did not commence the work until some months afterward.

After he had made considerable advance in the preparation of this volume, he invited proposals for the purchase of the copyright; and although the plaintiffs, in conversation with him, said they would give as much as any other persons, yet they made no proposal, as they were apprehensive it might affect the contract for the publication of the reports, as above stated. The defendants purchased the copyright, for which they paid $2,500. At a large expense, they prepared stereotypes for the work and printed it.

The plaintiffs, so soon as the volume was published, commenced a republication of it, and filed this bill to enjoin the defendants from selling their edition. Previous to the publication of the third volume of Comstock's Reports, the Secretary of State had the copyright of the head notes, references, etc., entered by the Clerk of the District Court of the United States, for the benefit of the State; and the complainants had a similar entry made, to secure the copyright of the State of the fourth volume. This was not done by the Secretary of State, as the law directed, and it seems it was not sanctioned by him, as he was doubtful whether he had the power to do so.

The 9th section of the Copyright Act of the 3d of February, 1831, provides "that anyone who shall print or publish any manuscript whatever without the consent of the author or legal proprietor first obtained as aforesaid," "shall be liable to suffer and pay to the author or proprietor all damages occasioned by such injury," etc.

At common law, an author has a right to his unpublished manuscripts the same as to any other property he may possess, and this Statute gives him a remedy by injunction to protect this right.

*A formal transfer of the copyright [*171 by the supplementary Act of the 30th June, 1834, is required to be proved and recorded as deeds for the conveyance of land, and such record operates as notice.

After the expiration of his official term, Comstock did not and could not act as reporter. His successor having been appointed and qualified, discharged the duties of the office and received the salary. As many of the opinions of the court were in the hands of Com-

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stock when his office expired, it might have been made a question whether he could not publish the fourth volume as reporter. This would have given to the State a continuous report of the decisions of the Court of Appeals, as the law contemplated, with the copyrights of the notes, etc., secured for the benefit of the people of the State. If the opinions of the court came into his hands during his continuance in office, there would seem to be no impropriety in his publishing them, as filling up the measure of his term.

But it seems a different view was taken by the late reporter. As his term of office had expired, he was unwilling to publish the fourth volume without compensation for his labor. This changed his relations with the plaintiffs, as that contract was made as reporter, and on the supposition that he would be continued in that office. Under that contract, the complainants had the advantage of publishing the reports for the price stipulated, but anyone was at liberty to republish them.

The fourth volume was published by Mr. Comstock as an individual, he having secured to himself the copyright. This probably insured to the purchaser of the right the republication of the work for the term of twenty-eight years. Under the agreements made with the plaintiffs, they had only the profit of their contract.

Whether the plaintiffs may not have a remedy on their contract with Mr. Comstock in the local tribunals of the state, is not a question before us. Our only inquiry is, whether any relief can be given by this court under the Copyright Act. Where a case arises under that Act, we have jurisdiction, though both the parties, as in this case, are citizens of the same state. But if the Act do not give the remedy sought, we can only take jurisdiction on the ground that the controversy is between citizens of different states.

Were the plaintiffs the legal proprietors of the manuscript from which the fourth volume of Comstock's Reports was published? The plaintiffs rely upon their contract with the Comptroller, the Secretary of State, and Mr. Comstock, the reporter. In that contract it is said, "this instrument is declared to be an 172*] *assignment and transfer of the copyright of the matter so published to the parties of the second part."

This contract was made with Mr. Comstock as reporter, and the plaintiffs agreed to publish the work in volumes containing five hundred pages each, to have them well bound in calf, the types, paper, and the entire execution, to be equal to Denio's Reports; the work to be done under the superintendence of the reporter; copies to be furnished to certain officers of the State, and the publishers were to keep the volumes for sale at $2.50 per copy; and in all things they were bound to comply with the statutes of the State.

Comstock could not have published the work as a reporter without the consent of the Court of Appeals, and also the Secretary of State, who was required to secure the copyright to the State; and for his labor in preparing the notes, references, etc, and superintending the printing, he could have received no compensation.

Without saying what effect might have been given to the contract, had the relation of the parties remained unchanged, we are unable to say, as the case now stands before us, that the plaintiffs were the legal owners of the manuscript within the copyright law. The contract was made by Comstock as reporter, whose duties were regulated by law; and the obligations of the complainants as publishers were embodied in the contract, and were incompatible with any publication on private account.

The entire labor of the work was performed by Comstock, not as a reporter, but on his own account. It is, we think, not a case for a specific execution of the contract; and in effect that is the object of the bill. This result has not been brought about by the acts of Comstock. He may have been imprudent in extending his contract unconditionally beyond the term of his office. But in doing so he has an apology, if not an excuse, by being associated in making the contract with two high functionaries of the State. Under the changed relation of the parties, the plaintiffs cannot be considered as legal owners of the manuscript for the purposes of the contract under the copyright law.

Whatever obligation may arise from the contract, under the circumstances, as against Comstock, must be founded on his failure to furnish the manuscripts to the plaintiffs, and of such a case we can take no jurisdiction as between the parties on the record.

The decree of the Circuit Court is affirmed.

JOHN B. CRAIGHEAD et al., Appellants,
v.
JOSEPH E. and ALEXANDER WILSON.

(See S. C. 18 How. 199-202.)

Appeal, decree must be final—not final, if dependent on master's report.

To authorize an appeal the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit.

Where the basis of the decree, embracing the equities in the bill, is found, but the distribution among the parties in interest depends upon facts to be reported by the master, until the court shall have acted upon his report and sanctioned it, the decree is not final.

Argued Jan. 22 and 23, 1856. Decided Jan. 24, 1856.

THE bill in this case was filed in the Circuit Court of the United States for the Eastern District of Louisiana, by the appellees, to establish the rights claimed by them as heirs of Joseph and Lavinia Irwin, deceased.

The decree of the Circuit Court ascertained the heirship of the claimants, and their relative rights in the succession, and referred the matter to a special master for an accounting. From this decree the defendants have appealed to this court. A further statement of the case appears in the opinion of the court.

Messrs. Miles Taylor, Wm. B. Robertson and Zenon Labauve for appellants.

Messrs. J. P. Benjamin and Louis Janin for appellees.

NOTE.—What is "final decree" or judgment of state or other court, from which appeal lies. See note to Gibbons v. Ogden, 5 L. ed. U. S. 302.

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200*] *Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

During the opening argument of this case, doubts were suggested whether the decree of the Circuit Court was final within the Act of Congress, and the attention of the court was directed to that question.

The complainants filed their bill in the Circuit Court, claiming as heirs a part of the property of Joseph and Lavinia Erwin, deceased. Erwin died in 1829, in the parish of Iberville, having made his will in 1828. His property, real and personal, was much embarrassed; the persons claiming an interest in the succession were numerous; and from the loose manner in which the property was managed by the testator in his lifetime, and by those who succeeded him, great difficulty was found in the distribution of the estate.

The Circuit Court, having ascertained the heirship of the claimants and their relative rights in the succession, referred the matter to a special master, "to take an account of the successions of the said Joseph Erwin, Sr., Joseph Erwin, Jr., and Lavinia Erwin, in so far as it may be necessary to state the accounts between the plaintiffs and the heirs at law, defendants in this suit, to ascertain the property in kind that remains in the possession and control of either of the defendants, except Adams and Whiteall, as aforesaid—what has been sold, and the prices of the same and the profits thereof; and he will report all the incumbrances that have been discharged by either of the defendants on the same, and make to them all just allowances for payments, and permanent and useful improvements and just expenses, and to ascertain what may be due to the said plaintiffs from either defendant; and the said master may make a special report of any matters that may be requisite to a full adjustment of the questions in the cause.

By the 22d section of the Judiciary Act of 1789, it is provided, that final decrees of the Circuit Court, where the amount in controversy exceeds $2,000, may be brought before this court by an appeal. The law intended that one appeal should settle the matter in controversy between the parties; and this would be the result in all cases where the appeal is taken on a final decree, unless it should be reversed or modified by this court.

The cases are numerous which have been dismissed on the ground that the appeals were taken from interlocutory decrees. In Perkins v. Fourniquet, 6 How. 206, it was held, "where the Circuit Court decreed that the complainants were entitled to two sevenths of certain property, and referred the matter to a 201*] master *in chancery, to take and report an account of it, and then reserved all other matters in controversy between the parties until the coming in of the master's report," was not a final decree on which an appeal could be taken. And in the same volume, 209, Pulliam et al. v. Christian, where "a decree of the Circuit Court, setting aside a deed made by a bankrupt before his bankruptcy, directing the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors; directing an account to be taken of these last-mentioned sums in order to a final decree," was held not to be final decree, and the appeal was dismissed.

The above cases are sufficient to show the grounds on which appeals in chancery are dismissed. To authorize an appeal, the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit. To apply this test, in all cases, cannot be difficult.

In no legal sense of the term is the decree now before us a final one. The basis of the decree, embracing the equities in the bill, is found, but the distribution among the parties in interest depends upon the facts to be reported by the master. It is his duty, under the interlocutory decree, to balance the equities, by ascertaining what has been expended on the property, and what has been received by each of the claimants; and also every other matter which should have a bearing and influence in the distribution of the property. Until the court shall have acted upon this report and sanctioned it, giving to each of the devisees his share of the estate under the will, the decree is not final.

There may be cases in which the attention of the court has not been drawn to the character of the decree appealed from; but such an inadvertence cannot constitute an exception to the rule. The decision of the court, under the law, establishes the rule which must govern in appeals from the circuit courts.

The case of Whiting v. Bank of the U. S. 13 Curt. 4, is supposed to conflict with the above rule; but that was a decree of foreclosure and sale of the mortgaged premises. This was held to be a final decree, the order for sale having an effect similar to that of an execution on a judgment.

The case of Michaud et al. v. Girod et al. 4 Pet. 503, was an interlocutory decree in the Circuit Court, and which case, being appealed, was heard and decided by this court. But, from the report, there appears to have been no exception taken to the appeal, and it may be presumed to have escaped the notice of the court.

*The case of Forgay et al. v. Conrad, [*202 6 How. 201, was an appeal from an interlocutory decree, which was sustained, though objected to. But this decision was made under the peculiar circumstances of that case. The decree was, that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to the complainant; that one of the defendants should pay a certain sum of money to the complainant; that the complainant should have execution for these several matters; that the master should take an account of the profits of the lands and slaves, and also an account of certain money and notes; and then said decree concluded as follows, viz.: "And so much of said bill as contains or relates to matters hereby referred to the master for a report, is retained for further decree in the premises," etc.

It will be observed that two deeds for lots in

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New Orleans were declared to be null and void, and certain slaves owned by Forgay, one of the appellants, were directed to be sold on execution, as also the real estate and the proceeds distributed among the bankrupt's creditors; and if the defendant's principally interested could not take an appeal until the return of the master, their property, under the decree, would have been disposed of beyond the reach of the appellate court, so that an appeal would be useless. This was the principal ground on which the appeal was sustained, although it was stated that this part of the decree was final.

The court say: "The decree upon these matters might and ought to have awaited the master's report; and when the accounts were before the court, then every matter in dispute might have been adjudicated in one final decree; and if either party thought himself aggrieved, the whole matter would be brought here and decided in one appeal, and the object and policy of the Acts of Congress upon this subject carried into effect.

The decree before us is not final, consequently it must be dismissed.

ADAM HAM, Plff. in Er.,
v.
THE STATE OF MISSOURI.

(See S. C. 18 How. 126-134.)

School lands granted to Missouri—Act of March 3, 1811—sales of school lands—Spanish claim does not cover school lands previously granted—meaning of "sold or disposed of."

The Act of March 6, 1820, authorizing the people of Missouri to form a state government, with the ordinance of the State Convention of 19th July, 1820, amounted to a grant for use of schools, of the 16th section of every township of public lands, and a dedication of those sections to that object.

The limitation or restriction in the proviso of section 10 of the Act of March 3, 1811, has no connection by its terms with lands granted for schools.

As to these lands, sales and every other disposition inconsistent with such dedication, are expressly inhibited.

Such 10th section and its proviso import only a temporary suspension of the sales of lands intended for sale, for the purposes of investigation.

A Spanish claim rejected by the commissioners in 1811, remained dormant seventeen years, and was then confirmed; meanwhile the United States granted to Missouri every 16th section not sold or otherwise disposed of.

The law confirming the Spanish claim simply relinquished the title of the United States, and is declared to have no influence to prejudice any title theretofore derived from the United States.

"Sold or otherwise disposed of" means a legal sale or disposition, final and irrevocable.

Held that the title of Missouri to the lands as schools lands was superior to that under the confirmation of the Spanish grant.

Argued Dec. 27, 1855. Decided Jan. 29, 1856.

IN ERROR to the Supreme Court of the State of Missouri.

This was an indictment in the Circuit Court of the County of St. François, State of Missouri, against Adam Ham, now plaintiff in error, for trespass and waste on sec. 16, township 34, range 7, east, alleged to be school lands belonging to the inhabitants of that township; plea, not guilty. Upon this indictment the plaintiff in error was convicted and condemned to pay a fine of $400, assessed by the jury, together with costs of the prosecution. This judgment was on appeal affirmed by the Supreme Court of the State. The case is now here on a writ of error. A further statement appears in the opinion of the court.

Mr. H. S. Geyer, for the plaintiff in error:

It is submitted by the counsel for plaintiff in error that the decision of the Supreme Court is founded on an erroneous construction of the several Acts of Congress under which the parties claim.

1. The reservation by the Act of March 3, 1811, is something more than "a direction" to the officers to refrain from selling the land claimed. It severed the land embraced by the claim from the public domain, and appropriated it to the satisfaction of the claim in the event of confirmation; being so set apart and appropriated, it was "disposed of" and therefore not granted by the Act of March 6, 1820.

Wilcox v. Jackson, 13 Pet. 498; Jackson v. Clark, 1 Pet. 628; Carman v. Johnson, 20 Mo. 108; Delauriere v. Emison, 15 How. 525; see also, Stoddard v. Chambers, 2 How. 313, and Bissell v. Penrose, 8 How. 337.

The engagement on the part of the United States is executory. No time is appointed for the fulfillment of the engagement, and the title remains in the United States, subject to the legislative power of Congress.

With few exceptions, nothing but a patent passes a perfect title to public lands. The exceptions are where Congress grants lands by words of present grant.

Wilcox v. Jackson, 13 Pet. 498; Bagnell v. Broderick, 13 Pet. 450; West v. Cochran, 17 How. 403; 16 How. 68; Guitard v. Stoddard, 16 How. 499; Lessieur v. Price, 12 How. 60.

The land in controversy had been severed from the domain, and was private property at the date of the cession of Louisiana, and was protected by the Treaty.

Soulard v. The U. S. 4 Pet. 111; Delassus v. U. S. 9 Pet. 117; Chouteau v. Eckhart, 2 How. 375.

Even if the State acquired a right to the lands by the compact, superior to that of the private claimants before the confirmation, it was merely equitable and inchoate, and cannot prevail against the complete legal title conveyed by the Confirmatory Act and patent.

Bagnell v. Broderick, 13 Pet. 436; Wilcox v. Jackson, 13 Pet. 498; Boardman v. Reed, 6 Pet. 328; West v. Cochran, 17 How. 403.

No counsel appeared for the defendant in error.

Mr. Justice Daniel delivered the opinion of the court:

*Upon a writ of error to the Supreme [*128 Court of the State under the authority of the 25th section of the Judiciary Act.

The proceedings now under review were founded upon an indictment in the Circuit Court of the County of St. François, against the plaintiff in error, for having committed waste and trespass on the sixteenth section of lands situated in congressional township number thirty-four, range seven, east, as being school lands belonging to the inhabitants of the township aforesaid.

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Upon this indictment the plaintiff was convicted, and condemned to pay a fine assessed by the jury, of $400, together with the costs of the prosecution. From the judgment of the Circuit Court, the plaintiff in error having taken an appeal to the Supreme Court of Missouri, by the latter tribunal that judgment was in all things confirmed; the same plaintiff now seeks its reversal here, in virtue of several Acts of Congress alleged to be applicable to this case.

Upon the trial in the Circuit Court, the following facts were either established in proof or admitted by the parties:

1. A joint petition on the part of Jean Batiste Vallé, and the heirs of François Vallé Jean Batiste Pratte, and St. Geunne Beauvais, presented on the 15th of October 1800, to Delassus, the Lieutenant-Governor of Upper Louisiana, praying for a grant of two leagues square of land on the River St. François, including the mine known by the name of Mine à la Motte, and the lands adjacent.

2. An acknowledgment by the Lieutenant-Governor, dated January 22, 1801, of his want of power to grant a concession of the extent prayed for, and the fact of his having transmitted the petition to the Intendant-General, with the expression of an opinion favorable to the grant and to the character of the applicants.

3. An order by the Intendant-General that the documents presented in behalf of the petitioners should be translated into the Castilian language, and then be laid before the fiscal agent.

4. A plat of survey for 28,224 arpents, or 24,142 acres of land, situated on the River St. François, certified by Nathaniel Cook, as Deputy-Surveyor of the District of St. Genevieve said by him to have been made by virtue of a concession by Delassus to J. B. and François Vallé, Beauvais, and Pratte, on the 22d of January, 1801.

5. The proceedings of the Board of Commissioners for the examination of land titles, on the 27th of December, 1811, setting forth the claim of Jean Batiste and François Vallé, Jean Batiste Pratte, and St. Geunne Beauvais, for two leagues of land, including the La Motte Mine, founded on the recommendation from Lieut.-Governor Delassus for a concession, 129*] bearing *date on the 22d of January, 1801, and the order of the Intendant-General already mentioned, and the rejection of the claim by the Commissioners.

6. The first section of an Act of Congress approved May 24, 1828, confirming to François Vallé, Jean Batiste Vallé, Jean Batiste Pratte, and St. Geunne Beauvais, their heirs or legal representatives, a tract of land not exceeding two leagues square, situated in the County of Madison, in the State of Missouri, commonly known by the name of the Mine la Motte, according to a field plat and survey made by Nathaniel Cook, Deputy-Surveyor of St. Genevieve, on the 22d day of February, 1806, with a proviso in the said first section, that the confiscation thus granted shall extend only to a relinquishment of title on the part of the United States, nor prejudice the rights of third persons, nor any title heretofore derived from the United States, either by purchase or donation.

7. A plat and survey made by Jenifer Sprigg, Deputy-Surveyor, in the months of March, 1829, and August, 1830, of the La Motte Mine tract of land, stated to contain 23,728.02 acres of land, confirmed to François Vallé, Jean Batiste Vallé, Jean Batiste Pratte, by an Act of Congress approved on the 24th of December, 1828.

8. A patent from the President of the United States, bearing date on the 25th of March, 1839, granted under the authority of the Act of Congress last mentioned, and in virtue of a title derived from the confirmees, to Lewis F. Linn and Evariste Pratte, for the La Motte Mine, and the land surrounding the same, containing 23,728.02 acres of land, in conformity with the survey of Sprigg, as certified from the General Land Office; this patent, containing literally the proviso in the Act of Congress limiting the grant to the patentees, to a relinquishment of the title of the United States at the date of the Act of Congress of 1828.

9. An admission on the part of the State, that all the right, title and claim of the original proprietors of the Mine la Motte tract of land had regularly passed to and was vested in Thomas Fleming, as fully as those proprietors had or could have had the same.

10. A lease from Thomas Fleming, of the 9th of April, 1849, to Ham, the plaintiff in error, for a portion of the Mine la Motte land.

11. An admission farther on the part of the State, that the 16th section claimed as school lands was within the lines of the original survey of the tract made by Nathaniel Cook, and of the other surveys given in evidence.

Upon the trial of the indictment the Circuit Court, at the instance *of the counsel [*130 for the State, instructed the jury, "that the Act of the 6th of March, 1820, entitled 'An Act to authorize the people of Missouri Territory to form a constitution and state government,' etc., taken in connection with an ordinance declaring the assent thereto by the people of Missouri by their representatives assembled in convention on the 19th of July, 1820, operated as a grant by Congress to the State of Missouri for the use of schools, of the 16th section in controversy, unless such 16th section had been previously disposed of by government.

That, although the land claimed by the proprietors of Mine la Motte was, by the several acts of Congress, reserved from sale, and that the survey of said claim includes the 16th section in controversy, yet such reservation is not such disposition of said section by the government, as within the saving clause of the 6th section of the Act of 1820, and cannot operate to prevent the title from vesting in the State, by virtue of said grant."

The defendant in the prosecution prayed of the court the following instructions, which were refused:

That if the jury believe the land in question is included within the original grant by the Spanish government, and within the lines of the survey made by N. Cook, in 1806, and within the lines of the lands confirmed by the Act of Congress to the original grantees and those claiming under them, then this land never was public land, subject or liable to be donated by Congress to the States for the use of schools.

That the several Acts of Congress reserving section sixteen for the support of schools,

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could only refer to the public lands proper, and could not attach to private claims, which had previous to such donation been claimed by individuals, and reserved by Congress to satisfy those claims.

That the confirmation of the claim by the Act of Congress of 1828, conferred and gave a superior title to the lands in question, over the title of the State for the use of schools."

Upon the accuracy or inaccuracy of the instructions given by the court at the instance of the State, and of those denied by it upon the prayer of the defendant in the prosecution, the decision of this cause must depend.

It would seem not to admit of a rational doubt, that the Act of Congress of March 6, 1820, authorizing the people of the Territory of Missouri to form a constitution and state government, taken in connection with the Ordinance of the State Convention of the 19th of July, 1820, amounted not merely to a grant for the use of schools, of the 16th section of every township of public lands in the Territory, but further, to a positive condition or mandate, so far as Congress possessed the power to impose it, for the dedication of those sections to that 131*] object. The assertion *of the court, then, of the existence and character of such grant, whilst it recognized any proper limitation of qualification imposed thereon, either by previous Acts of Congress, or by the investiture of any rights arising therefrom, can be obnoxious to no just criticism, but was in all respects proper.

Whether or not the lands claimed by the proprietors of the Mine à la Motte, so far as they cover a portion of the 16th section of township 34, range 7, east, are exempted from the operation of the Act of March 6, 1820, and of the Ordinance of July 19, 1820, must depend upon the correct interpretation of the previous legislation of Congress, and upon the acts and position of the claimants with reference to that legislation.

By the 10th section of the Act of Congress approved March 3, 1811, authorizing the President of the United States to offer for sale such portions of the public lands lying in the State of Louisiana as shall have been surveyed under the direction of the 8th section of the same Statute, it is provided, that "all such lands, with the exception of section number sixteen, which shall be reserved in each township for the use of schools" (and with the exception, further, of a township of land granted by the 7th section of the same Statute for the use of a seminary of learning, and of certain salt springs and lead mines), "shall be offered for sale to the highest bidder, under the direction of the Register of the Land Office, the Receiver of Public Moneys, and principal deputy-surveyor." In this 10th section is contained a proviso, "that till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the Recorder of land titles in the District of Louisiana, and filed in his office for the purpose of being investigated by the commissioners appointed to ascertain the rights of persons claiming lands in the Territory of Louisiana."

Upon this 10th section of the Act of 1811, and the proviso thereto annexed, is founded the position taken by the plaintiff in error, that the 16th section of township 34 did not and could not vest in the State of Missouri, in virtue of the Act of March 3, 1820, and of the Ordinance of July 19 of the same year—so far as that section fell within the proviso. In comparing the enacting part of sec. 10 of the Statute of 1811 with the proviso annexed thereto, it will strike the attention that the limitation or restriction contained in the proviso has no connection, by its terms, with lands granted or donated for schools; but relates altogether to such lands as it was designed and declared should be sold at public auction to the highest bidder.

Such, certainly, were not the lands appropriated to a specific, ultimate and permanent purpose, viz.: the support of schools. *As [*132 to these lands, sales, and every other disposition inconsistent with such dedication, were expressly inhibited. But, putting aside the literal meaning of the 10th section and its proviso, it may well be asked whether the language and objects of the latter can be made to import anything beyond a temporary suspension of the sales of the lands intended for sale, for the simple purposes of investigation; and much more, whether the 10th section of the Act of 1811, and the proviso thereto, can be interpreted to mean a denial to itself by Congress of the right and power to sell or to give, either upon satisfactory evidence of the invalidity of any opposing claim, or upon considerations of public policy, the land embraced within the suspension.

Such an interpretation, as is not warranted by the language of the Acts of Congress, seems not to accord either with considerations of justice or policy. Suppose that Congress, after the passage of the Law of 1811, should become satisfied of the groundless nature of a claim presented to the Commissioners, and should be convinced farther, not only of the benefits to result from appropriating the subject of that claim to purposes of education, but also of their having pledged that subject to such purposes; it cannot be questioned that the power to reject or disregard an unfounded claim, and to comply with a previous and just obligation, remained in a plenary and unimpaired extent in Congress; and that this right and obligation could in no degree be affected by a mere agreement to investigate.

Let it be remembered, too, that the application of those under whom the plaintiff in error deduces his alleged title, was for a simple gratuity founded on no consideration whatever but the bounty of the donor. The opinion and the action by Congress with respect to the rights of the parties to that controversy, seem to have been entirely coincident with the views herein suggested. Under the provision of the Act of 1811, the proprietors of the Mine à la Motte presented their claim, together with such evidence as they deemed essential to its support, to the tribunal created by law for the investigation of land titles. By this tribunal, the claim of these proprietors was rejected on the 27th of December, 1811. From the period last mentioned until the 24th of May, 1828, an interval of seventeen years, this claim remains dormant or quiescent, when it is confirmed at the date last mentioned.

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The nature and effect of this confirmation will presently be considered; but in the interval above mentioned, the government (the undoubted possessor of the title), after the lapse of nine years from the rejection by its agent of this slumbering title, by express compact with the State of Missouri, grants to that State, for the use of schools, the sixteenth section of every township in the State which had not been sold "or otherwise disposed of."

133*] *Upon recurring to the Law of May 24, 1828, it will be borne in mind, that the confirmation to the proprietors of the Mine à la Motte is extended merely to a relinquishment of the title of the United States at the date of that law, and is declared to have no influence to prejudice the rights of third persons, nor any title heretofore derived from the United States, either by purchase or donation.

It is proper to keep in view this proviso in this confirmation, in order to ascertain its effect, if any, upon the proper meaning of the qualification in the grant to the State of Missouri comprised in the phrase "or otherwise disposed of."

In our construction of the Act of Congress of March 3, 1811, we have interpreted the proviso to the 10th section of that Act as neither declaring nor importing a final and permanent devestiture, or any devestiture whatsoever, of the title of the United States, but as a provision prescribing a temporary arrangement merely for the purposes of investigation; leaving the title still in the government, to be retained or parted with according to the dictates of justice or policy, as these might be developed by such investigation. Nothing is here ordained which is definite in its character. Inquiry is all that is directed. The language and plain import of the 6th section of the Act of the 3d March, 1820, confers a clear and positive and unconditional donation of the 16th section in every township; and when these have been sold or otherwise disposed of, other and equivalent lands are granted. Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase "or otherwise disposed of" must signify some disposition of the property equally efficient, and equally incompatible with any right in the State, present or potential, as deducible from the Act of 1820, and the ordinance of the same year. Upon any other hypothesis, the right to the 16th section would attach under the provision of the Act of 1820; the State would still have the title, and could recover the section specifically, and there would be no necessity for providing for an equivalent for that section.

Under our interpretation of the Acts of March 3, 1811, and of May 24, 1828, no title can have passed to the proprietors of the La Motte Mine lands. The reply of the Lieut.-Governor, Delassus, to the petition of the applicants for the mine, acknowledges explicitly the absence of all power in that officer to make the grant asked for, and refers those petitioners to the Intendant-General, as the only functionary possessing authority to make it. The officer took no further action upon the petition than to order its translation into the Castilian language.

On the 27th of December, 1811, this claim was before the Commissioners for the examination of land titles in the State of *Louis- [*134 iana, and was rejected by them. From this period of time down to the 24th of May, 1828, no grant from the United States, nor evidences of title from any source, except those already referred to, have been shown by the plaintiff or those under whom he claims. In the meantime, the United States, the undoubted legal owners of the land in controversy, by the Act of March 3, 1820, bestow it on the State, as they had full authority so to do—bestow the specific section, it never having been disposed of within the intent and meaning of the 6th section of the Act last mentioned.

The confirmation in 1828, and the patent of the 25th of March, 1839, professing to confer no title but such as remained in the United States at those periods respectively, and the grant of the 16th section in township 34, range east, comprised within the survey of the Mine à la Motte, having been made seven years anterior to the confirmation, which constitutes the only ground of title in the claimants of the mine, the pretensions of the confirmees to the section in controversy must be regarded as without foundation and utterly null.

The view which this court has taken of the evidence in this cause, and of the law as applicable to that evidence, dispenses with any necessity for an examination seriatim of the instructions asked by the plaintiff in error upon the trial of the indictment and refused by the court. It is sufficient to remark, that the positions assumed in the instructions so prayed for, being incompatible with the law of this case as expounded by this court, we deem those instructions to have been properly refused.

It is the opinion of this court, that the decision of the Supreme Court of the State of Missouri, pronounced in this cause, sustaining that of the Circuit Court, is correct, and ought to be, as it is hereby affirmed.

Mr. Justice Nelson:

I concur in the judgment of the court upon the ground that, though the 10th section of the Act of March 3, 1811, had the effect to prevent the title of Missouri to this land from vesting, until the final decision by Congress upon the claim of Vallé and others, yet the Act of May 24, 1828, confirming lands to Vallé and others. operated as such final decision, and by its true construction, excepted out of the confirmation so much of the land as was included in section sixteen, the public surveys of the township having been made before the passage of the last-mentioned Act. I do not know that the opinion of the court is intended to go further than this. If it does, I do not assent thereto.

Mr. Justice Curtis concurred with Mr. Justice Nelson.

Mr. Justice Grier also concurred with Mr. Justice Nelson.

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173*] *JAMES M. COOPER, Plaintiff in Error,

v.

ENOCH C. ROBERTS

(See S. C. 18 How. 173-182.)

School lands in Michigan—title from state good—patent to mining company, not good.

The State of Michigan was admitted to the Union, with the unalterable condition "that every section No. 16, in every township of public lands, and when such section has been sold or disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools."

A lease of a 16th section, in 1845, by the Secretary of the Treasury, for three years, for mining, did not dispose of those lands so as to defeat the claim of the State.

By the repealing clause of the Act of September, 1850, 9 Stat. at L. 472, the section was disencumbered, and made subject to the compact with the State.

The entry by the mining company of that section, and a patent issued to it, did not confer title.

Michigan could sell the school reservations and give good title, and its patent is conclusive that the sale was valid and regular as against third persons.

Argued Jan. 14, 1855. Decided Jan. 29, 1856.

IN ERROR to the Circuit Court of the United States for the District of Michigan.

The case is stated by the court.

Messrs. S. F. Vinton and A. W. Buel, for the plaintiff in error:

The Act of Congress of June 23, 1836, granting school lands to the State of Michigan, together with the Ordinance of Michigan of Nov. 1835, should be considered articles of compact, obligatory on the State. Congress, on its part, declares that the proposition contained in the Act of June, 1836, if acceded to by the Legislature of Michigan, should be obligatory on the United States. 5 Vol. Stat. pp. 59 and 60.

2. The Act of June, 1836, became obligatory on the United States on July 25, 1836, that being the day on which the Legislature of Michigan passed the Act of acceptance.

Rutherford v. Greene, 2 Wheat. 196; Rice v. Foster, 4 Harr. Del. 479; Boddridge v. Thompson, 9 Wheat. 469; Trustees v. Payne, 3 Mon. 161.

3. From the time when this contract was agreed to, neither party could, without the consent of the other, annul or change any of its essential propositions.

Rutherford v. Greene, 2 Wheat. 196.

So far as the law is a compact for the sale, or grant of land to Michigan, it is to be construed by those rules and principles which regulate contracts generally.

Huidekoper's Lessee v. Douglas, 1 Pet. Cond. 453; Dodson v. Cocke, 1 Tenn. 319.

The words "section" and "township" have reference to the laws regarding public surveys, and the obligation of the government is the same as if those laws had made a part of the grant.

Ludlow v. Johnson, 3 Ohio, 572.

The government cannot resume its grant, which is a contract executed.

New Orleans v. De Armas, 9 Pet. 236; Terrett v. Taylor, 9 Cr. 43; Fletcher v. Peck, 6 Cr. 87; Polland v. Hagan, 3 How. 212.

5. A legislative Act should never be so construed as to subvert the rights of property, unless the intention so to do should be unmistakable.

Rutherford v. Greene, 2 Wheat. 196; Wilcox v. Jackson, 13 Pet. 513; U. S. v. Gear, 3 How. 131.

A perpetual statute, until repealed by an Act professing to repeal it, or by a clause or section of another Act directly bearing in terms upon the particular matter of the first, notwithstanding an implication to the contrary, may be raised by a general law, still remains in force as to the particulars of the subject matter.

2 Dwar. on Stat. 638, 673; Rex v. Borton, 12 A. & E. 470; Easton Bank v. Commonwealth, 10 Barr. 442; Dore v. Grey, 2 T. R. 365; Foster case, 11 Rep. 63; Rex v. Downs, 3 T. R. 569; Goldson v. Buck, 15 East, 377.

If the Act of 1847 had in general terms directed the sale of all the lands in the district, and was silent as to the lands previously dedicated and granted to schools, it would not have the effect to diverge them from this special use.

U. S. v. Gear, 3 How. 131; Snell v. Bridgwater Manufacturing Co. 24 Pick. 296; Goddard v. Boston, 20 Pick. 407; Bowen v. Lease, 5 Hill, 221; Wyman v. Campbell, 6 Port. 219; Planters' Bank v. State, 6 Sm. & M. 628; Street v. Commonwealth, 6 Watts & S. 209; McFarlan v. State Bank, 4 Pike, (4 Ark.) 410; Atwater v. Woodbridge, 6 Conn. 229; Williams v. Pritchard, 4 T. R. 2; Cortis v. Kent Water works, 7 B. & C. 314; Beales v. Hale, 4 How. 51; Quackenbush v. Danks, 1 Den. 130.

Mr. Truman Smith, for the defendants in error:

As a general rule, a patent is indispensable to devest the title of the United States to the public lands. An Act of Congress will not so operate unless it is in words of the present tense.

Wilcox v. Jackson, 13 Pet. 499; Foley v. Harrison, 15 How. 433.

The words of the Act in the future tense, do not constitute a grant.

Foley v. Harrison, 15 How. 433; Foster v. Neilson, 2 Pet. 253.

Even conceding that the compact vested a title in the State of Michigan, the jus disponendi could only be acquired by the Act of Congress, and does not exist by mere force of the compact.

Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements should be held sacred. The United States then retaining as founders of a charity an interest in the fund, and having a right to insist on its faithful application to the objects specified, it is obvious that its form cannot be changed without their consent.

Trustees v. Indiana, 14 How. 274; Pawlet v. Clark, 9 Cranch, 292; Dartmouth College v. Woodward, 4 Wheat. 518; Paup v. Drew, 10 How. 218.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiff sued in ejectment, to recover a portion of section No. 16, in township No. 50, north of range 39 west, lying within the mineral district south of Lake Superior, in Michigan.

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His case affirms that this section had been 176*] appropriated by the *United States to the State of Michigan for the use of schools, in their compact, by which that State became a member of the Union; that the Governor of Michigan issued in November, 1851, to Alfred Williams, a patent evincing a sale of that section under the laws of Michigan, in February, 1851; that he has a conveyance from the patentee, and that the defendant is a tenant in possession, withholding the locus in quo from him. The defendant, to support his issue, relies upon a license given in 1844, by the mineral agent of the United States for that district, empowering the donee to examine and dig for lead, and other ores, for the term of one year, and within that term to mark out and define a specific tract of land, not to exceed three miles square, for mining purposes; and if he should fulfill this and other conditions, he was to become entitled to a lease for three years, with a privilege of one or two renewals, under restrictions. The Secretary of War in September, 1845, executed a lease for a tract three miles square, which the donee of the license had selected, and which included the locus in quo, and stipulated to renew it, if Congress shall not have passed a law "directing the sale, or other disposition of these lands," and if the lessee shall have complied with all the conditions of the present lease, and tendered a bond for the fulfillment of the conditions of the new lease, as described in the Act. This lease came to the Minnesota Mining Company by assignment, and that company, in 1847, and from thence till 1851, held possession of the land described in the declaration, erected valuable improvements, and made successful explorations for copper upon it. In November, 1850, the Company applied to the proper officers of the Land Office to enter the land comprised in the lease, and from thence till the date of their patent in 1852, the right of the Company to secure the locus in quo by entry was in dispute in the Land Office of the United States. In September, 1851, the Secretary of the Interior determined adversely to the claim of the Company and in favor of the claim of Michigan; and in 1852, upon proofs that the Company had complied with the lease, while he re-affirmed his conclusions in favor of Michigan, allowed the entry of the Company, but with a reservation of the rights of Michigan. The section No. 16 aforesaid was surveyed in the summer of 1847, and the portion in controversy, in the report of the geological survey of the district, was returned to the Land Office as containing mines of copper. There was no application to the Department of Public Lands to renew the lease held by the Company, for the reason (it is said) that the system of letting mineral lands of this kind had been abandoned, upon the doubts expressed by the Attorney-General, in 1846, of the legality of such leases. Upon the trial of the cause in the Circuit Court, 177*] the *plaintiff moved the court for instructions to the jury, that, upon the facts, he was entitled to a verdict, and that the defendant's patent was invalid. The court refused the prayer and told the jury, "that by the Act of Congress of 1st March, 1847, all the mining lands within the district, reported, were taken out of the operation of the general law for the disposal of the public lands, in pursuance of an established policy to reserve from the ordinary mode of disposing of public lands those that contained valuable salt springs, lead mines, etc., that they might be leased or disposed of to purchasers having full knowledge of their value, by reason of the salt springs or mineral ores they contained, at their full value, for the public benefit. That, by the above Act, all the mineral lands reported by the geologists within the district, in pursuance of this settled policy of the government, were appropriated and disposed of without reference to the school reservation, the appropriation of the land being made before the surveys were executed, and before the locality of section 16 could be known. And as it appears from the report of the geologist that the land in controversy contains valuable minerals and was within the boundaries of the lease under which the Minnesota Company claim, and that they had made large expenditures thereon for mining, were entitled to the right of purchase, as provided in the third section of the above law; and having paid for the same, it was a disposition of the land which Congress had a right to make, and was an exercise of power within the grant. That the setting apart of another section adjacent will satisfy the grant to the State."

Our first inquiry will be into the nature of the right of the State of Michigan to section No. 16 in the townships of that State, and the effect of the discovery of minerals in such a section upon that right. The practice of setting apart section No. 16 of every township of public lands, for the maintenance of public schools, is traceable to the Ordinance of 1785, being the first enactment for the disposal by sale of the public lands in the Western Territory. The appropriation of public lands for that object became a fundamental principle, by the Ordinance of 1787, which settled terms of compact between the people and States of the Northwestern Territory, and the original States, unalterable except by consent. One of the articles affirmed that "religion, morality, and knowledge, being necessary for good government and the happiness of mankind;" and ordained that "schools, and the means of education, should be forever encouraged." This principle was extended, first by congressional enactment, 1 Stat. at L. 550, sec. 6, and afterwards, in 1802, by compact between the United States and Georgia to the Southwestern Territory. The earliest development of this *article, in practical legislation, is to be [*178 found in the organization of the State of Ohio, and the adjustment of its civil policy, according to the ordinance, preparatory to its admission to the Union. Proposals were made to the inhabitants of the incipient State to become a sovereign community, and to accept certain articles as the conditions of union, which, being accepted, were to become obligatory upon the United States. The first of these articles is, "that the section No. 16 in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools."

A portion of this Territory had been incumbered in the articles of cession by the States,

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and another portion by Congress for the fulfillment of public obligations, prior to the Ordinance of 1785, and without reference to the school reservations; therefore, uniformity in the appropriation of the section No. 16 was partially defeated. The Southwestern Territory was similarly burdened in the compact of cession by Georgia, with the fulfillment of antecedent obligations, and similar paramount obligations have arisen in treaties with the Indian tribes who inhabited it. The rights of private property vested in the inhabitants, ceded with Louisiana and Florida, and guaranteed to them in the Treaties of Cession, created an obstruction to the same policy within them. But the constancy with which the United States have adhered to the policy in the various compacts with the people of the newly formed States, and the care which Congress has manifested to prevent the accumulation of prior obligations which might interrupt it, fully display their estimate of its value and importance. There is, obviously, a definite purpose declared to consecrate the same central section of every township of every state which might be added to the federal system, to the promotion "of good government and the happiness of mankind," by the spread of "religion, morality and knowledge," and thus, by a uniformity of local association, to plant in the heart of every community the same sentiments of grateful reverence for the wisdom, forecast and magnanimous statesmanship of those who framed the institutions for these new States, before the constitution for the old had yet been modeled. Has the discovery of minerals of value upon this section been deemed a sufficient cause for its withdrawal from the operation of this policy, and the compacts which develop it?

The Ordinance of 1785 dedicated the section No. 16 for the maintenance of public schools, and in each sale of the public lands there was by the same ordinance a reservation of one third part of all gold, silver, lead and copper 179*] mines within the town ship *or lot sold. No reservations were afterwards made of gold, silver, or copper mines until the Acts of March, 1847. By the Act of March 26, 1804, and the Act of March, 1807, every "grant of a salt spring or a lead mine thereafter to be made, which had been discovered previously to the purchase from the United States, was to be considered as null and void."

2 Stat. at L. 279, sec. 6; 449, sec. 6.

These Statutes indicate a policy to withdraw from sale lands containing these minerals. But the compacts have been made without such a reservation, nor has the usage of the Land Office interpolated such an exception to the general grant of the section No. 16 for the use of schools.

The grant of the section No. 16 for the use of schools can be executed without violating the spirit of the legislation upon salt springs or lead mines, and as we have seen, no statute prior to the admission of Michigan to the Union contains an appropriation or reservation of other mineral lands. The State of Michigan was admitted to the Union, with the unalterable condition "that every section No. 16, in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools." We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The jus ad rem by the performance of that executive act become a jus in re judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others.

Gaines v. Nicholson, 9 How. 356.

The question now arises whether the Act of March 1, 1847, created a legal impediment to the operation of this principle, either by the reservation of the land for public uses, or by its appropriation to superior claims. In March, 1847, Congress established a land district in this region for the disposal of the public lands. It directed a geological survey for the ascertainment of those containing valuable ores, whether of lead or copper, and a report to the Land Office. It provided for the advertisement and sale of such lands, departing in a measure from that usual mode, as to the length of the notice and the amount of price; and in reference to the remainder of the lands, it applied the usual regulations. To the section containing those directions, 9 Stat. at L. 146, sec. 2, there is added an *exception from such [*180 sales, section No. 16, "for the use of schools, and such reservations as the President shall deem necessary for public uses." It has been argued, that this exception is only applicable to the lands not contained in the geological report, and that the mineral lands "were appropriated and disposed of without reference to the school reservation by this section of the Act." But it does no violence to the language to embrace within the exception all the sales, for which the section provides, and we cannot suppose that Congress could be tempted, with the hope of a small additional price, which is imposed upon the purchasers of the mineral lands, to raise a question upon its compact with Michigan, or to disturb its ancient and honored policy. We think the interpretation which claims this as an exception in favor of Michigan, is to be preferred to that which excludes her from the mineral lands under this compact. And this conclusion is strengthened by the fact that the power of the President to make useful public reservations is connected in the exception with the school reservations. There could be no reason for limiting the power of the President to a single class of the public lands, and to exclude him from another in the same district. We conclude that this Act does not withdraw the mineral lands from the compact with Michigan.

Did the execution of the lease by the Secretary of War, in 1845, before the survey of the lands, dispose of these lands so as to defeat the claim of the State? The Minnesota Mining Company, at the date of the Act of March 1st, 1847, held the unexpired lease by assignment,

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and continued to perform its conditions until their patent was issued. The 3d section of that Act authorized the persons in possession under such a lease, who had fulfilled its conditions, to enter in one tract all the lands included in it, at a diminished price, "during the continuance of the lease." The 4th section directed the sale of the mineral lands contained in the report, but with a proviso, that none of the lands contained in any outstanding lease, whose conditions had been fulfilled, should be sold till the expiration of the lease, either "by efflux of time, voluntary surrender, or other legal extinguishment." The Act of Congress of September, 1850, 9 Stat. at L. 472, abrogated such of the clauses of the Act of 1847 which distinguished the mineral from other public lands, and placed them alike, under the ordinary system for the disposal of the public domain, but reserved to lessees and occupants the privileges conferred by the Act of 1847. From that time, therefore, the argument "that the mining lands within the district were taken out of the general law for the disposal of the public lands, by the Act of March, 1847," lost all its cogency, and the rights of the Minnesota Company de- [*181] pended entirely *upon the validity of the lease and the protection accorded to the lessee. The lease expired, by "efflux of time," in September, 1848. There was no renewal of the lease, for the double reason that its original validity was doubted by the highest executive authority, and those doubts were submitted to by the lessee, and because Congress had passed the law for the disposal of the mineral lands, which determined the covenant for renewal, by the terms of the lease itself.

Hence, had there been a legal impediment to the execution of the compact with Michigan, erected either by the 2d section of the Act of 1847, which separated for some purposes the mineral from other public lands, or by the privileges granted to lessees or their assigns, in the 3d section of that Act, it was removed by the repealing clause of the Act of 1850, and the non-compliance with the conditions on which the privileges depended. The section No. 16 was, at that date, disencumbered and subject to the operation of the compact, whatever might have been its pre-existing state.

That compact had not been fulfilled by an assignment to the State "of equivalent lands, contiguous as may be," under the Act of May 20, 1826. 4 Stat. at L. 179. Shortly after the passage of the Act of 1850, we find Michigan asserting her claim to this section, advertising it for sale, and selling it to the vendor of the plaintiff. We also find the officers of the Land Office of the United States denying the right of the Minnesota Mining Company to enter the land, and admitting the superior title of the State of Michigan, and finally reserving those rights in the patent issued to the Company. We entirely concur with these officers in their decision on the subject of contest, for the reasons we have given. We think that the jury should have been instructed, that the section No. 16 was vested in the State of Michigan at the date of the entry by the Minnesota Mining Company, and that the Company did not acquire title by its patent.

The defendant insists that the title of the plaintiff is invalid, for the reason that the State of Michigan was not empowered by Congress to sell the school reservations. Where such grants have been made to the State, or to the inhabitants of the township for the use of schools, it has been usual for Congress to authorize the sale of the lands, if the State should desire it.

4 Stat. at L. 138, 237, 298; 5 Ib. 600.

But this consent was not, perhaps, necessary, and the application for it is but evidence of the strong desire of the state authorities to act in good faith, and to keep within the pale of the law. 4 Ala. 622.

The trusts created by these compacts relate to a subject certainly *of universal in- [*182] terest, but of municipal concern, over which the power of the State is plenary and exclusive. In the present instance, the grant is to the State directly, without limitation of its power, though there is a sacred obligation imposed on its public faith. We think it was competent to Michigan to sell the school reservations without the consent of Congress.

The defendant further objects, that the officers of the State violated the Statutes of Michigan in selling these lands, after they were known, or might have been known, to contain minerals. Without a nice inquiry into these Statutes, to ascertain whether they reserve such lands from sale, or into the disputed fact whether they were known, or might have been known, to contain minerals, we are of the opinion that the defendant is not in a condition to raise the question on this issue. The officers of the State of Michigan, embracing the Chief Magistrate of the State, and who have the charge and superintendence of this property, certify this sale to have been made pursuant to law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim in privity with Michigan, but holds an adverse right, and is a trespasser upon the land, to which her title is attached.

Michigan has not complained of the sale, and retains, so far as the case shows, the price paid for it. Under these circumstances, we must regard the patent as conclusive of the fact of a valid and regular sale on this issue.

Upon the whole record, we think the jury should have been instructed, that if they found the facts thus given in evidence to be true, the plaintiff was entitled to recover the premises in question.

Judgment reversed; cause remanded—a venire to issue.

Rev'g—6 McLean, 93.

THE SCHOONER FREEMAN, her Tackle, etc., Charles Hickox, Claimant and Appellant,

v.

ALVAH BUCKINGHAM, Philo Buckingham, Benjamin H. Buckingham and James W. M'Cullok, Libelants.

(See S. C. 18 How. 182–192.)

False bills of lading create no lien, even in favor of innocent holder.

False bills of lading issued by master, without the knowledge of the owner of the vessel, cannot operate to create a lien under the maritime law, binding the owner's interest in the vessel.

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In favor of a bona fide holder of such bills of lading procured from the master by the fraud of an owner pro hac vice, the general owner is not estopped to show the truth, though the special owner would be.

Contracts of affreightment entered into with the master in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts.

A wilful fraud committed by the master on a third person, by signing false bills of lading, is not within his agency, and does not bind the owner, even in favor of an innocent purchaser, if the facts upon which his power depended did not exist.

Argued Jan. 15, 1856. Decided Jan. 29, 1856.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The libel in this case was filed in the District Court of the United States for the Northern District of New York, by the appellees, to recover damages arising from the non-performance of two contracts of affreightment. The District Court having entered a decree dismissing the libel with costs, the Circuit Court, on appeal, overruled the decision and entered a decree in favor of the libelants for $5,775.34, with interest and costs. Whereupon the claimant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. S. G. Haven, for appellant:

The claimant had agreed to sell the schooner Freeman, of which he was owner, to John Holmes for $4,500, payable in five installments, and on such payments being made, and certain other conditions complied with, he agreed to give said Holmes a bill of sale. This agreement did not devest the property of the claimant in the schooner.

Hilliard on Sales, pp. 18 to 23; Barrett v. Pritchard, 2 Pick. 512; Ayre v. Bartlett, 9 Pick. 156; West v. Bolton, 4 Vt. 558; Herring v. Willard, 2 Sand. Sup. Ct. 418; 2 Kent's Com. 497; Strong v. Taylor, 2 Hill. 326.

The opinion of Mr. Justice Nelson "that John Holmes must be considered the owner of the schooner, as it respects the rights and interests of third persons dealing with him in the usual way, etc.," cannot be maintained.

Barrett v. Pritchard, 2 Pick. 516.

If Hickox had directed the master to sign bills of lading, or given him authority to do so, without having the flour on board, the schooner would have been bound, or the owner would have been estopped from denying the shipment had been made; but where there is no fraud, and the master has only general authority as such, he cannot sign a bill of lading for goods not delivered, so as to charge the owner of the vessel, even when the bill of lading has been assigned or indorsed for value.

Grant v. Norway, 70 Eng. Com. Law. 664.

The signatures of the master to the bills of lading were procured by fraud or were forged. As between Holmes and Hickox, they were void. The libelants, if they had been indorsees of the bills for value, would take nothing under them. As they make title to the pretended flour only by showing Holmes shipped it, and bills of lading procured, by felony, by fraud, or forgery, are no evidence of that fact, nor do they estop anyone.

King v. Richards, 6 Whart. 418; Berkley v. Watling, 7 Ad. & E. 29; 34 Eng. Com. Law, 22; Bates v. Todd, 1 Moo. & R. 106; Angell on Carriers, secs. 231-337; Abb. Ship. 324, 325; Bates v. Stanton, 1 Duer, 79, and cases there cited.

But the pretended flour was consigned to libelants as factors of S. Holmes & Co., not as owners. By the bills, they were not interested in it; the consignment was "for account of S. Holmes & Co." This would have given the libelants no right or title to the flour, had it been on board the schooner. Holmes could have sold it at any time before it actually reached the libelants.

Patten v. Thompson, 5 M. & S. 350; Russell on Factors and Brokers, 202, 203; Law Lib. Vol. XLVIII; Grove v. Brien, 8 How. 429-438; Conard v. Atlantic Ins. Co. 1 Pet. 386-445; Kinlock v. Craig, 3 T. R. 119.

No contract about transferring interest is pretended, except what appears upon the bills of lading.

Winter v. Coit, 3 Seld. 288.

Mr. John Ganson, for appellees:

The appellees were the consignees of the property, and as such advanced money upon the faith of the shipments, and the contract contained in the contracts of affreightment.

By such consignment in advance, they ac-

NOTE.—Lien of the contract of affreightment on the vessel.

By the general maritime law the vessel is bound to the shipper for the performance of a contract of affreightment made with the master, whether by charter-party, by bill of lading, or by parol. The Flash, Abb. Adm. 67; The Rebecca, Ware, 188; The Phebe, Ware, 263; The Paragon, Ware, 322; Morewood v. Ennequist, 23 How. 491.

The master may, acting in good faith and within the scope of his apparent authority, make a contract of affreightment for the vessel, and for the performance of such contract the vessel will be bound in rem. Jackson v. The Julia Smith, 6 McLean, 484; S. C. Newb. 61; The Henrick Hudson, 7 Law Rep. N. S. 93.

The master of a vessel cannot subject the ship in rem, or his co-owners, to a responsibility for safe carriage or delivery of cargo not actually laden on board of the vessel for transportation in her lawful employment. 19 How. 82; 2 Eng. L. & Eq. 333; 29 Eng. L. & Eq. 323; Montell v. The William H. Rutan, 1 Int. Rev. Rec. 125.

If goods are damaged through fault or neglect of the master, or want of care in respect to their storage, the party has a remedy against the vessel as well as against the persons chargeable. The Waldo, Daveis, 161; S. C. 4 Law Rep. 382.

The ship is hypothecated, by marine law, in every contract of affreightment, whether by charter-party or bill of lading to the shipper, for any damage his goods may sustain from the insufficiency of the vessel or the fault of the master or crew. The Casgo, Daveis, 184; S. C. 4 Law. Rep. 471; The Sarah, 2 Sprague, 30; Talbot v. Wakeman, 19 How. Pr. 36.

The vessel is also liable for damage to goods, partly attributable to bad stowage. Brower v. The Water Witch, 19 How. Pr. 241; also for damage caused by goods of one shipper to those of another. The Cheshire, 2 Sprague, 28.

Claim of shippers of cargo for damages for breach of contract of affreightment is a lien on the vessel next after that of seamen's wages and before that of materialmen. Hatton v. The Melita, 3 Hughes, 494.

Where there is no contract or agreement of affreightment between parties, vessel is not subject to a maritime lien as security for the performance of a contract to transport a cargo. The Keokuk, 9 Wall. 517.

As to procedure to enforce shipper's lien upon vessel, see The Belfast, 7 Wall. 624.

See also, as to lien of the contract of affreightment on the vessel—note to 70 L.R.A. 432.

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quired a property in the flour. The delivery of the bills of lading to the appellees, and the advancement of money upon the faith thereof, were equivalent to an actual delivery of the property to them as security for the advance.

Gibson v. Stevens, 8 How. 384; Conard v. Atlantic Ins. Co. 1 Pet. 445; Bank of Rochester v. Jones, 4 N. Y. 497.

It is a well established rule of the maritime law of this country, that a ship is bound to the merchandise, and the well established practice of our admiralty courts to entertain proceedings in rem for the non-performance of contracts of affreightment.

The Rebecca, 1 Ware, 188; The N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. 344; The Volunteer, 1 Sumn. 551.

Were the contracts in question made under such circumstances as to bind the vessel? The master was acting under the employment of Holmes. The vessel was in the possession of Holmes; he was running her at his own expense and risk, and for his own benefit. The appellant had no interest in her earnings, and was not liable for her debts. Holmes, not the appellant, was, therefore, owner of the vessel within the signification of that term as used by the maritime law, with reference to the responsibility for the master's contracts.

Reynolds v. Toppan, 15 Mass. 370; Hallet v. Col. Ins. Co. 8 Johns. 272; The Phebe, 1 Ware, 263; Cutler v. Winsor, 6 Pick. 335.

The person in possession of the vessel under a conditional contract of purchase, is the owner within the rule referred to.

Leonard v. Huntington, 15 Johns. 298; Wendover v. Hogeboom, 7 Johns. 308; Thorn v. Hicks, 7 Cow. 697.

It is upon this rule that a mortgagee out of possession is not liable for supplies, but is liable if in possession.

McIntyre v. Scott, 8 Johns. 159; Phillips v. Ledley, 1 Wash C. C. 226; Miln v. Spinola, 4 Hill, 176; Champlin v. Butler, 18 Johns. 169.

Hence, also, a person running a vessel under a charter-party is liable for its debts, and the general owner is not; and the vessel is liable for the contracts of the charterer's master.

Drinkwater v. The Spartan, 1 Ware, 149; The Phebe, 1 Ware, 263.

If the property reverts as in case of a charter-party at its expiration, the vessel goes back to the general owner, subject to the admiralty liens created in the hands of the original vendee or charterer.

The appellant was a mere mortgagee out of possession. The master was not his agent, but derived his authority over the vessel, and to make contracts binding upon her, from his employer, Holmes. Contracts of affreightment are such as bind the vessel to answer in specie for their non-performance. If they were made by the master, under such circumstances as to render the person who was pro tempore the owner, personally responsible for their performance, then it follows that the vessel is liable also.

The Druid, 1 Wm. Rob. 339.

The master and owner, Holmes, cannot deny even the receipt of the property on board as against these appellees, for it would be bad faith in them to do so. Much less can they deny the contract to carry the flour, upon the faith of which and the shipment of receipts declared in the bills of lading, appellees parted with their money.

Niles v. Culver, 8 Barb. 205; Abb. Ship. 323 (marg.); Foster v. Newland, 21 Wend. 94.

The appellant cannot impeach these contracts as between himself and the appellees.

1. Because he was not the owner of the schooner at the time the contracts were made and broken, in the eye of the maritime law.

2. Because, by the contract with Holmes for the sale of the vessel, he is in law deemed to have taken the risks of its becoming hypothecated, to answer for the breach of maritime contracts, as well as dangers sustained by collisions, and other marine torts.

3. Because he allowed Holmes to hold himself out to the world as the owner of the vessel.

The appellant should be required to pay the costs personally, because the fund realized from the sale of the vessel is insufficient to pay the appellees claim.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Northern District of New York.

The appellees filed their libel in the District Court, alleging that they are the consignees named in two bills of lading, signed by the master of the schooner Freeman, which certify that certain quantities of flour had been shipped on board the schooner by S. Holmes & Company, at Cleveland, in the State of Ohio, to be carried to Buffalo, in the State of New York, and there safely delivered—dangers of navigation excepted—to an agent named in the bills of lading, to be by him forwarded to the libelants, in the City of New York. That though this merchandise was thus consigned to the libelants for account of the shipper, yet, on receipt of the bills of lading, and on the faith thereof, the libelants made advances to the shippers. That thirteen hundred and sixty barrels of flour mentioned in the bills of lading were not delivered at Buffalo, though the delivery was not prevented by any danger of navigation.

In accordance with the prayer of the libel, the schooner was arrested, and the appellant intervened as claimant.

It appeared that, a short time before these bills of lading were *signed, the claim- [*188 ant being the sole owner of the schooner, contracted with John Holmes to sell it to him for the sum of $4,000, payable by installments of $500, at different dates; that, by the contract, John Holmes was to take possession of the vessel, and if he should make all the agreed payments, the claimant was to convey to him; that only one installment had become payable, and had been paid, when the vessel was arrested; that the vessel was delivered to John Holmes, under this contract, and he allowed his son, Sylvanus Holmes, to have the entire control and management of the schooner, which was in his employment, and victualed and manned by him, and commanded by a master whom he appointed at the time the bills of lading in question were signed.

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It further appeared that Sylvanus Holmes transacted business under the style of S. Holmes & Company; that the flour mentioned in these bills of lading as having been shipped by him, and which the master failed to deliver, never was in fact shipped—nor, so far as appeared, had Sylvanus Holmes any such flour; and that he induced the master to sign the bills of lading by fraud and imposition, intending to use them—as he did use them—as instruments to impose on the libelants, and obtain advances on the faith thereof.

To state succinctly the legal relations of these parties, it may be said that the claimant was the general owner of the vessel; that Sylvanus Holmes was owner pro hac vice; that the libelants are holders of the bills of lading, for a valuable consideration parted with, in good faith, on the credit of the bills of lading; but that the bills of lading themselves are not real contracts of affreightment, but only false pretenses of such contracts; and the question is, whether they can operate, under the maritime law, to create a lien, binding the interest of the claimant in the vessel.

Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it.

In this case there was no cargo to which the ship could be bound, and there was no contract made, for the performance of which the ship could stand as security.

But the real question is, whether, in favor of a bona fide holder of such bills of lading procured from the master by the fraud of an owner pro hac vice, the general owner is estopped to show the truth, as undoubtedly the special owner would be. This question does not appear to have been made in the court below, 189*] *the distinction between the special and general owner not having been insisted on. So large a part of the carrying trade of this country is carried on in vessels of which the masters, or other persons, are owners pro hac vice, and the practice of taking security by way of mortgage of vessels has become so common, while, at the same time, the confidence placed in bills of lading as the representatives of property is so great and so important to commerce, that the relative rights of the holders of such documents, and of the general owners and mortgagees of vessels, which are involved in this case, are subjects of magnitude; and the case has received the attentive consideration of the court.

The first and most obvious view which presents itself is, that the claimant in this case is not personally liable on these bills of lading. The master who signed them was not his agent, and they created no contract between him and the consignor or consignee, or any third person who might become their holder. Abb. on Ship. 42 and note, 57 and note. And it has been laid down by the High Court of Admiralty in England (The Druid, 1 Wm. Rob. 399), that "in all causes of action which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship, where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds by taking a lien on the vessel. The liability of the ship, and the responsibility of the owners in such cases, are convertible terms; the ship is not liable if the owners are not responsible; and vice versa, no responsibility can attach on the owners if the ship is exempt and not liable to be proceeded against." See, also, The Bold Buccleugh, 2 Eng. L. and Eq. 537.

Though this language is broad enough to cover all cases, whether of contract or tort, it should be observed that the case before the court was one of willful tort by the master, and that there was no occasion to advert to any distinction between a general and special owner, or to consider whether the interest of the former in the vessel could be bound by the act of the latter, or of the master appointed by him.

We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner.

In the case of The Phebe, 1 Ware, 263, Judge Ware has traced the power of the master to bind the vessel by contracts of affreightment, to the maritime usages of the middle ages. So *far as respects such contracts [*190 made by the master in the usual course of the employment of the vessel, and entered into with a party who has no notice of any restriction upon that apparent authority, those maritime usages may safely be considered to make part of our law; though we should hesitate to declare that their effect has not been modified by our own commercial law, which has recognized interests and rights unknown to the commercial world when those usages obtained. And we desire to be understood as not intending to say that all contracts made by a master within the usual scope of his employment, which, by the ancient maritime law, would have created liens on the vessel, will now do so, in such manner as to bind the interests in the vessel of parties whom he does not represent as agent. For the ground on which we rest the authority of a master, who is either special owner or agent of the special owner, is, that when the general owner intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel. The general owner must be taken to know that the purpose for which the vessel is hired, when not employed to carry cargo belonging to the hirer, is to carry cargo of third persons; and that bills of lading, or charter-parties, must, in the invariable regular course of that business, be made, for the performance of which the law confers a lien on the vessel.

He should be considered as contemplating and consenting that what is uniformly done may be done effectually; and he should not be

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allowed to say that he did not expect, or agree, that third persons, who have shipped merchandise and taken bills of lading therefor, would thereby acquire a lien on a vessel which he has placed under the control of another, for the very purpose of enabling him to make such contracts to which the law attaches the lien.

See The Cassius, 2 Story, 93; Webb v. Pierce, 1 Curtis, 107.

But if this be the ground upon which the interest of the general owner is subjected to liens, by the act of those who are not so his agents as to bind him personally, this ground wholly fails in the case at bar.

There can be no implication that the general owner consented that false pretenses of contracts, having the semblance of bills of lading, should be created as instruments of fraud; or that, if so created, they should in any manner affect him or his property. They do not grow out of any employment of the vessel; and there is as little privity or connection between him, 191*] or his vessel, *and such simulated bills of lading, as there would be between him and any other fraud or forgery which the master or special owner might commit.

Nor can the general owner be estopped from showing the real character of the transaction, by the fact that the libelants advanced money on the faith of the bills of lading; because this change in the libelant's condition was not induced by the act of the claimant, or of anyone acting within the scope of an authority which the claimant had conferred. Even if the master had been appointed by the claimant, a willful fraud committed by him on a third person, by signing false bills of lading, would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more an apparent unlimited authority to sign bills of lading, than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship, when, in case of disaster, his power of sale arises. But the authority, in each case, arises out of, and depends upon, a particular state of facts. It is not an unlimited authority in the one case more than in the other; and his act, in either case, does not bind the owner, even in favor of an innocent purchaser, if the facts upon which his power depended did not exist; and it is incumbent upon those who are about to change their condition, upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends.

Though the law on this point seems to have been considered in Westminster Hall not to have been settled, when the eighth edition of Abbot on Shipping was published, in 1849 (Abb. on Ship. 325), we take it to be now settled, by the cases of Grant v. Norway, 2 Eng. L. & Eq. 337; Hubbersty v. Ward, 18 Eng. L. & Eq. 551; and Coleman v. Riches, 29 Eng. L. & Eq. 323.

The same law was much earlier laid down in Walter v. Brewer, 11 Mass. 99.

But the case at bar is much stronger in favor of the claimant, because the master was not appointed by him, and the signature *of [*192 the bills of lading was obtained by the fraud of the special owner.

In Gracie v. Palmer, 8 Wheat. 605, the question came before the court, whether the charterer and the master could, by a contract made with a shipper who acted in good faith, destroy the lien of the owner on the goods shipped, for the freight due under the charter-party. It was held they could not; and the decision is placed upon the ground of want of authority to do the act. It was admitted by the court that the charterer and master might impose on a shipper in a foreign port, by making him believe the charterer was owner, and the master his agent. But it was considered that so far as respected the owner, the risk of loss from such imposition lay on the shipper. So, in this case, even if the special owner and the master had combined to issue these simulated bills of lading, they could not create a lien on the interest of the general owner of the vessel. Upon the actual posture of the facts, the master having been defrauded by the special owner into signing the bills of lading, it would be difficult to distinguish them, so far as respects the rights of the claimant, from the bills forged by the special owner. On these grounds, we are of opinion that, upon the facts as they appear from the evidence in the record, the maritime law give no lien upon the schooner; that the claimant is not estopped from alleging and proving those facts; and consequently, that the decree of the court below must be reversed, and the cause remanded, with directions to dismiss the libel, with costs.

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*THE HEIRS OF GENERAL LAFAY- [*197
ETTE,
Plaintiffs in Error,
v.
JOSEPH KENTON et al.,
and
THE HEIRS OF GENERAL LAFAYETTE,
Plaintiffs in Error,
v.
EDWARD C. CARTER et al.

(See S. C. 18 How. 197-199.)

Courts have no power to revise action of Congress as to titles of lands.

By Act of 1803 Congress authorized land warrant to General Lafayette, of lands in Orleans Territory but not to include lands rightfully claimed by others or improved lands.

Until the Register certified that the land was not rightfully claimed by another, the Secretary was not authorized to issue the patent.

Courts of justice have no power to revise what Congress or commissioners acting under its authority, have done in confirmation of titles of public lands.

Against the United States and the person to

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whom the warrant is issued, such confirmations, being a condition imposed on the location, are conclusive.

Argued Jan. 17, 1856. Decided Jan. 29, 1856.

ERRORS to the Circuit Court of the United States for the Eastern District of Louisiana.

These suit were brought by petitions filed in the Circuit Court of the United States for the Eastern District of Louisiana, by the plaintiffs in error, for the recovery of certain tracts of land. The court below having entered a decree in favor of the defendant, dismissing the petitions, with costs, the petitioners sued out these writs of error.

A further statement appears in the opinion of the court.

Mr. Miles Taylor, for the plaintiffs in error:

The instant the "option" given was exercised by Lafayette, by making his selection and "locating" a portion of the grant made to him on the "vacant land situate beyond the six hundred yards lately abandoned by Congress to the corporation" of the City of New Orleans, his right to the land became complete, if the land designated was "the property of the United States."

Ladiga v. Rowland, 2 How. 581; Lessieur v. Price, 12 How. 59.

There was no express reservation in favor of claimants under the Acts of 1805, 1806 and 1807; and as Lafayette had a right to locate at his option "on any land, the property of the United States in the Territory of Orleans," his right under a legal location could not have been devested by the filing of a claim subsequently.

Stoddard v. Chambers, 2 How. 284; McCabe v. Worthington, 16 How. 86; White v. Wells' Ex'rs, 5 Mart. 658.

If the confirmations made by the Commissioners under the Acts of Congress of 1805, 1806 and 1807, gave any rights to the confirmees, such rights were equitable rights. No legal rights to the lands embraced in the claims of those claimants could vest in them, unless patent certificates and patents were issued to them according to law. In the absence of such patent certificates and patents, the legal title to the land embraced in the patent of Lafayette was in the plaintiffs.

Burgess v. Gray, 16 How. 63; West v. Cochran, 17 How. 412.

Messrs. J. P. Benjamin and Louis Janin, for defendants in error:

What was granted by this patent?

Clearly not the $503\frac{88}{100}$ acres surveyed by Turner, as now claimed by the plaintiffs, but only "such parts and parcels thereof as are not legally claimed by any other person or persons whomsoever."

The survey itself states what portions of the land were vacant. These were the two pieces of land nearest to the city. On both of these tracts the word "vacant" is written. Their aggregate contents are added on the larger tract, thus showing that the vacant lands within the limits of the survey, amounted to 114.74 acres.

This is the full extent of the land to which Gen. Lafayette's patent applies. This extent of land Gen. Lafayette and his assigns have always peacefully possessed or recovered by suit.

Blanc v. Lafayette and Hagan, 11 How. 104.

Mr. Justice Catron delivered the opinion of the court:

By an Act of 1803, Congress authorized the Secretary of War to issue to Major General Lafayette, land warrants amounting in all, to 11,520 acres. By the Act of March 2, 1805, he was authorized to locate his warrants on any lands, "the property of the United States," within the Orleans Territory; the locations to be made with the Register of a land office established there, and the surveys were to be executed under the authority of the surveyor of the public lands south of Tennessee. Patents were directed to be issued, when surveys of the respective tracts were presented to the Secretary of the Treasury, "together with a certificate of the proper Register (in each case), stating that the land surveyed was not rightfully claimed by any other person." And the Act further provided, that no location should include any improved lands or lots.

By an Act passed in 1806, entries were authorized for any quantity of land not less than 500 acres.

*On the 26th day of November, 1807, [*198 General Lafayette (by his agent) located 503 acres, calling for "vacant lands situated beyond the line of 800 yards lately abandoned by Congress to the corporation of the said city, round the fortifications of the same."

Owing to the unsettled state of private land claims near the City of New Orleans, the location was not surveyed until March, 1825, when the principal surveyor certified to the Register that he had surveyed for General Lafayette "a tract of land situate in the parish of Orleans beyond the line of 600 yards abandoned by Congress to the corporation of the City of New Orleans, having such courses, distances, boundaries and contents, as are represented in the annexed plat of survey."

Pursuant to the Act of March 2, 1805, the Register certified that "the lands contained in the survey returned to his office were vacant, with the exception of the parts designated as private claims."

On the 4th day of July, 1825, a patent issued, which, by its recitals, describes the out boundaries of the 500 acres, and then the granting clause declares that there is "granted to said General Lafayette and to his heirs, all such parts or parcels of the tract of land above described, as are 'not legally claimed' by any other person or persons whomsoever."

From the recitals in the patent, it might be inferred that General Lafayette's entry had the same boundaries as described in the patent; the fact, however, is, that the description contained in the patent is the first description in words, of the land claimed under the entry; the patent being, in fact, founded on the figurative plan, which is attached to and forms an essential part of the patent, and to this plan we are forced to look for a certificate of the Register, "stating that the land is not rightfully claimed by any other person."

Until the certificate was made, the Secretary was not authorized to issue the patent, and, to enable the Register to make the proper certificate, he was compelled to delay till Congress, either directly or indirectly, through commissioners, ascertained the rightful claims of others lying within the limits supposed to be

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covered by General Lafayette's location; and as the location, in the form it was surveyed (and no doubt as claimed to exist when it was made), notoriously interfered with claims of different private individuals, and covered possessions protected by the Act of March 3, 1807, no reason could be urged, on behalf of the locator, why a survey and certificate should be made and returned to the Secretary of the Treasury before the private claims were duly ascertained; it being the obvious object of the locator to obtain "the parts or parcels of land," within his out 199*] boundaries, *that should chance to be found vacant, after the private claims had been acted on and confirmed or rejected.

As respected these private rights and pretensions, Congress reserved to itself the power to deal with them by such means as were deemed appropriate; and by the course of action it prescribed General Lafayette was compelled to abide. The case of West v. Cochran, 17 How. lays down the governing rule on the subject.

The courts of justice have no power to revise what Congress, or commissioners acting by its authority, have done in their confirmations of the titles here assailed. Against the United States these confirmations are conclusive, and they are equally so against General Lafayette; this being a condition imposed on his location by the Act of 1805 above quoted, and which is affirmed in his patent. Titles, covering the land sought to be recovered by the petitioners below, were confirmed to others before the patent to General Lafayette was issued, which appears by documents found in the record. But, if these documents were wanting, we are of opinion that the patent, and the figurative plan, with the designations on it, where the private confirmed titles, and the vacant lands are laid down on the plat, and noted as private property or as vacant, furnish evidence that nothing passed by the grant but the lands noted as being vacant.

It is, therefore, ordered that the judgment in the Circuit Court be affirmed in the respective cases cited in the caption.

241*] *THE UNITED STATES,
Plantiffs in Error,
v.
THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY.

(See S. C. 18 How. 241-243.)

Appeal—discontinuance—when granted.

The withdrawal or discontinuance of an appeal is not a matter of course, but only by leave of the court.

The discontinuance is usually granted unless some special reason be shown for retaining the case.

Usually the court will not allow it, if the party intend at some future time to bring a new appeal.

But where the Attorney-General avers that there are other questions than those appearing on the record which he deems material to be considered, leave to discontinue will be granted.

Argued Jan. 21, 1856. Decided Jan. 29, 1856.

IN ERROR to the Supreme Court of the Territory of Minnesota.

This suit was brought in the District Court of the United States for the First District of the Territory of Minnesota, by the United States, against the M. & N. W. R. R. Co., for an alleged trespass upon lands.

The judgment of the court was in favor of the defendants. This judgment, on appeal, was affirmed by the United States Supreme Court for the Territory of Minnesota.

Upon a writ of error sued out by the United States, the cause was thereupon removed to this court, where the record was filed by the defendants, and the cause docketed on or about Dec. 20, 1854.

A further statement of the case appears in the opinion of the court.

On motion by the Atty-Gen. to dismiss the writ of error, or strike the entry thereof from the docket.

Mr. C. Cushing, Atty-Gen., for the plaintiffs in error.

The judgment below was recorded Dec. 8, 1854.

The writ of error was allowed Dec. 9, 1854; and it is made returnable to this court on the fourth Monday of the same Dec.: all of which constitutes a fatal defect. The term of this court in that year commenced Dec. 4. Its regular return day is the 1st day of the term. A writ of error must be brought tested of the term next preceding that to which it is returnable.

Villalobos v. The U. S. 6 How. 81, 90, and cases there cited.

The entry was made by the defendants in error, prematurely, in anticipation of the expiration of the thirty days, which time the appellant is entitled to, for election whether himself to make entry or not.

Hartshorn v. Day, 18 How. 28, ante p. 272.

The suit was commenced in the name of the United States, on defective pleadings without the knowledge of the department, to which the direction of all such suits belongs, and contrary to law and standing instructions; and the prosecution of the appeal is not desired by the Home Department.

Mr. R. Johnson, for defendant in error:

The cause was regularly before this court pursuant to the 43d rule, and presents a complete record of facts demanding a judgment of law in the matters therein arising, and which are in dispute between the parties.

If the plaintiff wishes to discontinue, he cannot do so without leave of the court, which may be refused.

Booth v. Lycester, 1 Keen, 255; Carrington v. Holley, 1 Dick. 280.

When the Court of Appeals is possessed of the record by a due return of the writ, the plaintiff cannot withdraw or discontinue the case without the consent of the adverse party or the leave of the court. The same doctrine applies to appeals.

Yeaton v. Lenox, 8 Pet. 123, 124; Deneale v. Stumps, 8 Pet. 527; Montalet v. Murray, 3 Cr. 249; Radford v. Craig, 5 Cr. 289; U. S. v. Phillips, 8 Pet. 776; Mitchell v. Russell, 3 Stew. 53; Prettyman v. Waples, 4 Harr. Del. 299; Leving v. Calvry, 12 Mod. 561.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Supreme Court of the Territory of Minnesota.

An action of trespass was brought by the

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United States against the defendants before the District Court of the First District, in the County of Goodhue, in said Territory, for an alleged trespass committed on section 3, in township No. 112 north, of the public lands.

The defendants justified under an Act of Incorporation by the Legislature of the said Territory, passed March 4, 1854, and by which they were empowered to construct a railroad from a point on the northwest shore of Lake Superior, and near the mouth of the St. Louis River, across the said Territory of Minnesota, by the way of St. Anthony and St. Paul, over the Mississippi at St. Paul, and to such point on the northern boundary line of the State of Iowa as the Board of Directors might designate, which point should be selected with reference to the best route to the City of Dubuque, provided the location of the road should conform in all respects to such route as might be designated in any Act of Congress granting lands for the construction of a railroad through the Territory.

The Act of Incorporation also provided that any lands granted to the Territory in aid of the construction of this road, should be deemed vested in fee simple in the Company; and further, it is alleged that by an Act of Congress, passed June 29, 1854, for the purpose of aiding in the construction of the road, every alternate section of land designated by odd numbers, for 242*] six sections *in width on each side of the road along the line, was granted to the Territory upon the terms and conditions specified in the said Act; and also that the said defendants caused a survey and location of the road as contemplated by the Act of Incorporation, and that the said road includes the land upon which the trespass complained of was committed, and which is a portion of one of the sections granted to the Territory of Minnesota, by the Act of Congress aforesaid.

The plaintiff to this defense set up, by way of replication, that before the trespasses complained of were committed, namely: on the 4th of August, 1855, an Act was passed by Congress repealing the Act previously passed on the 29th of June, granting land in aid of the construction of said road.

To this replication the defendants demurred, and the plaintiff joined in the demurrer.

The District Court gave judgment for the defendants on the demurrer.

An appeal was taken from this judgment to the Supreme Court of the Territory, where, after argument, the judgment was affirmed. From this judgment the plaintiff has appealed to this court by a writ of error.

The writ of error was made returnable to this court on the fourth Monday of December, 1854, and the record was brought up by the defendants in error, and filed and docketed on the 21st of the same month.

The Attorney-General now moves, on behalf of the United States, to withdraw his writ of error, and discontinue the appeal to this court, which motion is resisted by the counsel for the defendants.

After an appeal brought to the appellate court, the withdrawal or discontinuance of the time is not a matter of course, but, if the plaintiff finds it expedient to discontinue, he must first obtain leave of the court. 2 Daniel's Pr. 1644; 11 Pet. 55. The discontinuance is usually granted on the application, unless some special reason be shown by the defendant for retaining the case with a view to a determination on the merits. Usually the courts will not allow it, if the party intend at some future time to bring a new appeal, as the allowance under such circumstances would be unjust to the defendant. There is no such ground of objection here, as the Attorney-General disclaims trying the questions involved upon the present pleadings. These pleadings, with the exception of some questions arising upon the powers conferred upon the defendants under their Act of Incorporation, confine the issue to the effect and operation of the Act of Congress granting the lands in aid of the construction of the road, and of the subsequent repealing Act. And these, *doubtless, comprise all the [*243 questions which the counsel in the court below, representing the United States, supposed could be material. They are represented very fully and lawyerlike upon the record, and are involved in the judgment rendered in the court below.

The Attorney-General, however, avers that there are other questions than those appearing on the record, which he deems material to be brought to the consideration of the court in deciding upon the force and effect of these Acts of Congress referred to, and without which he is unwilling to submit the case to the final determination of this court; and asks, therefore, for a withdrawal of the appeal. Without expressing any opinion whether there may or may not be questions presented, other than those appearing upon this record, bearing upon the general matters involved in the litigation, the court are of the opinion that the grounds stated by the Attorney-General, and his opinion expressed as the legal representative of the government, are sufficient to justify us in granting leave for the discontinuance.

Some technical grounds have been presented, depending upon the rules and practice of the court for the dismissal of the case from the docket, and of the writ of error, which we have not deemed it important to notice, as we think the motion should be granted upon the general ground stated.

Motion to withdraw and discontinue the appeal by writ of error, in this case granted.

SAMUEL L. CALCOTE, Plff. in Er.,

v.

FREDERICK STANTON and Henry S. Buckner.

(See S. C. 18 How. 243-245.)

Jurisdiction, under 3d clause of 25th section of Judiciary Act.

To give this court jurisdiction, under the 3d clause of the 25th section of the Judiciary Act, the suit must have drawn in question the construction of a statute, etc., of the United States, and the judgment of the state court must have been adverse to the claim set up under it.

This court have not jurisdiction of action, where the construction of no statute under which the plaintiff claimed title or exemption is called for; where the only privilege or exemption which could

NOTE.—What adjudication of state courts can be brought up for review in the U. S. Supreme Court by writ of error to those courts—see note, 62 L.R.A. 513.

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have been drawn in question under the Act were those of the defendants, and the decision was in their favor.

Argued Jan. 22, 1856. Decided Jan. 29, 1856.

IN ERROR to the High Court of Errors and Appeals of the State of Mississippi.

Motion to dismiss for want of jurisdiction.

Mr. J. P. Benjamin, for the defendants in error:

If jurisdiction in the present case exists at all, it must be under the third clause of the 25th sec. of the Judiciary Act. The only sections of the Bankrupt Act subject to construction by a state court, are the 4th and 5th. The 4th section provides for a discharge of the bankrupt in certain cases, and declares that a certificate of discharge shall confer on him "a full and complete discharge of all debts, contracts, and other engagements, etc."

The decision of the State Court has been rendered in favor of this "right, title, privilege and exemption," and not against it, and the jurisdiction cannot therefore attach on this ground.

Strader v. Baldwin, 9 How. 261; Linton v. Stanton, 12 How. 423.

The 5th section provides that "no creditor coming in and proving his debt, shall be allowed to maintain any suit at law, or in equity therefor, but be deemed thereby to have waived all right of action and suit against such bankrupt. The judgment of the State Court was in favor of this right, title, exemption, etc., and not against it; therefore the jurisdiction cannot attach.

Crowell v. Randell, 10 Pet. 368; McKinney v. Carroll, 12 Pet. 67; Gill v. Oliver, 11 How. 529; Williams v. Oliver, 12 How. 111.

Messrs. L. Madison Day and Reverdy Johnson, for the plaintiff in error:

The State Court denied us the right which we claimed under the Bankrupt Act, to impeach the discharges of defendants for the many frauds charged in the bill, and admitted by a naked demurrer of the defendants.

City of Mobile v. Eslava, 16 Pet. 249; Nielson v. Lagow, 7 How. 775; 12 How. 98; Clements v. Berry, 11 How. 408; Erwin v. Lowry, 7 How. 179; 11 How. 167; Smith v. Maryland, 6 Cranch, 286; Martin v. Hunter, 1 Wheat. 304; Owings v. Norwood, 5 Cranch, 344.

This right was properly claimed and set forth in the bill.

Alcott v. Avery, 1 Barb. Ch. 347; 8 Sm. & M. 519; 11 Sm. & M. 464; 1 Story. Eq. Pl. secs. 631, 677, 678

Mr. Justice Grier delivered the opinion of the court:

This case comes before us on a motion to dismiss for want of jurisdiction. It is a writ of error to the High Court of Errors and Appeals of the State of Mississippi.

The plaintiff in error, who was complainant in a bill in equity before the Chancellor of that State, claims jurisdiction for this court to review the judgment of the Court of Appeals, under the 25th section of the Judiciary Act, because the title to his demand comes through a bankrupt assignee, and therefore from an authority exercised under an Act of Congress, and because the judgment of the State Court was against his claim. He contends that his case is within the third clause of this section, which authorizes this court to review the decision of a state court "where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed, etc."

It is not enough to give jurisdiction to this court, under this clause, that the decision of the State Court was against a party claiming title under some statute of, or commission held under, the United States. The origin of the title may be but an accident of the controversy, and not the subject or substance of it. The suit must have drawn in question the construction of such statute or commission, and the judgment of the State Court must have been adverse to the claim set up under them. "The record also must show, if not ipsissimis verbis, at least, by clear and necessary intendment, that such question of 'construction' was raised, and must have been decided in order to induce the judgment. It is not enough to show that the question might have arisen, and been applicable to the case, unless it is further shown on the record that it did arise, and was applied by the State Court to the case." The cases [*245 which establish these principles are too numerous for quotation.

The record before us presents no evidence that such a question did arise, or could have been decided.

The bill shows, that twelve years after the defendants were discharged under the Bankrupt Act, the complainant got an assignment of certain claims against them from creditors who had received their dividends of the bankrupt's assets, without questioning the legality of their discharge; that being thus possessed, he set about "to ferret out the frauds, devices, combinations, priorities, preferences, etc., etc., practiced, done, and given by the defendants;" and that he had discovered numerous instances of preferences given by the defendants to indorsers and other favored creditors previous to their bankruptcy, in consequence of which it was alleged that their certificate of discharge was void. The balances claimed under these assignments, with interest, would amount to near a million of dollars. The averment of the bill, that the assignments to the complainant were for "value received," would be satisfied by the consideration of a dollar or less. The respondents demurred to the bill and set forth numerous causes of demurrer; the chief of which were a want of equity in the bill, and the bar of the Statute of Limitations, or the staleness of the demand. But in no one of them is any objection interposed which called for a construction of the Bankrupt Act, where the complainant claimed any title or exemption under it. The only "privilege or exemption" which could have been "drawn in question" under the Act, were those of the defendant, the validity of whose discharge under it, was impugned. But as the decision was in their favor, the case is not brought within our jurisdiction.

See Strader v. Baldwin, 9 How. 261.

The whole argument for plaintiff in error was expended in endeavoring to prove that the bill ought not to have been dismissed for want of equity or staleness; and, assuming this to be so, it was contended that the court could not

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have done so for these reasons, and consequently their decision might have been the result of some misconstruction of the Bankrupt Law as to the rights claimed by the complainant under it. But, as we have already shown, if the plaintiffs could successfully establish both their premises and conclusion, it would not avail to give us jurisdiction. And we may add, moreover, that we see no reason, from anything that appears on this record, why the State Court might not have dismissed the bill as devoid of equity, and as exhibiting a claim which, if not champertous, is on its face a litigious speculation in stale, abandoned, and, as to much the larger portion, wholly unfounded demands.

The writ of error is, therefore, dismissed for want of jurisdiction.

THE WIDOW AND HEIRS OF BENJAMIN POYDRAS De La LANDE, Pl'ffs in Er.,
v.
THE TREASURER OF THE STATE OF LOUISIANA.

(See S. C. 18 How. 192-196.)

Jurisdiction over state court—ground must appear on record, and must have been passed upon by court below.

This court can exercise no appellate power over state court except in a few specified cases; and the ground of jurisdiction must be stated with precision, the point must have been passed upon by the court below, and the ruling to bring the case under the 25th section of the Judiciary Act must appear on the record to have been against the right claimed.

Any reason assigned for a rehearing or new trial is not sufficient as a ground of jurisdiction.

Argued Jan. 23, 1856. Decided Jan. 31, 1856.

IN ERROR to the Supreme Court of the State of Louisiana.

This suit was brought in the Second District Court of New Orleans, by the Treasurer of the State of Louisiana, claiming on behalf of the State a tax of ten per cent. on the amount of the succession of Benjamin Poydras de la Lande, inherited by persons alleged to be citizens of France residing in France.

The answer of the defendants denied their liability, alleging that there were "citizens of the State of Louisiana, legally domiciliated in said State of Louisiana."

The court gave judgment for the State, which judgment or appeal was affirmed by the Supreme Court of the State of Louisiana.

The defendants brought the case here on a writ of error.

A further statement of the case appears in the opinion of the court.

Mr. Louis Janin, for the plaintiffs in error:

The validity of the Statute of Louisiana was called in question in our petition for a rehearing. The refusal of the rehearing was equivalent to an adverse decision.

Williams v. Norris, 12 Wheat. 117; Crowell v. Randell, 10 Pet. 368.

The constitutional question was raised by us as soon as its applicability was shown by the decisions of the Supreme Court of Louisiana.

The law in question was a regulation of commerce which is reserved to Congress.

Constitution, art. 1, sec. 8, 3; Gibbons v. Ogden, 9 Wheat. 190; 7 How. 412.

The Act was also contrary to the constitutional provision, that citizens of each State should be entitled to all privileges and immunities of "citizens in the several States."

Corfield v. Coryell, 4 Wash. C. C. 380; Story, Const. sec. 1806.

Mr. J. P. Benjamin, for the plaintiff in error:

This court is without jurisdiction. The averment in the petition for a rehearing, does not question the validity of the Statute. It was an argument to show that the court had misconstrued the Statute.

Bank of Cincinnati v. Buckingham, 5 How. 317.

The application for a rehearing cannot raise any new question. The Supreme Court of Louisiana has repeatedly so decided.

Sorbe v. Merchants' Ins. Co. 6 La. 193; Caldwell v. Western Ins. Co. 19 La. 48; Rightor v. Phelps, 1 Rob. 330; Garland v. Holmes, 1 La. Ann. 406.

Under the decisions of this court, the validity of the Statute does not appear upon the record to have been brought in question.

Armstrong v. Treasurer, etc. 16 Pet. 281; Grand Gulf Co. v. Marshall, 12 How. 166; Lawler v. Walker, 14 How. 153; Robertson v. Coulter, 16 How. 106.

The plaintiffs in error were not citizens of the United States.

Mager v. Grima, 8 How. 491; Desbois' case, 2 Mart. 185, is not law; 2 U. S. Stat. at L. 153; State v. Primrose, 3 Ala. 546.

Even if Poydras were a citizen, his wife never became so.

Shanks v. Dupont, 3 Pet. 242; Sutliff v. Forgey, 1 Cow. 95.

The Statute in question is not contrary to the 2d section of the 4th art. of the Constitution.

Story, Const. sec. 1806; The Federalist, No. 42, No. 80; Journal of Convention, 222, 302; Corfield v. Coryell, 4 Wash. C. C. 380; Abbott v. Bailey, 6 Pick. 92; Campbell v. Morris, 3 Har. & McH. 554; Ward v. Morris, 4 Har. & McH. 341; Austin v. State, 10 Mo. 591; Commonwealth v. Milton, 12 B. Mon. 212; Wiley v. Parmer, 14 Ala. 627.

Mr. Justice McLean delivered the opinion of the court:

This is a writ of error to the Supreme Court of Louisiana.

The Treasurer of the State of Louisiana instituted a suit in the Second District of New Orleans, claiming, in behalf of the State, a tax of ten per cent. on the amount of the succession of Benjamin Poydras de la Lande, inherited by persons alleged to be citizens and residents of France.

This tax was claimed by virtue of two Acts of the Legislature of Louisiana, one passed on the 26th of March, 1842, which provided "that each and every person, not being domiciliated in this State, and not being a citizen of any state or territory of the Union, who shall be entitled—whether as heir, legatee or donee—to the whole or any part of the succession deceased, whether such person shall have died in this State or elsewhere, shall pay a tax of ten per cent. on all sums, or on the value of all

NOTE.—What the record must show respecting the presentation and decision of a federal question in order to confer jurisdiction on the U. S. Supreme Court of a writ of error to a state court—see note, 63 L.R.A. 471.

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property which he may actually receive, or so much thereof as is situated in this State."

The 76th section of the Act of March 21, 1850, provides, that "every executor, curator, tutor or administrator, having the charge or administration of succession property belonging in whole or in part to a person residing out of this State, and not being a citizen of any other state or territory of the United States, shall be bound to retain in his hands the amount of the tax imposed by law, and to pay over the same to the State Treasurer."

Benjamin Poydras, an old and wealthy naturalized citizen of Louisiana, having died in 1851, in France, leaving a widow and three minor children in that country, the Treasurer of the State of Louisiana, filed, on the 27th of February, 1852, a petition in the Second District Court of New Orleans against the widow, as tutrix of her minor children, claiming ten per cent. on the amount of the property left by the deceased in Louisiana. The grounds for this claim, as alleged in the petition, are "that the said tutrix, as well as her said minor children, are all citizens of France, and reside in that country."

195*] *The answer of the defendants denied their liability for the payment of the tax, alleging that they were citizens of the State of Louisiana, legally domiciliated therein. The lower court gave judgment for the State; which judgment, on appeal, was affirmed by the Supreme Court of the State.

This being a writ of error, under the 25th section of the Judiciary Act of 1789, the defendant in error insists that there is no jurisdiction. That section provides, that on "a final judgment or decree in any suit in the highest court of law or equity in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision is in favor of such, their validity may be re-examined, and reversed or affirmed in the Supreme Court of the United States, upon a writ of error."

In the petition, the respondents are alleged to be citizens and residents of France. In their answer, they allege that the deceased, in the year 1804, settled in Louisiana, and became a citizen of the United States, and maintained his residence and citizenship in Louisiana; that his last visit to France was intended to be temporary, but he was involved in lawsuits in that country for years, though he intended to return to Louisiana, and would have done so, had he not died. During his absence he acquired a large amount of property in Louisiana, and he continued to express his determination to return to that country during his life. And they alleged that they were citizens of the State of Louisiana.

In the final judgment in the lower court, the judge says:

"The deceased was a French subject, who was born and died in France; and his heirs, now residents and natives of France, who have never been in this State, claim his estate. It appears to me that they came within the purview of the Act of 1842." A judgment for $45,208.80 and costs of suit was entered against the defendants. An appeal was taken to the Supreme Court of the State, where the judgment of the inferior court was affirmed.

It does not appear from the pleadings, and procedure in the inferior or in the Supreme Court, that the question was made whether the Acts of 1842 and 1850 were in conflict with any provision of the Constitution of the United States.

The Supreme Court held that the tax in question "attaches not only to property falling to alien heirs, who are non-residents, but also to the property falling to citizens of our own State residing abroad." And they say the object of the law is to discourage absenteeism. The court held that neither the Act of *1842 nor that of 1850 is repugnant to [*196 the 187th article of the Constitution of the State, of 1845.

Up to the final judgment in this case, in the Supreme Court of Louisiana, no question was raised by the counsel nor decided by the court, involving the constitutionality of either of the Acts before us, under the Constitution of the United States. Indeed, this is not asserted by the counsel; but it is contended that such a question was raised and decided on the petition for a rehearing. If this were admitted, does it bring the case within the 25th section? It must appear from the record that one or both the Acts referred to are not only repugnant to some provision of the Constitution of the United States, but that the point was presented to the court, and it decided in favor of the unconstitutional Act or Acts.

The points which the defendants requested the court to review were—

1. That a citizen of Louisiana, whether native or naturalized, who absents himself, even for temporary purposes, from the State for more than two years, thereby loses his domicil and residence, and is bound to pay to the State ten per cent. on any inheritance, legacy or donation to which he may be entitled as intestate or under a will, if the estate of which he is heir and legatee is opened in the State after his aforesaid absence of more than two years; but that he would not be liable to this tax, if during his absence he had become a citizen of another State or Territory in the Union.

2. That the Act of March 26, 1842, which establishes the tax of ten per cent. upon foreign non-resident heirs, is not contrary to the 12th article of the Constitution of 1845.

3. That Benjamin Poydras, by his prolonged residence in France, during the latter part of his life, had lost his domicil in Louisiana.

In neither of the above grounds is there an intimation of any conflict with the federal Constitution in the decision. Whether there was a repugnancy between the Tax Acts and the State Constitution, is a matter which belongs exclusively to the State Court.

The court refused the rehearing, on what ground does not appear.

This court can exercise no appellate power over the Supreme Court of a state, except in a few specified cases; and the ground of jurisdiction must be stated with precision, and the ruling of the court to bring the case under the 25th section must appear, on the record, to have been against the right claimed. Any reason assigned for a rehearing or a new trial is not sufficient.

The case is dismissed for want of jurisdiction.

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JAMES A. ABBOTT and Hannah K., his Wife, Demandants and Plaintiffs in Error,
v.
THE ESSEX COMPANY, Tenants.

(See S. C. 18 How. 202-217.)

Will—construction of devise—meaning of "heirs of his own."

A devise to two sons, of land and personal property, to be equally divided between them, the testator's debts and funeral charges and legacies to be paid thereout, there being no words of inheritance, conveys an estate in fee simple to each son in their respective shares of the lands.

In the clause, that if either of said sons should die without lawful heirs of their own, the share of him who should first decease should accrue to the other survivor and his heirs, the testator meant "by lawful heirs of their own," lineal descendants or "issue," living at his decease.

The testator thereby intended to give over the share of each son to the other on the contingency of his death, without issue living at the time of his decease.

Argued Jan. 25, 1856. Decided Feb. 7, 1856.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This was a writ of entry brought by the plaintiffs, in right of the wife, to recover a certain tract of land. The defendants pleaded nul disseisin. The plaintiffs claim under the will of one John Kittredge. The portion of the will in controversy is stated in the opinion of the court.

John Kittredge, one of the devisees, died in 1826, without issue. Jacob, the other devisee, died in 1807, having left issue. The female plaintiff is a granddaughter of Jacob, the said devisee, and claims the demanded premises under the said will, as the heir in tail of her grandfather. At the trial it was admitted that the other issue of the said Jacob, the devisee, had released and conveyed to the demandants all their interest and title in the demanded premises. The title of the demandants depends upon the question whether estates tail were devised by the said will to the two sons, John and Jacob.

The court below instructed the jury that the two sons (the devisees) took a fee simple conditional, with executory devise over.

Messrs. James A. Abbott, Fessenden Bartlett and Choate, for the plaintiffs in error:

The rule by which this court is to be governed, in the interpretation of this will, is the rule of law which has been established by the highest judicial tribunal of the state or district in which the land lies, or the suit originated.

Hinde v. Vattier, 5 Pet. U. S. 397; Jackson v. Chew, 12 Wheat. 153; Bank of the U. S. v. Daniel, 12 Pet. 33; Webster v. Cooper, 14 How. 488.

The testator, by the first clause of the will, gave to John and Jacob an estate for life only; and although he directed the executor, John, to see that the debts and legacies were paid out of that part of the estate given to John and Jacob, this was a charge upon the estate or fund, given to John and Jacob, and not upon the sole executor personally; and therefore the charge does not enlarge the estate for life to an estate in fee simple.

Jarman on Wills, 126 and note; Denn v. Slater, 5 D. & E. 335; Doe v. Owens, 1 Barn. & Adol. 318; Denn v. Melior, 5 D. & E. 558; Clark v. Clark, 1 Crompt. & Mees. 39; Lithgow v. Kavenagh, 9 Mass. 161; Cook v. Holmes, 11 Mass. 528; Wait v. Belding, 24 Pick. 129; Parker v. Parker, 5 Met. 134; Gardner v Gardner, 3 Mason, 209; Legh v. Warrington, 1 Bro. P. C. 511; Williams v. Chitty, 3 Ves. J R. 552; Miles v. Leigh, 1 Atk. 573.

Having given each of his two sons an estate for life, the next item in the will (viz.: the proviso "that if either of said sons, John or Jacob should happen to die without any lawful heirs of their own") enlarges the estate for life to an estate tail in each of the two sons; and by the use of such language, the testator intended an indefinite failure of issue.

Purefoy v. Rogers, 3 Saund. 380; Sonday's case, 9 Co. 127; King v. Rumball, Cro. Jac 448; Chadock v. Cowley, Cro. Jac. 695; Holmes v. Meynel, T. Raym. 452; Forth v. Chapman, 1 P. Wms. 663; Brice v. Smith, Willes, 1; Hope v. Taylor, 1 Burr. 268; Doe v. Fonnereau, Doug. 504; Denn v. Slater, 5 T. R. 335; Doe v. Rivers, 7 T. R. 276; Doe v. Ellis, 9 East, 382; Goodridge v. Goodridge, 7 Mod. 453; Tenny v. Preston, 12 East, 253; Kirkpatrick v. Kirkpatrick, 13 Ves. Jr. 476; Barlow v. Salter, 17 Ves. 479; Romilly v. James, 6 Taunt. 263; Atkinson v. Hutchinson, 3 P. Wms. 258; Shefield v. Orrery, 3 Atk. 282; Lampley v. Blower, 3 Atk. 396; Sheppard v. Lessingham, Amb. 122; Gordon v. Adolphus, 3 Bro. P. C. 306; Geering v. Shenton, Cowp. 410; Peake v. Pegden, 2 T. R. 720; Cadogan v. Ewart, 7 Ad. & E. 636; Walter v. Drew, Com. 372; Dansey v. Griffiths, 4 M. & S. 61; Wollen v. Andrews, 2 Bing. 126; Crooke v. Devandes, 9 Ves. 197; Elton v. Eason, 19 Ves. 77; Todd v. Duesbury, 8 M. & W. 514; Sampson v. Sampson, 4 H. C. 333; 2 Fearne, Ex. Dev. 5 Ad. 200; Bamford v. Lord, 14 Com. Bench, 707; Newton v. Griffith, 1 H. & G. 111; Bell v. Gillespie, 5 Rand. 273; Broaddus v. Turner, 5 Rand. 308; Snydors v. Snydors, 2 Munf. 263; Cruger v. Heyward, 2 Desaus. 94; Irwin v. Dunwoody, 17 Serg. & R. 61; Caskey v. Brewer, 17 S. & R. 441; Hefner v. Knepper, 6 Watts, 18; Patterson v. Ellis, 11 Wend. 259; Hunter v. Haynes, 1 Wash. Va. 71; Lillibridge v. Adie, 1 Mason, 235; Dallam v. Dallam, 7 H. & J. 220; Eichelberger v. Barnitz, 9 Watts, 447; Waples v. Harman, 1 Harr. 223; Jiggetts v. Davis, 1 Leigh. 368; Ide v. Ide, 5 Mass. 500; Hawley v. Northampton, 8 Mass. 3; Nightingale v. Burrell, 15 Pick. 104; Adams v. Cruft, 14 Pick. 25; Parker v. Parker, 5 Met. 134; Wight v. Thayer, 1 Gray, 286.

Where by one clause in a will an estate for life or an estate in fee simple, is given by plain words, if it appear in other parts of the will, by explanatory words or by implication, that it was the intent of the testator in such devise that the issue should take the estate in succession after him, then the life estate is enlarged in the one case, and the estate in fee reduced in the other, to an estate tail.

Nightingale v. Burrill, 15 Pick. 104; Parker v. Parker, 5 Met. 104.

The words "lawful heirs of their own," mean heirs of "the body lawfully begotten;" and in this will they are technical, and used as words of limitation, restraining the devise to a cer-

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tain class of heirs, viz.: the heirs of the body of either John or Jacob. See authorities under second proposition.

That the meaning and intent of the testator, by the use of the words "first decease," was the one that should so first decease—viz.: should first decease without heirs of the body lawfully begotten.

The testator, by the use of the words "other survivor," meant and intended "other" simply, and thereby showed his especial reference to the children or heirs of the body of either of the devisees; meaning and intending if either left heirs of the body at any time, they were to take their father's estate, according to the will of the testator.

2 Jarman on Wills, 609, 735; Doe v. Wainwright, 5 Durn. & E. 427; Anderson v. Jackson, 16 Johns. 415; Cole v. Sewell, 2 H. of L. Cas. 186; Aiton v. Brooks, 7 Sim. 204; Harman v. Dickenson, 1 Brown Ch. C. 91.

In a devise of real and personal property, the law makes a distinction as to the two estates in the construction of devises; and when technical language is used, the devisee takes an absolute estate in the personal, and a limited estate or an estate tail in the personal property.

Forth v. Chapman, 1 P. Wms. 663; Bamford v. Lord, 14 Com. Bench, 707, in which all the English cases are collated; Hawley v. Northampton, 8 Mass. 3; Nightingale v. Burrell, 15 Pick. 104; Adams v. Cruft, 14 Pick. 25; Parker v. Parker, 5 Met. 134.

The use of the word "estate," in the first clause, or in other parts of the will, is not for any technical or specific purpose, but simply directory and descriptive. It was used to designate the fund only out of which the debts and legacies were to be paid.

Gardner v. Gardner, 3 Mason, 209, and other authorities cited under first proposition.

If the testator had not referred to John and Jacob any further than to have given them all his land, etc., to be equally divided between them, and directed John to see that the debts and legacies were paid, they might each have taken a fee simple by implication; but having controlled this intent by the proviso in the will, that if either should happen to die without heirs of the body, this creates an estate tail in each son, with cross remainders in fee simple absolute.

Parker v. Parker, 5 Met. 134; Bells v. Gillespie, 5 Rand. 273; Caskey v. Brewer, 17 S. & R. 441.

If the testator's sons, John and Jacob, took and became seised of an estate in fee simple, the share of him who should first die without issue would in that event go to the other, if living, by way of executory devise, and if the other son was not living, it would go to his heirs.

Messrs. C. G. Loring and E. Merwin, for defendants in error:

The defendants submit as the proper construction of this will, that it gave to the two sons a fee simple conditional, with executory devise over, and not an estate tail general with cross remainders in fee.

That each son took a fee simple upon this simple contingency; that if the son who died first left no issue, then his share was to pass to the surviving brother, by way of executory devise.

1. By the first clause, independent of that which devised the estate over, a fee simple absolute was given to the two sons.

Although the devising clause contains no words of inheritance, yet it charges personally one of the devises with the payment of debts and legacies by reason of the estate devised, and therefore carries a fee by implication.

Lithgow v. Kavenagh, 9 Mass. 165, 6; Wait v. Belding, 24 Pick. 139.

And as the intent of the testator is clear, that both sons should take the same estate, if John, the executor, took a fee, then Jacob did also.

Roe v. Daw, 3 M. & S. 518.

The direction to pay the debts and legacies out of the estate devised, creates a charge upon the devisee personally, as well as upon the estate.

Doe v. Richards, 3 T. R. 356; Doe v. Snelling, 5 East, 87; Spraker v. Van Alystyne, 18 Wend. 205; Gardner v. Gardner, 3 Mason, 178; 2 Jarman, Wills, 172.

Moreover the charge is here imposed, "in consideration of what is given to said sons," clearly importing that a personal liability was intended.

The rule is the same, although the devisee charged is named as executor.

Goodtitle v. Maddern, 4 East, 496; Doe v. Holmes, 8 T. R. 1; Doe v. Phillips, 3 B. & A. 753; Dolton v. Hewen, 6 Madd. Ch. 9; 2 Jarman, Wills, 172.

One of the legacies given, is the maintenance of Sarah Dwinnel (sic), a granddaughter, "out of that part of my estate I give to my sons John and Jacob Kittredge, until she arrives at the age of eighteen years."

If life estates only were given to the two sons, then the manifest intention of the testator might be defeated by their dying before she reached that age.

The testator directs the legacies to be paid "out of that part of my estate I have given to my two sons."

It is well settled that a devise of one's "estate" includes all the testator's interest in the subject devised; and this is true, although it is accompanied with words descriptive only of the corpus of the property.

Godfrey v. Humphrey, 18 Pick. 537; Paris v. Miller, 5 M. & S. 408; Gardner v. Harding, 3 J. B. Moore, 565; 2 Jarman, Wills, 181, 182.

The testator's intention to give a fee is as fairly inferable from his subsequently describing what he has given, "as that part of my estate," etc., as if he had used those words in making the gift.

If the intention to give a fee appears from any part of the will, a fee will pass.

2. The next inquiry is, whether the fee simple thus given is reduced by the succeeding clause of the will to an estate tail by implication: item, "It is my will, that if either of my said sons should happen to die without any lawful heirs of their own, then the share of him who may first decease, shall accrue to the other survivor and his heirs."

This depends upon whether the testator has provided for a definite or an indefinite failure of issue.

If he intended a failure of issue at the death of the first taker, then the will gives a fee simple conditional, and not an estate tail: and

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the limitation over not being too remote, is good as an executory devise.

Pells v. Brown, Cro. Jac. 590, and cases post.

The defendants contend that this is the proper construction of the will.

The defendants rely upon this rule of construction, viz.: that in a devise, words referring to the death of a person without issue, are construed to import an indefinite failure of issue, instead of a failure at the death of such person.

2 Jarman, Wills, 418.

But this rule, taken with its proper qualifications, will not justify the construction which the demandants seek to give this will.

The rule is entirely artificial, giving an arbitrary meaning to certain forms of expression, as "dying without issue," and the like. Its application, therefore, should be limited to these settled forms of expression.

2 Jarman, Wills, 418.

It is generally conceded that the rule violates the natural meaning of language, and in most cases tends to defeat, rather than to give effect to, the intentions of testators;

2 Jarman, Wills, 418; Keily v. Fowler, Ch. J. Wilmot, notes, etc. 298; Hall v. Chaffee, 14 N. H. 216, and cases post;

Insomuch that in England and several of the States, the rule has been abolished by express legislation.

1 Vick, ch. 26, sec. 29; New York St.; Virginia, 1819, Miss. 1824; N. C. 1827.

Its qualification.

A limitation, "if T. died without issue, leaving his brother W., then to W.," refers to a failure of issue at the death of T.

Pells v. Brown, Cro. Jac. 590.

So, also, the words, if one die "leaving no issue behind him" (Porter v. Bradley, 3 T. R. 143); and if one leave no issue, then life estates "to the survivor or survivors."

Roe v. Jeffrey, 7 T. R. 589.

The limitation in bequests, "to the survivor," has been uniformly held in England to denote a definite failure of issue;

Hughes v. Sayre, 1 P. Wms. 534; Ranelagh v. Ranelagh, 2 M. & K. 441; Radford v. Radford, 1 Keen, 486; Lewis on Perpetuities, 218;

Although it may not have been so held in reference to devisees of real estate.

In the United States, it is settled by numerous authorities, that a limitation "to the survivor" imports a definite failure of issue, in gifts, both of real and personal estate.

Fosdick v. Cornell, 1 Johns. 340; Anderson v. Jackson, 16 Johns. 382; Jackson v. Chew, 12 Wheat. 153; Wilkes v. Lion, 2 Cow. 333; Cutter v. Doughty, 23 Wend. 513; Davison v. De Freest, 3 Sandf. Ch. 456; Heard v. Horton, 1 Den. 165; Den v. Schenk, 3 Halst. 29; Cordle v. Cordle, 6 Mun. 455; Rapp v. Rapp, 6 Barr. 45; Johnson v. Currin, 10 Barr. 498; Morgan v. Morgan, 5 Day, 517; Couch v. Gorham, 1 Con. 86.

The rule in Massachusetts is, that although a devise to one and his heirs, and if he die without issue, then to another, will create an estate tail with remainder over; yet that this construction will be controlled by other words, showing that the testator referred to a failure at the death of the first taker.

Hawley v. Northampton, 8 Mass. 41.

And in conformity with the American doctrine, it has been held that a limitation to the survivor denotes a definite failure of issue.

Richardson v. Noyes, 2 Mass. 56; see Ide v. Ide et al. 5 Mass. 500.

The case of Parker v. Parker, 5 Met. 134, cannot be considered as having established a rule of construction which controls this case for these reasons (12 Wheat. 153):

1st. The construction of a will by a state court does not constitute a rule of decision for this court, unless it has been long acquiesced in as a rule of real property.

Lane et al. v. Vick et al., 3 How. 476; Homer v. Brown, 16 How. 354.

2d. That decision was made on the ground that the testator did not intend to give more than an estate tail to his sons; whereas, in this case, as already shown, the sons were intended to have a fee.

That decision cannot control the construction of this will, because the single question upon which this depends was neither passed upon nor adverted to, namely: whether a definite or indefinite failure of issue was intended.

If it had been, it is utterly improbable that the court would have come to the result they did; for it is undoubted law everywhere, that a limitation over, upon the first taker's dying without issue and under 21 years of age, is clearly upon a definite failure of issue.

Pells v. Brown, Cro. Jac. 590; Glover v. Monckton, 3 Bing. 13; Doe v. Johnson, 16 L. & E. 550; Lippett v. Hopkins, 1 Gall. 454; Barnitz v. Casey, 7 Cr. 456; Ray v. Enslin, 2 Mass. 554.

This will provides for a definite failure of issue.

The language, "if either son should happen to die without heirs," denotes that the testator was contemplating a contingency which would occur, if at all, at the death of such son.

The limitation is "to the other survivor."

It is clear that a fee simple, and not an estate tail, is devised over, "to the survivor and his heirs."

It is "the share" of him who may die first, that is devised over.

The term "share" in a devise, denotes all one's interest and will pass a fee.

Paris v. Miller, 5 M. & S. 408; Roe v. Bacon, 4 M. & S. 366.

The testator did not intend to limit over the personal property, on an indefinite failure of issue; and from uniting the two in the same clause and in the same contingency, the reference is equally as strong as to the real estate.

Porter v. Bradley, 3 T. R. 146; Richardson v. Noyes, 2 Mass. 63, and direct authorities.

A distinction has, indeed, been sometimes made between real and personal estate. But the soundness of this distinction is denied by the weight of authority. Vide cases supra, and opinion of Mr. Justice Curtis, and cases cited by him.

Lastly, it is the share of him "who may first decease," that is devised over.

Mr. Justice Grier delivered the opinion of the court:

The questions submitted to our consideration in this case arise on the construction of the will of John Kittredge, deceased, and on the following devise to his sons:

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"Item. I give to my two sons, namely: John and Jacob Kittredge, all my lands and buildings in Andover aforesaid (excepting the land I gave to my son Thomas aforesaid), which buildings consist of dwelling houses, barns, corn house, grist mill, and cider mill, all of every denomination; also all my live stock of cattle, horses, sheep and swine, and all my husbandry utensils of every denomination, and all my tools that may be useful for tending the mills aforesaid; and also all my bonds and notes of hand and book accounts, together with what money I may leave at my decease; and my 212*] wearing apparel, I *give the same to my said sons, John and Jacob Kittredge, to be equally divided between them; and in consideration of what I have given my said sons, John and Jacob Kittredge, the executor of this testament (hereinafter named), is hereby ordered to see that all my just debts and funeral charges, together with all the legacies in this will mentioned, be paid out of that part of my estate I have given to my two sons, John and Jacob Kittredge, to whom I give each one bed and bedding."

"Item. It is my will, that if either of my said sons, namely: John and Jacob Kittredge, should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs."

On the trial, the demandants requested the court to instruct the jury, "that John and Jacob took the real estate therein devised, in equal moieties of an estate tail general, with cross remainders in fee simple." But the court instructed the jury "that the testator's said sons, John and Jacob, took an estate in fee simple, and that the share of the one of the sons, who should first die without issue, in the lifetime of the other, should, in that event go over to the other son, by way of executory devise." To this instruction the plaintiffs excepted, and now contend:

1st. That the testator, by the first clause of his will, gave to John and Jacob an estate for life only.

2d. That the next clause of the will enlarges the estate for life to an estate tail in each of the two sons, and by the use of such language, the testator intended an indefinite failure of issue.

The defendants, on the contrary, maintain that, independent of the last clause, by which the estate is given over, the sons took a fee simple. And second, that the clear intention of the testator is, that both real and personal estate should pass on a definite contingency, viz.: the decease of one brother without issue in the lifetime of the other.

There is, perhaps, no point of testamentary construction which has undergone such frequent discussion, and is so fruitful in cases not easily reconciled, as that now brought under our consideration. This has arisen, in a great measure, from the discrepancy between the popular acceptation of the phrases, "if he die without issue," "in default of issue" and similar expressions, from the established legal acceptation of them in courts of justice. It is often necessary to construe these expressions as conveying an estate tail by implication, in order to carry out the evident general intent of the testator. Such is, or ought to be, the object of all rules of interpretation; but court rules, however convenient in the disposition of cases where the intention is doubtful, cannot claim to be absolute or of universal application. *Hence it has been said, "that courts [*213 have been astute to defeat the application of this rule of construction, harsh in itself, and often producing results contrary to the testator's intention." If wills were always drawn by counsel learned in the law, it would be highly proper that courts should rigidly adhere to precedents, because every such instrument might justly be presumed to have been drawn with reference to them. But in a country where, from necessity or choice, every man acts as his own scrivener, his will is subject to be perverted by the application of rules of construction of which he was wholly ignorant.

The rule laid down in Purefoy v. Rogers, 2 Saund. 388, "that where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise," has been received and adopted in Massachusetts.

In England, and in some of the States here, it has been abolished by legislative interposition, as harsh and injurious. This rule, however, has never been construed, either in England or this country, to include cases where the title of the first taker is a fee simple, and the contingency is definite.

In the case of Pells v. Brown, Cro. Car, 590, where there was a devise "to A in fee, and, if he die without issue living, then C shall have the land," it was held to be an executory devise to C, on the contingency of A dying in the life time of C without issue. There is no necessary conflict between this case and that of Purefoy v. Rogers. It is true, also, that this rule has been applied where the first taker had an estate in fee; and it is conceded "that, unless there are expressions or circumstances from which it can be collected that these words, 'without issue,' are used in a more confined sense, they are to have their legal sense of an indefinite failure of issue;" but whenever such "expressions or circumstances" show the intention of the testator that the estate is to go over only on a definite contingency, courts will give effect to such intention. Notwithstanding the expressions in Plunket v. Holmes, Sid. 47, derogatory of the case of Pells v. Brown, it has always been considered "a leading case, and the foundation of this branch of the law."

See Williams' Saund. 388, b, in note.

In Porter v. Bradley, 3 T. R. 143, where lands were devised to A and his heirs, and if he die leaving no issue behind him, then over, it was decided that the limitation over was good by way of executory devise; and Lord Kenyon acknowledges the case of Pells v. Brown, to be "the foundation and Magna Charta of this branch of the law," deciding that the words, "leaving no issue behind him," showed clearly that the testator did not contemplate an indefinite failure of issue.

*In the case of Roe v. Jeffery, 7 T. R. [*214 589, where the devise was "to A and his heirs, and in case he should depart this life and leave no issue, then to B, C and D, and the survivor or survivors of them, share and share alike," it was held that the devise to B, C and D was a good executory devise. In delivering the

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opinion of the court in that case, Lord Kenyon observes: "This is a question of construction, depending on the intention of the party; and nothing can be clearer than if an estate be given to A in fee, and by way of an executory devise, an estate be given over, which may take place within a life or lives in being, etc., the latter is good by way of executory devise. The question, therefore, in this and similar cases, is, whether, from the whole context of the will, we can collect when an estate is given to A and his heirs forever, but if he die without issue, then over, the testator meant without issue living at the death of the first taker. The rule was settled as long ago as in the reign of James I., in the case of Pells v. Brown. That case has never been questioned or shaken, and is considered as a cardinal point on this head of the law."

Without referring to any more of the numerous English and American cases of like tenor, brought to our notice by the learned counsel, it will be sufficient to notice the case of Richardson v. Noyes, 2 Mass. 56. There the devise was "to my three sons, A, B and C, all my other lands, etc.; also my will is, that if either of them should die without children, the survivor or survivors of them to hold the interest or share of each or any of them so dying without children as aforesaid;" and it was held to pass an estate in fee simple, determinable on the contingency of either of them dying without issue, and vesting by way of executory devise. See, also, the case of Ray v. Enslin, 2 Mass. 554. These cases fully adopt the principles of the English cases we have just referred to. The case of Parker v. Parker, 5 Metc. 134, has been quoted as containing a contrary doctrine; but it does not appear that the question of definite or indefinite failure of issue was made by the counsel or adverted to by the court in the decision.

Our inquiry must be, therefore, from an examination of the whole context of this will:

1. Whether, independent of the second clause, by which the estate is limited over, the sons took an estate in fee simple, or only a life estate; and,

2. Whether he intended to give over the share of each son to the other, on the contingency of his death, without issue living at the time of his decease, or upon an indefinite failure of issue.

1. There are no words of inheritance, in this first clause of the devise, to John and Jacob; 215*] but such words are not absolutely *necessary in a will to the gift of a fee. The subject of this devise is described as "that part of my estate." The word "estate," or "that part of my estate," has always been construed to describe not only the land devised, but the whole interest of the testator in the subject of the devise; thus, a devise of "my estate, consisting of 30 acres of land, situate, etc.," will carry a fee. Moreover, the legacy given for the maintenance of Sarah Devinny, "to be paid out of that part of my estate given to John and Jacob," would be defeated by their death before she arrived at the age of eighteen, if the devise to them was a life estate only. The intention of a testator must be drawn from the whole context of his will. And it is not necessary to look alone at the words of the gift itself to ascertain the intention of the testator as to the quantum of the estate devised, if it can be gathered, from expressions used in any part of it, what he supposed or intended to be the nature and extent of it. It will not admit of a doubt, also, that the testator intended that both of his sons should have the same estate in the devised premises, which were "to be equally divided between them." John is charged personally, in respect of the estate given him, with the payment of all the debts and legacies. The testator calls it the "consideration" to be paid for that part of his estate given to his two sons; and though John was appointed executor, whose duty it became, as such, to see to the payment of the debts and legacies, the charges are to be paid by him at all events out of the estate devised to him and Jacob, and not out of the rents and profits only. By their acceptance of the devise, they became personally liable. In such cases, it is well settled that the devisee takes a fee, without words of inheritance.

On this point, therefore, we are of opinion that John and Jacob each took a fee in their respective "share" or moiety of the estate devised to them.

2. It remains to consider the effect of the second clause of the will, which is in these words: "It is my will, that, if either of my said sons, namely: John or Jacob, should happen to die, without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs."

Viewing this clause free from the confusion of mind produced by the numerous conflicting decisions of courts, and untrammelled by artificial rules of construction, we think that no two minds could differ as to the clear intention of the testator. By "lawful heirs of their own," he evidently meant lineal descendants or "issue."

The contingency contemplated is as definite as language can make it—"if either son should happen to die without heirs of their own during the life of the other."

*The person to take, on the happening [*216 of this contingency, is precisely described—"the other survivor." It is true that cases may be found which decide that the term "survivor" does not of itself necessarily import a definite failure of issue, and no doubt there are many cases where it would be necessary to disregard the obvious import of this term, in order to carry out the general intent of a testator, otherwise apparent; but a large number of English, and nearly all the American cases, acknowledge the force of this term as evidence of the testator's intending a definite contingency. The other words of this clause, connected with it, clearly describe a definite contingency, and the individual who is to take on its happening: "the share of him who shall first decease without heirs shall accrue to the other survivor;"—on the death of one, the other is to take—a definite contingency and a definite individual.

Again, it is the "share," or the estate previously given, not of him who dies without issue, generally, but of him who may first decease, that is given over to the other survivor. This "share" also consisted of personal and real property. As to the former the testator could certainly not mean an indefinite failure of is-

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sue, yet both, personalty and realty, are within the same category, and, as one "share," they are subject to the same contingency. It is said to be a rule of construction, that the words "dying without issue" will be construed to mean "an indefinite failure of issue" as to real estate; but with regard to personalty, it shall be taken to mean "a failure at the death." There are several cases to this effect. Lord Kenyon, in speaking of them in Roe v. Jeffery, 7 T. R. 589, very justly remarks that "the distinction taken in Forth v. Chapman, 1 P. Wms. 663, that the very same words in a will should receive one construction when applied to one portion of the devise, and another construction as applied to another, is not reconcilable with reason." Without making an array of cases, we may state that many of the English, and nearly all the American cases, seem to concur in the truth and force of this observation; and consider a "share" of an estate, consisting of both realty and personalty, given over on a contingency to the "survivor," as clear evidence that the testator did not intend an indefinite failure of issue. A rule of construction which would give different meanings to the same words, in the same sentence, could only be tolerated where, from the whole context of the will, it is evident that without such construction the general intent of the testator as to the disposition of his realty would be frustrated.

Lastly, construing this clause as providing for an indefinite failure of issue, and as vesting each of the sons with an estate tail by implication, the survivor would take an estate in fee 217*] *simple in his brother's share, while he had an estate in tail in his own: a result most improbable, which could hardly have been contemplated by the testator, and which ought not to be imputed to him without clear expressions indicating such an intention.

On the whole, we are of the opinion that the instructions given to the jury by the court below are correct, and that the judgment should be affirmed.

PATRICK McLAUGHLIN, Plff. in Er.,
v.
JAMES SWANN and John S. Gittings, Garnishees of the Chesapeake and Ohio Canal Company.

(See S. C. 18 How. 217-233.)

Attachment—moneys in hands of trustee—record, how far evidence—defenses to attachment.

An attachment will hold a balance of moneys in the hands of garnishees, who are trustees, after the specific objects of their trusts have been satisfied.

A decree in another cause which expressly excepts the rights of the attaching creditor, cannot affect his rights.

The record of the other cause, although read in evidence, is not evidence of any facts found by the court either in the opinion or decree.

Only legal defenses can be made to an attachment, in the attachment suit.

(Mr. Chief Justice Taney was prevented by sickness from taking his seat on the Bench at the present term, until the 4th of February, and was not present when this cause was argued and decided in this court.)

Argued Jan. 28, 1856. Decided Feb. 7, 1856.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

The Circuit Court instructed the jury, upon the prayer of the defendants, that the plaintiff was not entitled to recover, because the rights of cestuis que trust cannot be determined in proceedings at law by attachment; because there is no evidence that any of the fund remained in the trustees' hands, after satisfying prior and superior claims; and because the plaintiff, having been party to the suit in Maryland concerning this fund, is concluded by its decision.

A further statement appears in the opinion of the court.

Messrs. **T. S. Alexander** and **Henry Winter Davis**, for plaintiff in error:

Under the circumstances of this case, process of attachment was a proper process to reach and affect any surplus remaining in the hands of the trustees, after gratifying the trust of the deed, and not needed to satisfy the demands of others having prior and superior claims on the fund.

Maryland Act, 1715, ch. 40, secs. 1, 2, 3, 7; Ford v. Philpot, 5 Harr. & J., 312; Campbell v. Morris, 3 Harr. & McH. 535; Wells v. Gheselin, 1 Harr. & McH. 91; White v. Winn, 8 Gill, 499; Black v. Zacharie, 3 How. 511; Gilbert v. Dyneley, 3 Man. & Gran. 12; Murphy v. Barron, 1 H. & G. 265; Case v. Roberts, Holt, N. P. 500; Edwards v. Bates, 7 Man. & G. 590; Weston v. Barker, 12 Johns. 26; Neilson v. Blight, 1 Johns. Cas. 205; Oliver v. Palmer, 11 G. & J. 128.

There was evidence of a large surplus existing in the hands of the trustees, after satisfying the trusts of the deed, the claim of the Bank of Potomac, and all others superior and prior to the claim of the present plaintiff.

The decree of the Court of Chancery of Maryland cannot prejudice the plaintiff's right to recover, if it can be shown that, at the time of passing the decree, the trustees had in hand a surplus, which was liable to be affected by process of attachment.

Wallace v. McConnell, 13 Pet. 137.

Mr. **J. M. Campbell**, for defendants in error:

The whole surplus was in controversy between the Chesapeake Bank and the Bank of the Potomac, when this attachment issued.

How could the court below settle the conflict between these rival claimants, neither of them before it, or weigh in legal scales their respective equities?

The action for money had and received must not be turned into a bill of equity for the purpose of discovery.

Case v. Roberts, 3 Eng. Com. Law, 199.

While the matter remains in account and is charged with the specific trust, the action for money had and received will not lie.

Roper v. Holland, 30 Eng. Com. Law, 37; Edwards v. Bates, 49 Eng. Com. Law, 590; Pardoe v. Price, 13 Mees. & W. 282, 283; Bartlett v. Dimond, 14 Mees. & W. 49; Tiernan v. Jackson, 5 Pet. 597; Duval v. Craig, 2 Wheat. 56; Rathbone v. Stocking, 2 Barb. 135.

Mr. Justice **Curtis** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Maryland.

The plaintiff in error having recovered a judgment in that court against the Chesapeake and Ohio Canal Company, sued out a writ of for-

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eign attachment against the lands and tenements, goods, chattels and credits of that Company, and on the 4th day of June, 1841, it was laid in the hands of James Swann and John S. Gittings. The garnishees having appeared and answered certain interrogatories, pleaded that at the time of laying the attachment they had not any goods, chattels or credits of the Company in their hands, and upon the trial a bill of exceptions was taken, from which it appears that the plaintiff offered evidence tending to prove, that, by an indenture, bearing date on the 15th day of April, 1840, between the Company of the first part, and the garnishees, together with William Gunton (who, residing out of the district, was not served with process), of the second part, the party of the first part transferred to the party of the second part two hundred and forty-eight bonds of the State of Maryland, each for £250, in trust, to pay, from the proceeds thereof, such promissory notes of the Company, described in a schedule annexed 220*] to *the indenture, as should be presented to the trustees at the Chesapeake Bank in Baltimore, within six months from the date of the indenture; and at the end of the six months, to pay to the Company any money, and to deliver to the Company any of the bonds which might then remain in their hands, whether all the notes mentioned in the schedule should then be paid or not.

The plaintiff further offered evidence to prove that Gitting, with the assent of the other trustees, sold the bonds prior to the 28th day of February, 1841, for the aggregate sum of $344,117.26; and that the sums received by him for interest on the bonds amounted to $16,958.62, amounting in the whole to the sum of $361,075.88. The disbursements and payments made by the trustees, in the execution of the trust, appeared to have been $324,825.18, leaving a balance due from the trustees, after the complete execution of the trust declared in the indenture, of $36,250.70.

Upon this state of facts we think the plaintiff entitled to a verdict.

The trust was for the payment of specified debts, which should be presented to the trustees before a fixed day. The payments made, and the sums received in execution of the trust, were liquidated sums ascertained with entire precision. The trust was completely executed, and the balance remaining in the hands of the trustees was a sum certain.

Under these circumstances, an action at law for money had and received could be sustained by the Canal Company against the trustees, they not having sealed the deed.

In Case v. Roberts, Holt's N. P. C. 500, Burrough, J., states the rule on this subject to be: "If money is paid into the hands of a trustee for a specific purpose, it cannot be recovered in an action for money had and received, until that specific purpose is shown to be at an end. If the plaintiff show that the specific purpose has been satisfied, that it has absorbed a certain sum only, and left a balance, such balance (the trust being closed) becomes a clear and liquidated sum, for which an action will lie at law." This statement of the rule has been approved, and in conformity with it many cases decided.

See, among others, English v. Blundell, 8 Car. & P. 332; Edwards v. Bates, 7 Man. & Gr. 590: Allen v. Impett, 8 Taunt. 363; Weston v. Barker, 12 Johns. 276.

This case, thus presented, comes within that rule; and as an action at law could have been sustained by the Canal Company to recover the liquidated balance remaining in the hands of the trustees, the plaintiff could subject that balance to the satisfaction of his judgment, by attaching it as a credit in the hands of the trustees.

*But, in addition to the evidence [*221 above referred to, the bill of exceptions contains the following statement concerning evidence introduced by the defendants:

"That on the 25th of June, 1841, a bill was filed in the Court of Chancery, in Maryland, against the said garnishees and the Chesapeake and Ohio Canal Company, and others, by the Bank of Potomac, claiming as assignee of the surplus which remained after satisfying the trusts under the deed of April, 1840, and praying an account and settlement of the trust, which bill is in the following words: It being agreed between the parties that the said bill and other portions of the pleadings or proceedings in that case, hereinafter mentioned to have been produced and read, shall be received in evidence and have the same effect as if the whole record was produced, and such pleadings or proceedings read from it."

Then follows a copy of the bill, of an opinion of the acting Chancellor, and of the final decree in the cause. McLaughlin, the present plaintiff in error, is not made a party to this bill. How he came into the cause as a party does not appear. If by the amended bill, he ceased to be a party before the final decree, because that decree recites that the amended bill was dismissed by the complainants before the final submission of the cause to the Chancellor. Nor does it appear for what purpose McLaughlin was made a party, or whether he at any time submitted his rights, as an attaching creditor, by a process out of the Circuit Court of the United States, to a court of the State of Maryland, in a suit in equity, begun after his attachment was laid. But it does not appear to be material to consider either of these particulars, because the final decree concludes with this clause:

"And it is further adjudged, ordered and decreed, that this cause be, and the same is hereby dismissed as against the defendant, Patrick McLaughlin, and this decree is passed without prejudice to the rights of the said McLaughlin against any and every of the parties to this suit."

Either because the Chancellor deemed it improper to pass on his rights acquired by an attachment under process of the court of the United States, or for some other reasons, he has made a decree, which in express terms leaves McLaughlin in all respects unaffected by that suit.

We think, also that so much of the record of the chancery suit as is in this record, though it was properly read in evidence to prove that such proceedings were had, and such decree made, is not evidence of any facts found by the Chancellor, either in his opinion or in the decree.

The bill having been dismissed as against

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him, and all his rights, as against any and every of the parties, expressly saved, 222*] *there has been no matter tried or adjudicated as between him and any other party, and he stands, in all respects, as if he had never been a party to the suit.

It was insisted at the argument, that the stipulation already extracted from the bill of exceptions made the Chancellor's opinion evidence, as against McLaughlin, of the facts it finds. This was denied by the plaintiff's counsel; and however probable we may think the inference, that the Chancellor's opinion was treated as evidence by the Circuit Court, with the consent of the plaintiff, yet we cannot say this appears to us judicially, by the bill of exceptions. The stipulation only extends so far as to make the parts of the record, which were read, have the same effect as if the whole record had been put in. The whole record might have properly been put in, to prove what was done and decreed in that suit, valeat quantum. But when it appeared that, so far as respected the plaintiff and his rights, nothing was done or decreed, his rights in this suit could not be affected by anything appearing therein, or deducible therefrom. In our opinion, therefore, the case is presented to us upon evidence, extraneous to the record of the State Court. Upon that evidence, we think the jury would have been authorized and required to find for the plaintiff; and consequently, that the instruction given in the court below, that their verdict must be for the defendants, was erroneous.

We express no opinion upon the defenses supposed to arise out of the facts found in the opinion of the Chancellor. If the facts, which may be proved in defense, on another trial, should amount to a legal defense to an action for money had and received, if brought by the Canal Company, they would also amount to a defense to this attachment. If they only show outstanding equities, in third persons, of such a character that a court of law cannot take notice of them, they must be availed of, if valid, by a bill brought by such third persons against McLaughlin, or by a bill of interpleader by the trustees. The attachment invests the plaintiff with the same right of action which belonged to the Canal Company; and no defense which could not have been made at law to an action by the Company, can be made to the attachment, which is but a substituted mode of pursuing the same right.

Wanzer v. Truly, 17 How. 584.

So far as respects equitable rights of set-off by the garnishee, a different rule has been followed in Massachusetts.

Boston Type Co. v. Mortimer, 7 Pick. 166; Hathaway v. Russell, 16 Mass. 473; Green v. Nelson, 12 Met. 567.

And, in the absence of an equitable jurisdiction in that State, there has been, until recently, no mode of giving effect to the equitable rights of the garnishee, or of third persons, save in the process of garnishment, or possibly 223*] *by an action on the case in some instances.

Foster v. Sinkler, 4 Mass. 450; Hawes v. Langton, 8 Pick. 67; Adams v. Cordis, 8 Pick. 260.

But in other states it has been held that only legal defenses can be made to the attachment.

Pennell v. Grubb, 13 Penn. 552; Taylor v. Gardner, 2 Wash. C. C. 488; Loftin v. Shackleford, 17 Ala. 455; Edwards v. Delaplaine, 2 Har. 322; Watkins v. Field, 1 Eng. 391.

We are not aware that this subject has come under the examination of the courts of Maryland, in any reported case. But in a state where the legal and equitable jurisdictions are distinct, and in a court of the United States, having full equity powers, we consider that a garnishee should stand as nearly as possible in the same position he would have occupied if sued at law by his creditor; and if he, or any third person, has equitable rights to the fund in his hands, they should be asserted in that jurisdiction which alone can suitably examine and completely protect them.

The judgment of the Circuit Court is to be reversed, and the cause remanded, with directions to issue a venire facias de novo.

THE STEAMBOAT NEW YORK, her Tackle, Apparel, etc., Thomas C. Durant, Charles W. Durant and Septimus Lathrop, Clmts. and Appts.,

v.

ISAAC P. RAE, owner of the Brig Sarah Johanna.

(See S. C. 18 How. 223-230.)

Negligence—not having lookout—steamboat going eight or ten miles an hour in crowded harbor—rule of navigation prescribed by New York Statute, not binding on federal courts.

When steamboat was going down East River at eight or ten miles an hour with strong ebb tide and heavy northwest wind, having barges and canal boats in tow, the continuance of that speed while entering a crowd of vessels at anchor in the harbor, under the circumstances of wind and tide, and incumbrance of the tows, was gross and inexcusable negligence and neglect of duty in case of collision with a brig lying at anchor.

The steamboat was also in fault in not having a lookout at the time, properly stationed.

A rule of navigation prescribed by the laws of New York, is binding on her own courts, but cannot regulate the decisions of the federal courts, administering the general admiralty law.

An exception to this principle is the regulation of steamboats and other water craft in the ports and harbors of the States, required for the accommodation and safety of vessels. These are police regulations in aid of commerce.

Submitted Jan. 28, 1856. Decided Feb. 7, 1856.

APPEAL from the Circuit Court of the United States for the Southern District of New York, from a judgment of the Circuit Court affirming the decree of the District Court, against the steamboat New York, for damages.

The case is stated by the court.

Messrs. W. Q. Morton and F. B. Cutting, for the appellants:

A failure to hoist a signal light, by the general maritime law, is negligence per se.

The Delaware v. The Osprey, 2 Wall. Jr. 268;

NOTE.—Collision. Rights of steam and sailing vessels with reference to each other and in passing and meeting. See note to St. John v. Paine, 13 L. ed U. S. 537.

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Simpson v. Hand, 6 Warth. 311: Strout v. Foster, 1 How. 89; The Victoria, 3 Wm. Rob. 49; 1 Law N. S. 80; 3 Kent's Com. 230, note c.; Ang. Car. sec. 649, and The Scioto, Davies, 359.

The law of the State of New York made it necessary that a good and sufficient light be shown in some part of the brig's rigging, at least 20 feet above her deck and above her taffrail.

1 Rev. Stat. 685, sec. 12.

This regulation was within the power of the state, and public policy required that it should be rigidly enforced.

Cooley v. Board of Port Wardens, 12 How. 299: The Osprey, 2 Wall. Jr. 275: Vandewater v. Westervelt, 4 Sand. 512. cited in Fitch v. Livingston; Van Pelt v. Steamboat Niagara, cited in 4 Sand. 512, and in Fitch v. Livingston.

It will be presumed that if the light had been properly shown, it would have been observed.

Moore v. Moss, 14 Ill. 106.

Other precautions which should have been observed in a frequented thoroughfare, and a dark and tempestuous night, were omitted.

Halderman v. Beckwith, 4 McLean, 286; Steamboat Senator, 1 Cal. 459.

A decree should be rendered for an apportionment of damages, upon the ground that it is doubtful whether either vessel is entirely free from fault.

Catharine of Dover, 2 Hagg. 154; The George, 2 W. Rob. 399; The Maid of Aukland, 6 Notes of Cases, 245.

The Sarah Johanna was bound to prove, by a clear preponderance of evidence, that she complied with the legal requirements.

The Ligo, 2 Hagg. 356; Strout v. Foster, 1 How. 93; 1 N. Y. Rev. Stat. 861, secs. 12, 13, 46, Ad. Rule, 23, U. S. Sup. Ct.

Mr. George E. Betts, for the appellee:

The brig was lying at anchor, helpless and at a proper place, and as the steamboat had control of her movements, she was at fault.

The Girolamo, 3 Hagg. 173; The George, 9 Jur. 670; The Steamboat U. S. v. Mayor, etc., of St. Louis, 5 Mo. 230; 3 Greenl. Ev. sec. 407; Strout v. Foster, 1 How. 90; The Julia M. Hallock, 14 Law Jur. 555.

This presumption of negligence could only be repelled by proof that the collision was the result of an inevitable accident. The steamer was in fault for not carrying a lookout.

The George, 9 Jur. 670; St. John v. Paine, 10 How. 557; The Catharine v. Dickinson, 17 How. 177; Newton v. Stebbins, 10 How. 586; The Genesee Chief v. Fitzhugh, 12 How. 443, 463; The Ogdensburg, 5 McLean, 636.

The helms of the barges were not starboarded, and it is no excuse that they were not manned.

Fretz v. Bull, 12 How. 466; The Virgil, 7 Jur. 1174; The Itinerant, 2 W. Rob. 240.

The steamer used an improper rate of speed, in a place crowded with vessels.

Newton v. Stebbins, 10 How. 586; The Rose, 2 W. Rob. 3; The Iron Duke, 4 Notes of Cases, 94, 585; The Virgil, 7 Jur. 1174; 2 W. Rob. 201; The Steamboat Northern Indiana, 16 Law Rep. 448.

The testimony of the steamer's witnesses being simply negative, cannot be compared in reliability with affirmative evidence.

Williams v. Hall, 1 Curt. 597; Chambers v. Queen's Proctor, 2 Curt. 415.

The presumptions are: 1. That the crew of the brig performed their duty, it being a universally recognized rule that a vessel at anchor must show a light.

3 Greenl. 406; The Mary Stuart, 2 W. Rob. 244.

2. That the men on the brig knew better what occurred in regard to her navigation, than the men on the other vessel.

The Iron Duke, 4 Notes of Cases, 590; case of Williams v. Chapman, 585.

The Statute is only directory, in specifying the precise number of feet above the dock at which the light should be suspended. Its mandatory part—that a light be exhibited in the proper place—was fully complied with.

Dwarris on Stats. pp. 713, 716; Rex v. Justices of Leicester, 9 Dowl. & R. 772; Rex v. Inhab. of Birmingham, 8 B. & C. 29.

The maritime law regulating the navigation of vessels cannot be controlled by state statutes.

The Girolamo, 3 Hagg. 169; The Barque Chusan, 2 Story, 455; The Globe, 13 Law Rep. 488; 2 Blatchf. 427.

The Statute of New York is not made applicable to seagoing vessels.

Halderman v. Beckwith, 4 McLean, 292.

The rule of damages adopted by the commissioner was correct. The demurrage was proved and properly allowed.

Williamson v. Barrett, 13 How. 101; Bodley v. Reynolds, 10 Jur. 310; 8 Q. B. 779; The Narragansett, 1 Blatchf. 211.

The deterioration in the general strength and seaworthiness of the brig, and of her market value beyond the actual repairs put upon her, was proved and properly allowed.

The Schooner Catharine, 17 How. 174; The Matchless, 10 Jur. 1017; The Gazelle, 2 W. Rob. 279; Voorhes v. Earl, 2 Hill, 288.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal in admiralty from a decree of the Circuit Court of the United States for the Southern District of New York.

The libel was filed by the owner of the brig Sarah Johanna against the steamboat, for a collision in the harbor of the City of New York. The brig was lying at anchor in the North River, off pier No. 6, nearer to the Jersey than the New York shore, her bow heading up the River, there being at the time a strong ebb tide, and wind heavy from the northwest. The collision occurred between four and five o'clock in the morning of the 4th of November, 1850—the river at this place being filled with vessels at anchor in the vicinity of the brig. The morning was considerably dark.

The steamboat was passing down the North River to get around to her berth in the East River. She had in tow eleven heavily loaded barges and canal boats, the first tier being three abreast on each side of her, the other boats astern, towed by lines attached to this first tier. The steamer, with the tows, occupied a breadth of some three hundred feet, and from three hundred and fifty to four hundred feet

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in length, her bows projecting some sixty feet ahead of the tows. She entered this thicket of vessels, at anchor in the river, at a rate of speed from eight to ten miles an hour, and as we have seen, with a strong ebb tide and heavy northwest wind; and while passing through them, the center towboat of the tier on the starboard side struck the bow of the brig, smashing her timbers, cutwater and bowspirit, and otherwise doing great damage to the vessel.

The captain of the steamboat admits that he saw the brig from three to five hundred feet off before the collision, but as he could not stop his boat in less than within ten or fifteen of her lengths, the collision was inevitable. He admits, also, that it would have required all her power to stop within that distance, as it would have depended upon the way the towboats were managed. The rear tows were not so fastened, he observes, as to prevent their swinging, and could not have been. He gave orders instantly, on discerning the brig, to starboard the helm, and passed the same order to the towboats. This was undoubtedly the proper order at the time, under the circumstances, but with the rate of speed of the steamer, and incumbered as she was with her tows, it was unavailing.

225*] *Upon this statement of the facts in the case, it is manifest the steamer was grossly in fault in entering this crowd of vessels at anchor in the harbor, at the rate of speed with which she was moving, especially in the night time. A collision with some of them thus lying in her trail was the natural, if not inevitable, result. Lying at anchor, they were disabled from adopting any measure to get out of her way, and incumbered as she was with tows, she was not in a condition to adopt any prompt and effective maneuver to avoid the danger. The continuance of the speed, therefore, under the circumstances of wind and tide, and incumbrance and embarrassment of the tows, was the grossest carelessness and neglect of duty, without the semblance of excuse. Indeed, the term carelessness hardly expresses the degree of fault; under the circumstances, it seems almost to have been willful, or what, in degree, should be regarded as equally criminal.

The steamboat was also in fault in not having a lookout at the time, properly stationed. The captain admits that no person was stationed on the deck as a lookout. He claims to have been on that duty himself, although he stood upon the upper deck, some fifteen feet above the water, and sixty feet from the bow of the steamer, and was at the time engaged in giving directions for the management of her and her tows.

We have had occasion frequently to lay down the rule, that it is the duty of steamboats traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout, stationed at a part of the vessel best adapted for that purpose, and whose whole business was to discern vessels ahead, or approaching, so as to give the earliest notice to those in charge of the navigation of the vessel; and that the omission in case of a collision, would be prima facie evidence of fault on the part of the steamer. 12 How. 459; 10 How. 515.

It is insisted, however, on the part of the steamboat, that the brig was also in fault, in not showing a light while lying at anchor. We have looked carefully into the evidence on this branch of the case, and are satisfied that the clear weight of it is in favor of the libelants, and that a proper light was kept constantly in the fore-rigging, some seventeen feet above the deck.

Again, it is claimed that, admitting the brig had a light sufficient, within the requirements of the admiralty rule, still she was in fault in not showing a light, in conformity with the Statutes of New York, which required it should be suspended in the rigging at least twenty feet above deck. 1 Rev. Stat. p. 685, sec. 12; also Sess. Laws, 1839, p. 322.

This is a rule of navigation prescribed by the laws of New York, and is doubtless binding upon her own courts, but cannot *regu- [*226 late the decisions of the federal courts, administering the general admiralty law. They can be governed only by the principles peculiar to that system, as generally recognized, in maritime countries, modified by Acts of Congress, independently of local legislation. The Johanna was a foreign ship engaged in the general commerce of the country, not in the purely internal trade of a state.

The Bark Chusan, 1 Story, 445.

We agree, an exception to this general principle is, the regulation of steamboats and other water craft in the ports and harbors of the States, which is required for the accommodation and safety of vessels resorting thither in the pursuits of business and commerce. These are police regulations in aid and furtherance of commerce, enacted by the local authorities, who have a knowledge of the wants of the locality, and a deep interest in properly providing for them.

We are satisfied that the decree of the court below is right, and should be affirmed.

Mr. Justice **Daniel**, dissenting:

I dissent from the decision just pronounced. This record brings before us what the testimony shows to be the case of simple tort or trespass, alleged to have been committed in the harbor of New York; which might have been disposed of upon principles and under proceedings familiar to the habits of the people of the country, and at a greater economy of time and expense than is necessarily incident to proceedings like those just sanctioned. I should always be reluctant, were there no considerations other than those of mere convenience, or even of habit or prejudice involved, to interfere with the local institutions or customs of states or communities. It is proper to leave to these, wherever no paramount obligation forbids it, the adoption and practice of such local institutions or local prejudices if they may be so denominated. Much higher and stronger is the motive for forbearing such interference where the latter cannot be clearly traced to an undoubted legitimate authority. I hold it as an axiom or postulate, that by the admiralty jurisdiction, vested by the Constitution of the United States, a power has not been, nor was ever intended to be, delegated to those courts, to supersede or control the internal polity of the States in providing for the preser-

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vation of property, or for the regulation of order, or the security of personal rights. These subjects constitute a class, the control of which is inseparable from political or social existence in the States; every encroachment upon which is an instance of unwarrantable assumption in the federal government, and of progressive decline in the health and vigor of those of the States. Especially does it seem strange 227*]to me that there should *anywhere exist a tendency to extend a system which, however attended with advantage when limited to the necessities in which it originated, must (almost in every instance), be attended with inconvenience, and not unfrequently with ruin to one side of the litigant parties, by operating the seizure and transmutation of property, and of course the suspension, if not the destruction, of all business in which that property formed a necessary instrument—and this, too, before an adjudication upon the rights of litigants can possibly be had; and although such adjudication may be in favor of the person subjected to the consequences just mentioned. The guards which the wisdom and beneficence of the common law and equity jurisprudence of the country have thrown around the rights of property, will tolerate no consequences like these; they require judgment before execution; and this single consideration, were there no other, should cause them to be cherished and maintained, rather than impugned or evaded.

The case before us furnishes a precedent, a pregnant precedent, for interference with the harbor regulations of every town in the Union, and this, too, under the ambitious and undefinable pretensions of a great system of maritime jurisprudence. Truly it may be said that this pretension entirely reverses the maxim of that venerable, though neglected common law, De minimis non curat lex; a trespass in the harbor of New York would else be a quarry upon which it would disdain to stoop.

But independently of the objection to the decision in this case, which, in my view of it, results from the absence of power under the Constitution, upon the principles of justice and fairness, were there no restriction upon the powers of the court, its decision is altogether unwarranted.

The evidence correctly compared, so far from fixing upon the steamboat the fault of the collision, shows that collision to have been very probably, if not certainly, the result of delinquency on the part of the brig. It seems to have become a favored doctrine that in all cases of collision between steamboats and sailing vessels, the burden of proof, either for excuse or exculpation, is to be placed on the steamboat, because it said that she is in a great degree independent of the winds and the tide, and possesses entire control of her movements. This rule, when applied within the limits of reason and the bounds of unquestioned or obvious right as to all parties, is just, and should be enforced; but, if strained or perverted to the justification or toleration of willful neglect or caprice, or perverseness on the one side, and to the extension of penal infliction on those who have been involved, by the indulgence of such neglect or perverseness, the rule becomes the source of greater mischiefs 228*]than it professes to *prevent or cure. It imposes upon an important class of interests in society conditions and burdens incompatible with the prosperity or even with the existence of those interests. By the rule thus expounded—or if a steamer, merely because she is not propelled by the winds or the tides, is under all the circumstances bound to avoid a vessel navigated by sails—it would follow, that should a vessel of the latter description wantonly or designedly place herself in the track of a steamer, or even put chase to her with that object, the steamer would nevertheless be responsible for the effects of a collision thus brought about.

Such an application of the rule cannot be correct. Steamers have their rights upon the waters as certain and entire as can be those of sailing vessels, and the exercise of those rights, under the injunctions of integrity and discretion, is all that can justly be demanded of them There can be no sound reason why they should be placed upon a ground of comparative disadvantage with reference to others. Why should there be placed under a species of judicial ban a mean of navigation and intercourse which, in regard to commerce, science, literature, art, wealth, comfort and civilization, has, in a few years, advanced the world by more than a thousand years, perhaps, beyond the point at which the previous and ordinary modes of navigation would possibly have obtained? I am most unwilling to cripple or needlessly or unjustly to burden the means of such benefits to mankind, by harsh and oppressive exactions.

The danger and injustice of such a course are, in my judgment, exemplified by the testimony in this case, and by the conclusions deduced by the court from that testimony.

The witnesses examined in this case are of three classes or descriptions: 1st. Those who belonged to the crew of the brig. 2d. Those who were engaged in the management of the steamer. 3d. The owners or crews of the several barges then in tow by the steamer.

It is admitted on all sides that the night on which the collision occurred was dark, and that the brig was anchored in the much frequented and even greatly thronged track of vessels of every description—in fact, in the very port of New York. And it is equally shown that, by the laws of the State of New York, and by rules of the harbor, vessels thus situated are required to hoist a light at the elevation of twenty feet above the deck. There are no laws of the State, nor regulations of the port, inhibiting ingress and egress into and from the harbor during the night, nor prescribing the degree of speed at which these movements shall be accomplished, and any such regulation would be inconvenient, and to say the least of it, useless, where the precaution of a light, such as that prescribed by the law and the regulation of *the port, was used. And it would [*229 seem to be as absurd and as vain to prescribe a given speed to a steam vessel entering or leaving the harbor, as it would be to attempt the same thing as to sailing vessels, whose speed, at least, must depend upon the state of the wind at the time of her progress. Every necessity, every reasonable precaution, every guide, is supplied by a sufficient light, exhibited at the proper time and place.

The statements of the crew of the brig are

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vague and by no means consistent, with respect to the precautions used on that vessel. They cannot state the precise time at which a light was displayed, nor that at which it was taken down to be used for other than the purposes of a signal; nor do they concur as to the hour at which the collision occurred, nor as to the lapse of time between the lowering of the signal light, for the purpose of paying out chain, and the fact of collision. They do agree in stating the lowering, and in the use of the light for another purpose than that of a signal, shortly before the collision; and in the further important fact that the light, when up, was suspended several feet below the elevation required by the law and the harbor regulations.

It is an opinion frequently expressed, and which seems to have become trite with many persons, with reference to cases of collision, that the crews of the different vessels are almost certain to swear to such facts as will justify the conduct of their own vessel; or in other words, will excuse or justify themselves, and cast the imputation of blame on the opposing vessel or party, even at the cost of perjury; and that, therefore, little or no faith can be given the oaths of the officers and crews of the respective vessels. With every proper allowance for the influence of selfishness, or alarm, or falsehood, it may be remarked that extreme opinions, like the one just stated, are themselves calculated to lead to error, and would often defeat the purpose which the diffidence or mistrust on which they rest would seek to attain. Collisions between vessels engaged in the navigation, either on the ocean or on rivers, rarely occur in the presence of spectators wholly detached from and indifferent to the events which really take place. The scene of such events is usually on the track of the ocean, the course of rivers, midst the darkness of night, where and when there are none to testify save those who participate in the catastrophe; and if such persons, under the influence of a foregone opinion, are to be set aside as unworthy of faith, decisions upon cases of collision will, and indeed must, become so entirely the result of conjecture, or of an arbitrary rule, as to challenge but a small share of public confidence; and what is of more importance, may be the instruments of injustice and oppression. The error and inconsistency 230*] of this rule *is strikingly exemplified in the present instance, in which it is seen that the testimony on which the decision professes mainly to be founded is said to be that of the captain of the steamer, the party said to be in default—a source of evidence denounced by the rule as unworthy of belief. It so happens, however, by a conjuncture quite unusual, that the case before us is placed beyond the operation of the rule of evidence above adverted to. Of the fourteen witnesses who testify on behalf of the defendant in the libel, seven of them did not belong to the steamer. They were composed of the masters and crews of the barges then in tow of the former, and whose lives and property were imperiled by any misconduct of her conductors, with regard to whom there is no conceivable ground for bias or partiality on the part of these witnesses. Yet it is explicitly declared by them all—and they all appear to have been awake and in a situation to observe what was passing—that not one of them saw a light of any description or in any position displayed from the brig; that the latter was perceived as a dark spot upon the water, only when approached so closely as to be at the immediate point of collision. It is incomprehensible to my mind how this could have been the case had there been lights from the brig, and especially at the proper elevation prescribed by law. Such lights must have been in some degree perceptible, instead of the vessel being perceived only at the very point of contact, as a dark spot upon the water. But if in truth the brig had lights at all, provided they were placed in a situation to render them invisible, or on a place below that prescribed by law, she is as obnoxious to censure as if she displayed no lights. The steamer is proved to have been abundantly lighted. To excuse a departure from the law, either in failing to exhibit any lights, or displaying such as were insufficient or placed in an improper position, and still more to make such delinquency the ground of reclamation for injuries resulting therefrom, appears to me to be the award of a premium for a breach of duty, and an invitation to similar offenses by others.

Without a further detail of the testimony in this case, I must say that the preponderance of that testimony is, in my judgment, against the libelant upon the merits. Independently, therefore, of the objection to the jurisdiction of the court, were I at liberty to disregard that objection, I think that the libel should not have been sustained. Upon the question of jurisdiction, it is my opinion that the libel should have been dismissed apart from the merits, and that the case should by this court be remanded to the Circuit Court, with directions to dismiss the libel, with costs.

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*THE SHIP HOWARD, her Tackle, etc., [*231
William F. Schmidt and George Belcher, Claimants and Appt's,
v.
FREDERICK WISSMAN.

(See S. C. 18 How. 231-235.)

Potatoes shipped unsound, vessel not liable for loss.

When potatoes were shipped at Hamburg, in Germany, unsound and unfit for shipment, and were lost by decay on the voyage to New York, the vessel is not liable for their loss.

Argued Jan. 30, 1856. Decided Feb. 12, 1856.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. Reverdy Johnson and C. Donohue, for the appellants:

1. The contract is a special one, and the burden of proving it is on the libelants.

2. The vessel sailed as soon as possible. A carrier is excused, not only by what is technically called the act of God, but also by other causes beyond his control.

Ang. Car. sec. 289.

3. The cargo was unfit to be shipped. Its loss was beyond the power of respondent to control; hence he is discharged.

Ang. Car. 210, 211, 218.

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The time of shipment fixes the vessel's charge of the cargo.

Sto. Bailm. sec. 533; Ang. Car. 480.

Messrs. **George F. Betts** and **F. B. Cutting**, for the appellees:

1. This court will not reverse the decision of the court below upon matters of fact, unless a mistake is clearly shown.

Walsh v. Rogers, 13 How. 283.

2. A common carrier, having receipted for freight in good order, and delivered it in a ruined condition, is presumptively liable.

Clark v. Barnwell, 12 How. 272; Rich v. Lambert, 12 How. 347.

3. The carrier was bound to have used ordinary forecast in anticipating the freezing of the river, and to have sailed in time to escape it.

3 Kent. 204, 262; Shepperd v. Kain, 5 Barn. & A. 240; Bowman v. Teall, 23 Wend. 306; Hans v. Rand, 4 Wend. 559; Crosby v. Fitch, 12 Con. 410; Wallace v. Vigus, 4 Blackf. 260.

Especially when the cargo consisted of perishable articles.

Abb. Ship. 371.

Mr. Justice **Catron** delivered the opinion of the court:

This is a proceeding in rem. against a foreign vessel, by libel; charging that the libelant shipped on her, at Hamburg, in Germany, 5,004 bushels of potatoes in good order and well conditioned for the purpose of shipping, and that, by the long and willful delay of the vessel at Hamburg, and on her voyage to New York (to port of destination), and through the carelessness and misconduct of the master and owner, the potatoes became and were injured, decayed, and wholly lost to the libelant.

To this charge the respondents answer, that the decay of the potatoes was caused by their lying in port for some time before they were put on board; and that they were delivered to the vessel in a damp and wet state, and were not in a sound condition. The alleged negligence is denied generally.

On the foregoing issue the District Court made an interlocutory decree, declaring that "the libelant recovered in this action against the ship, the value of the potatoes at Hamburg at the time they were laden on board, together with charges and expenses, unless it be proved by the claimants that they were not then in a good, sound condition; or that they perished afterwards, in consequence of inherent disease or defects existing at the time of lading the same, and not from the prolonged detention in their transportation: and it is further ordered, that it be referred to a commissioner to ascertain and report the cause of the destruction and loss of the potatoes, and their value at the time of shipment."

232*] *The commissioner reported that he had heard the parties and their testimony, and found that the potatoes were in a sound condition, and that they did not perish afterwards in consequence of inherent disease or defects existing at the time of loading the same, but that the cause of their destruction and loss was the long and protracted voyage of one hundred and nine days; and that they were worth, when shipped (including charges), $2,256.77.

This report was adopted by the District Court and a decree made accordingly.

An appeal was prosecuted by the claimants to the Circuit Court, where the decree below was affirmed.

The potatoes were shipped in bulk in the hold of the vessel, which mode of shipment was adopted at the instance of the libelant's agent, who superintended their stowage.

It appears that much rain fell during the time the potatoes were lying in lighters, awaiting an opportunity to ship them, being about a month; and it rained when they were alongside, and putting into the vessel; and in our opinion it is satisfactorily established, that the potatoes were wet to a considerable extent when delivered and stowed in the hold.

Wulff, the stevedore, under whose immediate supervision they were stowed, deposes that they were wet, "and considering their condition and their being shipped in bulk, he thinks they should not have been shipped across the Atlantic; for said potatoes began to steam before the sailing of the ship Howard."

The pilot of the Howard deposes that he saw them steam out of the fore hatch, during the passage down the river, before the vessel got outside.

Kumpel deposes that he saw the potatoes in the lighters and on board, and that they were wet. So the other witnesses prove.

Kundsten, mate of the Howard, deposes that the potatoes began to have a bad smell when the vessel was fourteen days out. The captain says he smelt them when they were only eight days at sea.

It is proved, by all the witnesses of both sides, that the potato crop of 1849 was much blighted and diseased all over Germany; and several witnesses declare that potatoes grown that year were generally unfit for shipment across the ocean.

The libelant's witness, Heidpriein, answers to cross-interrogatories, that he purchased and sold that year 7,200,000 pounds of potatoes; that the crop was generally unsound, and would not stand being shipped in bulk for so long a voyage as from Hamburg to New York; says he shipped to Hamburg—about forty German miles (160 of ours)—by water, and that no cargo arrived, after being on the way from four to fourteen days, without *the potatoes [*233 being in a bad condition. And respecting those shipped on The Howard, he states that Mr. Rawalle, Mr. Wissman's agent, applied to him to purchase potatoes; and he having none to sell, told Mr. Rawalle of some for sale by Lehman and Cleve—which, not being sound, the deponent had refused to buy—and he understood Rawalle purchased them. Rawalle deposes that he got the potatoes he shipped of Devan and Lehman, but declares they were not sick or diseased.

Baalman deposes that he saw the potatoes in the lighters; that they were in a bad condition and diseased, he having made examination by cutting them with a knife, and found they were not in good shipping order; and he knows that potatoes of that year's growth, shipped in bulk to England, arrived there in a worthless state, and had to be thrown overboard.

Wulff, the stevedore, says that when he stowed the potatoes he examined them, by

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breaking and cutting; they appeared to be unsound and diseased.

The master of The Howard deposes, that the ship Miles took a cargo of the potatoes purchased by Rawalle for Wissman, and what The Miles did not take were taken by The Howard; that he, the master, purchased some of the potatoes that were going to The Miles, for use on The Howard, which proved to be diseased and unfit for use on being cooked.

The mate declares that the potatoes looked well outside, but when cut open they had sickness in them; that the potatoes loaded on both vessels came from the same man.

Arianson, master of the bark Miles, deposes that more potatoes were sent to The Miles, when loading at Hamburg, than he could take on board, and that the balance were sent to The Howard; that the potatoes that he brought rotted. He discovered it five or six weeks after going to sea, by the smell, which was two or three weeks before arriving at New York.

The owner having been committed to the prima facie facts of soundness and good condition by his contract of affreightment, it was properly imposed on him by the District Court to establish the contrary by due proof; and our opinion is, that the proof produced by him does overcome the prima facie presumption, and shows the potatoes of the libelant to have been unsound and unfit for shipment, and especially unfit to be shipped in bulk and wet, as was done by the libelant's agent.

Rawalle was examined for the libelant several times. He deposes that the potatoes were put on board in good order: that they were dry and sound; and in his opinion, if The Howard had sailed in due time, according to her advertisement, they would have arrived at New York in a sound condition.

As a dealer in this article, the witness had 234*] very small experience *compared with various others examined; none of whom express the belief that this cargo, stowed in bulk, could have reached the port of destination uninjured. But what appears to us far more satisfactory than the speculations of witnesses is, that the cargo of The Miles was lost by decay, she being loaded at the same time and in the same manner as was The Howard, and with part of the potatoes taken from the same lighters—although The Miles made her voyage in due time.

Our conclusion is that the libelant's case has no merits. It is, therefore, ordered, that the decree of the Circuit Court be reversed, and the cause remanded to that court, with directions to dismiss the libel with costs.

Mr. Justice Daniel:

In the opinion just pronounced, so far as it goes to demonstrate the entire want of justice in the demand of the libelant, I entirely concur. The testimony in this case having satisfactorily ascertained that the loss of the cargo was inevitable from the character of the subject of which that cargo consisted, and that by no degree of diligence or care could it have been transported in good condition to its point of destination. But independently of these considerations, and in advance of them, there is another which, of itself, in my judgment, should have prevented the claim of the libelant from being established or entertained at all in the district or circuit courts, and which should operate with equal effect in preventing its being entertained here.

This case is one of contract between the owner of property and the master of a vessel to transport a cargo of potatoes from Hamburg, and to deliver them in New York. It is nothing more than a contract between the owner of property and a carrier to convey a given subject for hire. It was a contract made upon land to be terminated and executed upon the land for a stipulated compensation, and not strictly or properly a maritime contract, in any sense beyond any other contract in the performance of which a party or agent would be compellable to cross the ocean or even to pass a river. It did not begin and terminate on the sea. Upon this contract an action might have been instituted in a court of law either upon the charter-party or the bill of lading in conformity with ancient and well-settled practice, and could have been as speedily and efficiently decided in such a court as it could be in the present form of proceeding, less familiar to the common understanding and habits of the country, dubious and undefined in its claims to power, and attended with expenses beyond those incident to the usual tribunals of the land.

*My opinion is, that for want of juris- [*235 diction in the case presented upon the face of the libel, that libel should have been dismissed by the Circuit Court, and that this court should now, for that cause, order it to be dismissed.

JOHN F. McKINNEY, Plff. in Er.,

v.

MANUEL SAVIEGO and Pilar, his Wife.

(See S. C. 18 How. 235-240.)

Constitution of Texas—inheritance by aliens—Treaty of Guadaloupe Hidalgo.

The Constitution of Texas, of 1836, provided for the transmission of estates of citizens to their children or heirs, being citizens, and that Congress should legislate to give to aliens a reasonable time to take possession and dispose of an inheritance. But neither its Constitution or laws provided that an alien could transmit land in Texas by descent to an alien heir.

Subsequent Texas statute provided that an alien heir must within nine years sell the lands or become a citizen.

The 8th section of the Treaty of Guadaloupe Hidalgo, of February, 1848, is inapplicable to persons who before the revolution in Texas had been citizens of Mexico, and who, by that revolution, had been separated from it.

The right of property to which this article of the Treaty was designed to afford a guarantee, was that which at its date belonged to Mexican citizens not established within the territories then ceded to the United States.

Submitted Jan. 30, 1856. Decided Feb. 12, 1856.

IN ERROR to the District Court of the United States for the District of Texas.

The case is stated by the court.

Mr. W. G. Hale, for plaintiff in error:

A grant of land within the littoral leagues, made by the State of Coahuila and Texas was

NOTE.—Effect or alienage, as to title to real estate.—see notes, 6 L. ed. U. S. 488; 28 L. ed. U. S. 934. Alien's right to inherit—see note 31 L.R.A. 177. Effect of treaties upon alien's right to inherit—see note, 32 L.R.A. 177.

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absolutely void, unless it had received the previous approbation of the executive of the Union; and the burden of proving that approbation is upon the party claiming under the grant.

Colonial Laws, August 18, 1824, art. 4; 1825, art. 7; 1832, art. 25; Goode v. McQueen's Heirs, 3 Tex. 241; Edwards v. Davis, 3 Tex. 321; Republic v. Thorn, 3 Tex. 499; Jones v. Borden, 5 Tex. 410; Simpson v. McLemore, 8 Tex. 448; Bissell v. Haynes, 9 Tex. 556; De Leon v. White, 9 Tex. 598; Edwards v. Davis, 10 Tex. 316.

Under the laws of Texas, a colonist who abandoned the State to reside in a foreign country, without having legally sold his land, forfeited it, and it became ipso facto vacant.

Holliman v. Peebles, 1 Tex. 673; Horton v. Brown, 2 Tex. 78; Wheeler v. Moody, 9 Tex. 372; Yates v. Iams, 10 Tex. 168; Hart. Dig. art. 127.

A citizen of Mexico residing in Texas before the Declaration of Independence, who left the country before that declaration, and becoming domiciled in another state, elected to remain a Mexican citizen, thereby became an alien to the Republic of Texas.

Const. Repub. Gen. Prov. secs. 6 and 10; Hart. Dig. 37, 38; Dawson's Lessee v. Godfrey, 4 Cr. 321; Orr v. Hodgson, 4 Wheat. 453; Shanks v. Dupont, 3 Pet. 242; Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. 99; Orser v. Hoag, 3 Hill, 79; Hollingsworth v. Duane, Wall. C. C. 46, 51, 77, 141, 147.

An alien cannot take by descent; and the estate, where there are no citizen heirs, escheats to the state without office found.

Fairfax v. Hunter, 7 Cr. 603; Orr v. Hodgson, 4 Wheat. 453; Lessee of Levy v. McCartee, 6 Pet. 102; Hardy v. De Leon, 5 Tex. 242.

It was admitted in the District Court that the original grantee of the land, the mother of the female plaintiff, moved from Texas to Matamoras, west of the Rio Grande, before the declaration of independence of Texas; and that she continued to reside there as a Mexican citizen, until her death in 1842, and that the present plaintiffs have since resided there and in other parts of Mexico. The plaintiffs, in their petition, describe themselves as aliens. It is evident that the female plaintiff was, with respect to the lands in Texas, the alien child of an alien, and as such, she could not take the estate by inheritance.

Mr. Robert Hughes, for defendant in error:

Gertrudis Barrera was not deprived of her right to the land in question, by removing to Tamaulipas after the commencement of the revolution, and before the declaration of independence. This declaration was on March 2d, 1836, and the constitution of the Republic was adopted on the 17th of the same month. The 8th section of the General Provisions of the Constitution, upon which the objection to her right is founded, is prospective merely in its provisions. It is in these words: "All persons who shall leave the country for the purpose of evading a participation in the present struggle, or shall refuse to participate in it, or shall give aid or assistance to the present enemy, shall forfeit all rights of citizenship, and such lands as they may hold in the Republic."

Hart. Dig. 37.

Persons who left before the declaration, were not citizens, and to them the provision did not apply; for the penalty was a forfeiture of citizenship and of land. But even if the land was liable to forfeiture, the right remained with the grantee until forfeiture declared. Such forfeiture cannot be declared in this proceeding.

Const. of State, art. 13, sec. 4; Hart. Dig. 80; Hancock v. McKinney, 7 Tex. 384; Swift v. Herrera, 9 Tex. 263.

Gertrudis Barrera, by adhering to her native allegiance, did not forfeit her right.

Jackson v. Lunn, 3 Johns. Cas. 109; 9 U. S. Stat. at L. 929; Chirac v. Chirac, 2 Wheat. 259.

The plaintiff below, her only heir, took by descent under the laws of Texas.

Hart. Dig. arts. 38, 585, 600; Jackson v. Britton, 4 Wend. 507.

Mr. Justice Campbell delivered the opinion of the court:

The defendants (Saviego and wife) claimed, in the District Court, two and one half leagues of land lying in the Counties of Goliad and Refugio, in Texas, as an inheritance of Mad. *Saviego, from her mother, Gertrudis [*237 Barrera, who died in Matamoros, in Mexico, in 1842.

Gertrudis Barrera acquired, in 1834, one league of the locus in quo by donation, and the remainder by purchase under the Colonization Laws of the State of Coahuila and Texas, while it formed a part of the Republic of Mexico. She occupied and improved the land until the commencement of the revolutionary movements in Texas, in 1835; but prior to the declaration of independence in that year she emigrated and became a resident of Matamoros, where she continued until her death. The plaintiffs were also citizens of Coahuila and Texas, but abandoned their connection with Texas in Company with their ancestress, and have retained their status as Mexican citizens.

They are described on the record as aliens and citizens, and residents of the City of Matamoros, in the State of Tamaulipas, in the Republic of Mexico. The defendant claimed the land by virtue of locations and surveys of valid land certificates which had been regularly returned to the General Land Office in Texas, before the 31st August, 1853.

A number of questions are presented in the bill of exceptions, but the opinion the court has formed upon the 12th, 13th and 14th instructions given at the instance of the plaintiffs, in the District Court, renders it unnecessary for us to consider any others. These instructions are as follows:

"12. If Gertrudis Barrera was a citizen of the Republic of Mexico, domiciliated within the State of Coahuila and Texas when the land in question was granted to her, her abandonment of the State of Coahuila and Texas, and settlement in Matamoros, in the State of Tamaulipas, after the commencement of the revolution in Texas, and before the declaration of Texan independence, was not a forfeiture of the land so granted, nor did the land thereby become vacant; and after the close of the revolution in Texas, she would have been authorized to enforce her right, had she then been living.

13. If Madame Barrera died in Tamaulipas, in 1842, then being a citizen of the said State—

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of Tamaulipas, domiciliated there, and the female plaintiff was her only heir, she too being a citizen of, and domiciliated in, Tamaulipas, said heir could and did take, by the law here, the land in contest, by descent, and had a right to enforce her title by descent, to the same extent that her ancestor could have done, but subject, as she is an alien, to forfeiture by proceedings on the part of the State.

14. But if no proceedings were instituted and perfected before the late Treaty between the United States and Mexico, the right in said heir becomes perfect, and not subject to forfeiture, by virtue of the 8th article of said Treaty."

238*] *It is settled, in the jurisprudence of Texas that the Colonization Laws of Coahuila and Texas annex, as an enduring and peremptory condition, to all titles issued by their authority, that the grantee, so long as he remains the proprietor, shall continue his domicil within the Republic of Mexico, of which that State formed a part. A change of domicil operated to defeat the estate of the grantee, and to restore the land without incumbrance to the public domain, so that, without a judicial or other inquiry, it might be regranted. The same jurisprudence recognizes the prohibition upon foreigners to inherit lands in Mexico, for the owners of lands were subject to charges and obligations which citizens could alone perform.

Holliman v. Peebles, 1 Tex. 673; Horton v. Brown, 2 Tex. 78; Yates v. Jams, 10 Tex. 168.

The conduct of Gertrudis Barrera and her children, the defendants in this suit, after the commencement of the revolutionary movements in Texas, and which separated that State from Mexico, deprived them of all claim to political rights in the new Republic, and placed them under the civil disabilities of foreigners under its laws. The constitution of Texas, of 1836, identified as citizens only such persons as were residing in Texas on the day of the declaration of independence, or should be naturalized according to its provisions. Hart. Dig. 35, 38; Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. 99. The same instrument provided that "no alien shall hold land in Texas, except by titles emanating directly from the government of this Republic." Hart. Dig. 38, sec. 10, and provided that Congress should, as early as practicable, introduce by statute the common law of England, with such modifications as the circumstances of the State might require. This duty was performed in 1840, by an enactment that "the common law of England, so far as it is not inconsistent with the Constitution or Acts of Congress now in force, shall, together with such Acts, be the rule of decision in this republic, and shall continue in full force until altered or repealed by Congress." The common law authorities clearly establish that Mad. Saviego, under the circumstances, is not deemed to be an heir at law, having no inheritable blood, and, in the absence of such heirs, the estate would be cast immediately upon the State without inquest of office.

Hodgson v. Orr, 4 Wheat. 453; Hardy v. De Lear, 5 Tex. 211, 242.

We shall now examine if there are other provisions in the laws of Texas to relieve the defendants from the apparent disability.

The constitution of Texas, by way of exception to the general inhibition upon aliens to "hold lands except by titles emanating directly from the Republic," declares that "if any citizen should *die intestate or other- [*239 wise, his children or heirs shall inherit his estate, and aliens shall have a reasonable time to take possession of and dispose of the same in a manner hereafter to be pointed out by law." The 10th section of the Law of Distribution and Descent, Hart. Dig. art. 585, provides "In making title to land by descent, it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien; and every alien to whom any land may be devised or may descend, shall have nine years to become a citizen of the Republic and take possession of such land; or shall have nine years to sell the same, before it shall be declared forfeited, or before it shall escheat to the government." The first clause of this section is substantially a reenactment of the Statute of 11 and 12 William III. ch. 6, and removes no other defect than the want of inheritable blood arising from the alienage of some person through whom the heir must deduce his claim.

McCreery v. Somerville, 9 Wheat. 354.

The second clause modifies the existing laws which regulate the capacities of aliens to take or hold real property in the State, whether by devise or descent.

But the remedial effect of the Act does not extend beyond the disability of an alien heir. It contains no enactment in favor of an alien who may have acquired possession or property in lands, whereby he could make a valid bequest or transmit it to his heirs, whether aliens or citizens by descent.

The Act of which this section forms a part is framed for the disposal of the estates of those having "title to any estate in inheritance, and regulates its descent or distribution." The prohibition in the Constitution upon aliens to hold lands in Texas, and the limited powers of Congress to introduce favorable conditions in favor of alien heirs, must be remembered in ascertaining its meaning. The Constitution had provided for the transmission of the estates of citizens to their children or heirs (being citizens), and then provides that Congress shall legislate to give to aliens a reasonable time to take possession and to dispose of such an inheritance. Neither the language of the Act nor the policy of the State, as it may be discovered from its constitution and laws, authorizes the conclusion that an alien, claiming real property in Texas, can transmit it, by descent, to an heir who is also an alien.

The subject matter to which these provisions all relate is the estates of citizens; and we cannot apply their conditions to the special and peculiar case of an inheritance claimed by an alien heir in the right of an alien intestate. The question has not arisen, so far as we can discover, in the courts of Texas; but in the case of Cryer v. Andrews, 11 Tex. 170, the court seems to assume that the Act we have considered was a legislative compliance *with [*240 the constitutional guarantees in favor of the alien heirs of deceased citizens; and that the alien heir must, within nine years, sell the lands or become a citizen. In the present in-

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stance, citizenship has not been acquired, which that court seems to treat as a prerequisite to an entry on the inheritance.

The last question remaining for consideration arises on the 8th section of the Treaty with the Republic of Mexico of the 2d February, 1848, 9 Stat. at L. 923, called the Treaty of Guadaloupe Hidalgo. The first clause of that article provides "for the Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States." The second clause provides for those who shall prefer to remain in the said territories, and they are authorized to retain the title of Mexican citizens or acquire the rights of citizens of the United States. The third clause prescribes "that in the said territories property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to its guarantees equally ample as if the same belonged to citizens of the United States." To what territories did the high contracting parties refer to in this article? We think it clear that they did not refer to any portion of the acknowledged limits of Texas. The territories alluded to are those which had previously to the Treaty belonged to Mexico, and which, after the Treaty, should remain within the limits of the United States. The Republic of Texas had been many years before acknowledged by the United States as existing separately and independently of Mexico; and as a separate and independent State it had been admitted to the Union. The government of the United States, by that Act, had conferred upon the population established there all the privileges within their constitutional competency to grant.

The various stipulations contained in this article are wholly inapplicable to the persons, who before the revolution in Texas, had been citizens of Mexico, and who, by that revolution, had been separated from it.

The right of property, to which this article of the Treaty was designed to afford a guarantee, extended to property of every kind which at its date belonged to Mexican citizens ("now belonging to Mexicans") not established within the territories then ceded to the United States. In the present instance, the Republic of Texas had acquired title many years before, and the land at the date formed its public domain.

Our conclusion is, that the judgment of the District Court should be reversed, and the cause remanded to that court for further proceedings.

JOHN G. SHIELDS, Appt.,

v.

ISAAC THOMAS and Mary, his Wife; Nancy Pirtle, John B. Goldsbury, Thomas Starks and Elizabeth, his Wife, and James Pickett and Ann, his Wife.

(See S. C. 18 How. 253-263.)

Circuit Court of Kentucky has jurisdiction of settlement of estates—voluntary appearance confers jurisdiction—multifariousness defined—right of trial by jury not applicable to equity courts—District Court has jurisdiction of bill to execute decrees of state court.

Circuit Court of Kentucky has jurisdiction, having general equity powers, either in personam or in rem, as to persons or property, such as the settlement of estate of intestate who lived and died within the limits of the court's authority.

The proceedings are binding only on those legally served, or those who have voluntarily submitted themselves as parties.

A voluntary appearance and answer precludes objection to jurisdiction for non-residence.

Each case, as to whether it is multifarious must be determined by its peculiar features.

Multifariousness defined.

Bill for recovery of a subject under a common title, although complainants claim in aliquot parts, against persons for withholding and diverting that subject, who are jointly and severally liable therefor, is not multifarious.

The 7th amendment of the Constitution providing "that in suits at common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved," does not apply to courts of equity.

District Court has jurisdiction of a bill in equity to carry into execution decree of State Court.

Argued Jan. 30, 1856. Decided Feb. 19, 1856.

APPEAL from the District Court of the United States for the Northern District of Iowa.

The case is stated by the court.

Mr. R. H. Gillet, for the plaintiffs in error:

1. There was adequate remedy at law, and hence, a suit in equity could not be sustained.

Baker v. Biddle, 1 Bald. C. C. 394; Henley v. Soper, 8 Barn. & C. 16; Sadler v. Robinson, 1 Kent. 253; Dubois v. Dubois, 6 Cow. 494; Howard v. Howard, 15 Mass. 197; McKim v. Odoom, 3 Fairf. (12 Me.) 94; Evans v. Tatem, 9 S. & R. 252; Pennington v. Gibson, 16 How. 65.

2. The bill is multifarious, embracing separate causes of action, and therefore bad.

1 Dan. Ch. Pr. 437; Cooper's Eq. Pl. 182; Mit. 146, 147; Yeaton v. Lennox, 8 Pet. 123.

3. A final decree in equity cannot be made, until all the parties interested are made parties.

Mit. 4, 145; Cooper's Eq. Pl. 33; Poole v. Clark, 2 Atk. 515; Cockburn v. Thompson, 16, Ves. 325; Palk v. Clinton, 12 Ves. 58; Wilkins v. Fry, 1 Meriv. 262; Russel v. Clark, 7 Cranch, 69; Marshall v. Beverley, 5 Wheat. 313; Conn. v. Penn. 5 Wheat. 424.

Demands cannot be split up and separate suits brought.

Smith v. Jones, 15 Johns. 229; Farrington v. Payne, 15 Johns. 432; Willard v. Sperry, 16 Johns, 121; Phillips v. Berick, 16 Johns, 136; Connell v. Cook, 7 Cow. 310; Miller v. Covert, 1 Wend. 487; Butler v. Wright, 2 Wend. 369; Colvin v. Corwin, 15 Wend. 557; Guernsey v. Carver, 8 Wend. 492; Bendernagle v. Cocks, 19 Wend. 207.

4. Whether a court have jurisdiction of the person or subject matter of a suit, may be inquired into by other courts.

NOTE.—Appearance cures defects in service of process and its non-service, except want of jurisdiction. See note to Knox v. Summers, 2 L. ed. U. S. 510. Effect of appearance by counsel or attorney in an action. Unauthorized appearance. What is an appearance. See note to Shelton v. Tiffin, 12 L. ed. U. S. 387. Multifariousness. See note to Gaines v. Chew, 11 L. ed. U. S. 402.

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Elliott v. Piersol, 1 Pet. 340; Thompson v. Tolmie, 2 Pet. 157; Rose v. Himely, 4 Cranch, 242; Hickey v. Stewart, 3 How. 762; Schriver v. Lynn, 2 How. 60; Lincoln v. Tower, 2 McLean, 473; Williams v. Preston, 3 J. J. Marsh. Ky. 600.

5. A judgment against persons not within the jurisdiction of the court, and who were not served with the process, and who did not appear to the action, is null and void.

Ewer v. Coffin, 1 Cush. 24; Hickey v. Smith, 1 Eng. 456; 3 Eng. 318; Woodruff v. Taylor, 20 Vt. 65; Davis v. Smith, 5 Ga. 274; Dunn v. Hall, 8 Blackf. 32; DeArcy v. Ketchum, 11 How. 165; Lincoln v. Tower, 2 McLean, 473; Williams v. Preston, 3 J. J. Marsh. 600; Shaeffer v. Gates, 2 B. Mon. 453; Johnson v. Vaughan, 9 B. Mon. 218; Rogers v. Hagan, 6 J. J. Marsh. 578; Cobb v. Haynes, 8 B. Mon. 137; Williams v. Preston, 3 J. J. Marsh. 600.

6. A judgment or decree void as to one or more of the parties, is void as to all.

Hall v. Williams, 6 Pick. 232; Richardson v. Walton, 12 Johns. 434; Holbrook v. Murray, 5 Wend. 161; Rangely v. Webster, 11 N. H. 299; Blanchard v. Gregory, 14 Ohio, 413; Williams v. Duffy, 7 Humph. 255.

Mr. Platt Smith, for appellees:

The Grayson Circuit Court in Kentucky had jurisdiction of the subject matter and of John G. Shields. Consequently its decree cannot be inquired into; full faith and credit are to be given to it.

Const. U. S. art. 4, sec. 1; Act Cong. May 26, 1790; 1 Stat. at L. 122.

As to James Shields and Henry Yates, who are non-residents and proceeded against as such, the Kentucky decree would not be binding on them, except in the State of Kentucky, the courts of that State not having obtained jurisdiction of their persons.

Sto. Confl. Laws, sec. 569; Williams v. Preston, 3 J. J. Marsh. 600; Cobb v. Haynes, 8 B. Mon. 139.

The remedy at law would have caused a multiplicity of suits, and if the whole had been attempted in one suit, there was no mutuality between the plaintiffs.

Gould, Pl. 197; Wend. 117, N. 2.

No action at law will lie on the decretal order of a court of equity.

Hugh v. Higgs, 8 Wheat. 697; Carpenter v. Thornton, 3 B. & Ald. 52; Elliot v. Ray, 2 Blackf. 31; Van Buskirk v. Mulock, 3 Harr. N. J. 184.

Unless the remedy at law is plain, adequate and certain, equity has jurisdiction. It cannot be maintained that a court of equity will interfere only when no remedy can be had at law.

Boyce's Exrs. v. Grundy, 3 Pet. 215; Corp. of Carlisle v. Wilson, 13 Ves. 279; 1 Dan. Ch. Pr. 611; Adams Eq. 2 Am. ed. 220, note.

The preventing multiplicity of suits, is itself a cause for giving equity jurisdiction.

Jesus College v. Bloom, 3 Atk. 263; 1 Sto. Eq. Jur. sec. 64, K. 67; Sto. Eq. Pl. secs. 287, 473.

Mr. Justice Daniel delivered the opinion of the court:

Upon an appeal from a decree in chancery by the District Court of the Northern District of Iowa.

This case, although upon the record a good deal extended in volume, is in effect narrowed to the questions of law arising upon the pleadings.

The facts of the case, so far as a statement of these is necessary to an accurate comprehension of the legal questions discussed and decided, were as follows: In the year 1839, a portion of the appellees, as heirs and distributees of John Goldsbury, by their bill filed in the Circuit Court for Grayson County, in the State of Kentucky, alleged that their ancestor died in Nelson County, in the State aforesaid, intestate, leaving a widow, Eleanor Goldsbury, and four children—three daughters, Elizabeth, Nancy, and Mary, and one son, Bennett Goldsbury—all these children infants at the time of their father's death. That John Goldsbury died possessed of one male and one female slave, and of other personal property, and perfectly free from debt. That the widow Eleanor Goldsbury, who was appointed *the administratrix [*256 of her husband, and as such took possession of the estate within a year from the period of his death, intermarried with one James Shields, in conjunction with whom she had continued to hold the entire estate, and to apply it to their exclusive use, without having made any settlement or distribution thereof. The bill further charged that Shields and wife, after enjoying the services and hires of the male slave for several years, had ultimately sold him, and that, in the year 1818, they removed from Kentucky to the State of Missouri, carrying with them the female slave belonging to the estate of John Goldsbury, together with her descendants, seven in number, and of great value; that upon application to said Shields and wife for a surrender of those slaves, and for an account of the estate of John Goldsbury so possessed and used by them, this request was refused, and by a fraudulent confederacy between Shields and wife, and John G. Shields, their son, and Henry Yates, their son-in-law, the slaves had by the son and son-in-law been secreted, carried off and sold, in parts unknown to the complainants, and the other personal estate of John Goldsbury fraudulently disposed of in like manner. The bill also made defendants the representatives of the surety of Eleanor Goldsbury, in her bond given as administratrix of her first husband. The bill also made defendants, though not in an adversary interest, Isaac Thomas, and Mary, his wife, Elizabeth, John and Ann Goldsbury, which said Elizabeth, John and Ann, are the infant children of Bennett Goldsbury, son of John Goldsbury, deceased.

After the filing of the bill in this case, it appearing to the satisfaction of the court that James Shields, and Eleanor his wife, Elizabeth, John, and Ann Goldsbury, John Shields, and Henry Yates, were not inhabitants of the State of Kentucky, there was, on the 25th of December, 1839, under the authority of the Statute of Kentucky with reference to absent defendants, issued by the court what is termed a warning order by which the absent defendants were required to appear at the next April Term of the court, and answer the complainants' bill.

Afterwards, viz.: on the 28th of April, 1840, the absent defendants still not appearing, under the like authority of the law of the State,

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the clerk of the court, by its order, filed on behalf of those defendants a traverse denying the allegations of the complainants' bill.

Subsequently to this proceeding, viz.: on the 30th of October, 1841, the said John G. Shields filed his answer to the complainants' bill; thereby recognizing as to himself personally the jurisdiction of the court.

Upon these pleadings, the cause, after an ex-257*] amination of witnesses, *and upon a report of the master, came to a hearing before the Circuit Court, and this tribunal decreed against the representative of the surety in the administration bond of Mrs. Goldsbury (afterwards Mrs. Shields), and against James Shields, her husband, she having departed this life, John G. Shields, the son, and Henry Yates, the son-in-law, in favor of the heirs and distributees of John Goldsbury, the portions reported to be due to them respectively of the general effects of John Goldsbury, deceased, and of the values and hires of the slaves. Upon an appeal taken from this decree to the Supreme Court of Kentucky, it being the opinion of the latter, that under the circumstances, the surety in the administration bond should not be charged, and also that an amount equal to the price of the slave Mat, sold by the administratrix and her husband, and to the hires of the remaining slaves, had been properly applied to the dower of the widow and to the use of the heirs of John Goldsbury, it ordered the decree of the Circuit Court to be reformed in conformity with the opinion of the Supreme Court. By a final decree of the Circuit Court of Grayson County, made on the 28th day of October, 1846, the bill as to the representative of the surety in the administration bond was dismissed, and the defendants, James Shields, John G. Shields and Henry Yates, and each of them, who had, by fraudulent combination, secreted and carried off and disposed of the descendants of the female slave, originally the property of John Goldsbury, were decreed and ordered to pay to the heirs of said John Goldsbury, severally, the amounts ascertained to be due to them as their respective and separate portions of the value of the slaves thus fraudulently disposed of, without any allowance for the hires of those slaves.

To obtain the benefit of this last decree, the suit now before us was instituted in the names of the appellees, Isaac Thomas and Mary his wife, Uriah Pirtle and Nancy his wife, citizens of the state of Kentucky, and John B. Goldsbury, a citizen of the State of Missouri, the said Mary Thomas, and Nancy Pirtle, and John B. Goldsbury, being heirs and distributees of John Goldsbury, deceased, against John G. Shields, a citizen of the State of Iowa. The bill refers to the proceedings in the Kentucky suit, which proceedings are set forth in extenso as an exhibit in this cause; it further assigns as a reason for the non-joinder of a portion of the heirs of John Goldsbury as defendants, the fact that their residence precluded as to them the jurisdiction of the District Court of Iowa. It sets out the sums of money severally and specifically decreed to the complainants by the Circuit Court of Grayson County, Kentucky, and prays that the defendant, John G. Shields, may be compelled to perform that decree by 258*] *the payment to the complainants respectively the sums so awarded to them, and concludes with a prayer for general relief.

By an amendment to the original bill in this case, the several heirs and distributees of John Goldsbury, residing in the State of Missouri, beyond the jurisdiction of the District Court of Iowa, and who, for that reason, were not made defendants by the original bill, were admitted as complainants in this suit, and united in the prayer for enforcing the decree in their favor, as rendered by the Circuit Court of Grayson County, Kentucky.

To the original and amended bills in this case, the defendant, John G. Shields, interposed a demurrer, which having been overruled, and the demurrant abiding by his demurrer, and declining to answer over, the District Court for the District of Iowa, on the 17th day of January, 1854, adjudged and decreed to the complainants the sums respectively awarded to them by the Circuit Court of Grayson County, Kentucky, as against the defendant, John G. Shields, with interest upon those several sums from the 28th day of October, 1846, the date of the decree in the Circuit Court.

Upon an appeal from the District Court of Iowa, several points arising upon the demurrer, and discussed and adjudged by that court, are presented for consideration here. Amongst the objections insisted upon, that which stands first in the natural order, is the alleged want of jurisdiction in the Circuit Court of Kentucky, either over the subject matter or the parties embraced in the proceedings in that court.

In this objection no force is perceived. The subject matter of the suit was the settlement of the estate of an intestate who lived and died within the limits of the court's authority, within which limits the qualification of the administratrix of the intestate, the appraisement of his estate, and the recording of that appraisement had taken place; within which, also, was the residence of the surety in the administration bond, and of a portion of the distributees—both plaintiffs and defendants asserting before that court their interest in the estate. The court, as one vested with general equity powers, could act either in personam or in rem, as to persons or property within the State.

Under the laws and the practice in the State of Kentucky, already referred to, proceedings are authorized and prescribed in suits in equity against absent defendants; which proceedings, when regularly observed, are held within the State to be binding absolutely. With respect to absent defendants, such proceedings could be considered as binding beyond the limits of the State in instances only in which those defendants should have been legally and personally served with process, or in which they should have voluntarily submitted themselves as parties. In the *suit in the State [*259 Court, the subject matter of the controversy, as well as a portion of the parties, both plaintiffs and defendants, being confessedly with its cognizance, no ground for exception to the jurisdiction could exist as to these. The defendant John G. Shields, when he voluntarily entered his appearance, and answered the bill, placed himself in the same predicament with the other parties regularly before the court, and could

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not afterwards except to the jurisdiction upon the ground of his non-residence. The decree, therefore, so far as this exception is designed to affect it, cannot be impeached.

The objection which seems to follow next in order, is one leveled at the frame of the bill in the District Court of the United States, irrespective of the justice or regularity of the proceedings in the State Court. This objection is, that the bill filed in the District Court of Iowa is multifarious, by embracing in one suit interests and causes of action in themselves separate and disconnected, and therefore such as it was improper to include in one bill.

There is perhaps no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application, than has attended this relating to multifariousness. This effect, flowing perhaps inevitably from the variety of modes and decrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is, that each case must be determined by its peculiar features. Thus Daniel, in his work on Chancery Practice, Vol. I., p. 384, quoting from Lord Cottenham, says: "It is impossible, upon the authorities, to lay down any rule or abstract proposition, as to what constitutes multifariousness, which can be made universally applicable. The cases upon the subject are extremely various, and the court, in deciding upon them, seems to have considered what was convenient in particular cases, rather than to have attempted to lay down an absolute rule. The only way of reconciling the authorities upon the subject is, by adverting to the fact that, although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently, the objection raised, though termed multifariousness, is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the court will not permit them to be litigated in one record. But what is more familiarly understood by the term multifariousness, as applied to a bill, is, where a party is able to say, he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever."

260*] *Justice Story, in his compilation upon equity pleading, defines multifariousness in a bill to mean, "the improperly joining in one bill, distinct and independent matters, and thereby confounding them." And the example by which he illustrates his definition is thus given: the uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. Sir Thomas Plumer, V. C., in allowing a demurrer which had been interposed by one of several defendants to a bill on the ground that it was multifarious, remarks, that "the court is always averse to multiplicity of suits, but certainly a defendant has the right to insist that he is not bound to answer a bill containing several distinct and separate matters relating to individuals with whom he has no connection." Brooks v. Lord Whitworth, 1 Madd. 89.

Justice Story closes his review of the authorities upon this defect in a bill, with the following remark: "The conclusion to which a close survey of all the authorities will conduct us, seems to be, that there is not any positive, inflexible rule as to what, in the sense of a court of equity, constitutes multifariousness, which is fatal to a suit on demurrer." To bring the present case to the standard of the principles above stated, the appellees are seeking a subject their title to which is common to them all, founded in the relation they bear to a common ancestor. The different portions or shares into which the subject may be divisible amongst themselves, can have no effect upon the nature or character of their title derived as above mentioned; and which in its character is an unit, and cannot be objected to for inconsistency or diversity of any kind. They seek an account and the recovery of a subject claimed by their common title, or an equivalent for that subject, against persons charged with having, by fraudulent combination withheld and diverted that subject, and who by such combination and diversion, rendered themselves equally, jointly and severally liable therefor. Upon the face of this statement it would be consistent neither with justice nor convenience, nor consistent with the practice, to turn the appellees round to an action or actions at law, for any aliquot parts of each upon a division of this subject claimed under their common title, and which aliquot portions would have to be ascertained by an account which would not depend upon the question of liability of the defendants. The like principles and considerations would in every case of equal responsibility in several persons, instead of condemning, commend, and in a court of equity would command, wherever practicable, a common proceeding against all to whom such responsibility extended.

But in truth, the question raised upon this point on the demurrer, *seems to have [*261 been virtually, if not directly, concluded by this court upon this very record. At the December Term 1854, of this court, a motion was made by a portion of the appellees to dismiss this appeal upon the following grounds: in the decree in favor of the distributees in Kentucky, the court having designated the shares of the whole amount recovered, which would belong to each distributee, and the District Court of Iowa having adopted the same rate of distribution in enforcing the decree of the Kentucky court, by which rate it appeared that none of the distributable portions amounted to the sum of $2,000; those distributees, with the view, no doubt, of hastening the termination of this controversy, and of obtaining immediately the benefit of the decree in their favor, moved this court for dismission of this cause. upon the ground that the sum in controversy between the appellant and the persons submitting that motion was less than $2,000, and therefore insufficient to give this court jurisdiction. The Chief Justice, in the opinion denying the motion to dismiss, uses this language: "The whole amount recovered against Shields in the proceeding in Iowa exceeds $2,000, but the sum allotted to each representative who joined in the bill was less; and the motion is made to dis-

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miss, upon the ground that the sum due to each complainant is severally and specifically decreed to him; and that the amount thus decreed is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable. But the court think the matter in controversy in the Kentucky court was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled when the amount due was distributed among them according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant how it was divided among them. He had no controversy with either of them on this point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him." Vide 17 How. pp. 4, 5. This reasoning appears to be conclusive against the defect of multifariousness imputed to the claim of the appellees in this case; and we deem it equally so with respect to defendants sustaining an equal responsibility deducible from one and the same source.

The remaining objection arising upon the demurrer, which we deem it necessary to consider, is that urged against the right of the appellees to institute proceedings in equity in the State of Iowa, to enforce the decree rendered in their favor by the court in Kentucky. We can perceive no force in the effort to sustain 262*] *this objection by citation of the 7th amendment of the Constitution of the United States, which provides, "that in suits at common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved." This provision, correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law; but should be understood as limited to rights and remedies peculiarly legal in their nature; and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law.

With respect to the character and effects of decrees in chancery, although they now rank in dignity upon an equality with judgments at law, it is well known that they were once regarded as not being matters of record; and that the final process incident to judgments at law was unknown to and not permitted in courts of equity; that where such process has been permitted to them, it has been the result of statutory enactments. But the extension to a court of equity of the power to avail itself of common law process, cannot be regarded as applying any abridgment of the original constitutional powers or practice of the former; but as cumulative and ancillary, or as leaving those powers and that practice as they formerly existed, except as they should have been expressly restricted. Amongst the original and undoubted powers of a court of equity is that of entertaining a bill filed for enforcing and carrying into effect a decree of the same, or of a different court, as the exigencies of the case, or the interests of the parties may require. Vide Story's Eq. Pl. secs. 429, 430, 431, upon the authority of Mitford, Eq. Pl. 95, and of Cooper's Eq. Pl. pp. 98, 99.

In the present case the appellees were, by the residence of the appellant in a different state, cut off from the benefit of final process upon the decree of the State Court, which process would not run beyond the territorial jurisdiction of the State. They were left, therefore, to the alternative of instituting either an action or actions at law upon the decree in their favor, or of filing a bill for enforcing and carrying into effect that decree. Upon the former mode of proceeding, they would have been compelled to encounter circuity, and most probably the technical exceptions urged in argument here, founded upon the nature of the decree with respect to its unity or divisibility. The appellees have elected, as the remedy most beneficial for them, and as we think they had the right to do, the proceeding bill in equity, to carry into execution the decree of the State Court. We can perceive no just exception to the jurisdiction of the District Court of Iowa in entertaining the bill of the appellants, *nor [*263 to the measure of relief decreed, nor with respect to the party against whom that relief has been granted.

We therefore order that the decree of the District Court of Iowa be affirmed.

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*JOHN DEN, ex dem., James B. Murray, [*272 and John C. Kayser, Plffs.,

v.

THE HOBOKEN LAND AND IMPROVEMENT COMPANY.

(See S. C. 18 How. 272-286.)

Warrant from treasury against delinquent collector, is "due process of law" and not unconstitutional—adjustment of accounts of officer, not a judicial controversy—warrant, evidence of facts and authority—not invalid by Constitution, because issued without oath—levy on lands, prima facie evidence of want of goods.

A distress warrant issued by the Solicitor of the Treasury under the Act of May 15, 1820, against a delinquent collector, is not in conflict with the Constitution, but is "due process of law."

The adjustment of the balances due from accounting officers, is not necessarily a judicial controversy.

There is a distinction between claims of government for their taxes and all others, which may be carried out by summary methods of proceeding.

When the Act of 1820 enacts that after levy of the distress warrant has begun, the collector may bring before the District Court the question whether he is indebted as recited in the warrant, and give security and avert the proceedings, it simply waives a privilege which belongs to the government: by granting it, nothing which may not be the subject of judicial cognizance is brought before the court.

The action of the executive power in issuing the warrant, pursuant to the Act of 1820, is conclusive evidence of the facts recited in it, and of the authority to make a levy.

The warrant was not invalid because it was issued without oath or affirmation, and so forbidden by the 4th article of the Amendments to the Constitution.

The return of the marshal that he had levied on lands by virtue of the warrant, is prima facie evidence that there were no goods and chattels to levy on.

Argued Jan. 30 and 31, and Feb. 1 and 4, 1856.
Decided Feb. 19, 1856.

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ON A certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of New Jersey.

The case is stated by the court.

Messrs. **Edgar S. Van Winkle, George Wood** and **J. D. Miller**, for the plaintiff:

The warrant of distress issued by the Solicitor of the Treasury was not sufficient, under the Constitution of the United States, to transfer the title to the premises in question, as against the lessors of the plaintiff. The laws under which it was issued are unconstitutional. This summary proceeding was, in substance and effect, a judicial proceeding, and could only be taken and carried out under the judicial power.

The Constitution of the United States, art. 3, secs. 1 and 2, Federalist No. 80, etc., Hoke v. Henderson, 4 Dev. 1; Ex parte Randolph, 2 Brock. 447; Robinson v. Campbell, 3 Wheat. 212; U. S. v. Nourse, 9 Pet. 8; Bank of the State v. Cooper, 2 Yerg. 599; Kilburn v. Woodworth, 5 Johns. 37; Art. 7, Amend. to the Const.

This process deprives of liberty and property, contrary to the 5th article of Amendments to the Constitution.

Co. Lit. 2 Inst. 47 Magna Charta, Ch'y, 29 and 8; 2 Kent's Com. 5th ed. 13; Sto. Const. sec. 1783; Sullivan's Lectures, C. 39, 40; Taylor v. Porter, 4 Hill, 146; Fletcher v. Peck, 6 Cr. 138; Bank of Columbia v. Okely, 4 Wheat. 235; Van Zant v. Waddel, 2 Yerg. 260; Jones v. Perry, 10 Yerg. 59; Lane v. Dorman, 3 Scam. 238; White v. White, 5 Barb. 481; Holden v. James, 11 Mass. 404.

If the warrant of distress be constitutional, the statute authorizing it must be regularly pursued, and should appear to be so on the face of the proceedings.

U. S. v. Nourse, 6 Pet. 470; 9 Pet. 8; Smith v. Hileman, 1 Scam. 323; Thatcher v. Powell, 6 Wheat. 119.

Messrs. **A. O. Zabriskie, J. P. Bradley** and **R. H. Gillett**, for the defendants:

This is a mere proceeding upon distress and sale to raise an amount alleged to be due, without any adjudication or judicial proceeding to ascertain or settle the amount due. There are none of the usual characteristics of judicial proceeding. It is not a "case" or "controversy," within the meaning of the Constitution.

3 Bl. Com. 3 and 6; U. S. v. Ferreira, 13 How. 40; U. S. v. Nourse, 6 Pet. 470; 9 Pet. 8.

Distress and sale for taxes has never been held illegal, but has been sanctioned by the uniform action of the courts.

Parker v. Rule, 9 Cranch, 64; Williams v. Peyton, 4 Wheat. 77; U. S. v. Bullock, cited 6 Pet. 485; U. S. v. Nourse, 4 Cranch, C. C. 151; Union Tow Boat Co. v. Bordelon, 7 La. Ann. 192.

When a statute introduces a new remedy or a new mode of procedure, then to obtain the benefit of that new remedy or new mode of procedure, the directions of the statute must be pursued; but without negative words, it does not supersede any remedy or mode of procedure before existing. But when the statute is declaratory of the common law, then affirmative words, though positive, are not imperative or compulsive.

Rex v. Woolstanton, 1 Bott. Littl. Cas. 616; Rex v. Lester, 7 B. & C. 12; Rex v. Loxdale, 1 Burr. 447; Pond v. Negus, 3 Mass. 230; Jackson v. Young, 1 Cow. 131; People v. Allen, 6 Wend. 486; People v. Peck, 11 Wend. 604; Marchant v. Langworthy, 6 Hill, 646; People v. Holley, 12 Wend. 481; U. S. Bank v. Dandridge, 12 Wheat. 64; In re Mohawk & Hudson R. R. Co. 10 Wend. 136; People v. Cook, 14 Barb. 290; Morril v. Gardner, Spencer, N. J. 673; Wilson v. Troup, 2 Cow. 195.

Mr. Justice Curtis delivered the opinion of the court:

This case comes before us on a certificate of division of opinion of the judges of the Circuit Court of the United States for the District of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartwout—the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the Marshal of the United States for the District of New Jersey, on the 1st day of June, 1839— by virtue of what is denominated a distress warrant, issued by the Solicitor of the Treasury under the Act of Congress of May 15, 1820, entitled "An Act providing for the better organization of the Treasury Department." This Act having provided, by its first section, that a lien for the amount due should exist on the lands of the debtor from the time of the levy and record thereof in the office of the District Court of the United States for the proper district, and the date of that levy in this case being prior to the date of the judgment under which the plaintiffs' title was made, the question occurred in the Circuit Court, "whether the said warrant of distress in the special verdict mentioned, and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the Constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, as against the lessors of the plaintiff." Upon this question, the judges being of opposite opinions, it was certified to this court, and has been argued by counsel.

*No objection has been taken to the [*275 warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the Act of Congress. The special verdict finds that Swartwout was Collector of the Customs for the port of New York for eight years before the 29th of March, 1838; that, on the 10th of November, 1838, his account, as such Collector, was audited by the first Auditor, and certified by the first Comptroller of the Treasury; and for the balance thus found, amounting to the sum of $1,374,-119.65, the warrant in question was issued by the Solicitor of the Treasury. Its validity is denied by the plaintiffs, upon the ground that so much of the Act of Congress as authorized it is in conflict with the Constitution of the United States.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one supreme court and in such inferior courts as Congress may, from time to time,

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ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the Act in question is to deprive the party, against whom the warrant issues, of his liberty and property "without due process of law;" and therefore, is in conflict with the fifth article of the Amendments of the Constitution.

Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a Collector of the Customs, from whom a balance of account has been found to be due by accounting officers of the Treasury, designated for that purpose by law, can be deprived of his liberty or property, 276*] *in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, second, whether the warrant in question was such due process of law.

The words "due process of law," were undoubtedly intended to convey the same meaning as the words "by the law of the land," in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says, they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal Constitution, following the language of the Great Charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The Ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the words.

The Constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions, and in the Ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty or property, but by the judgment of his peers of the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Charta had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. "But is it due process of law?" The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process [*277 enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him, except that the principal debtor can show himself to be acquitted against the said sureties."

By the common law, the body, lands and

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goods of the King's debtor were liable to be levied on to obtain payment. In conformity with the above provision of Magna Charta, a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and if they were insufficient, then to extend on the lands. 3 Co. 12 b; Com. Dig. Debt, G, 2; 2 Inst. 19. But it is said that since the Statute 33 H. VIII. ch. 39, the practice has been to issue the writ in an absolute form, without requiring any previous inquisition as to the goods. Gilbert's Exch. 127.

To authorize a writ of extent, however, the debt must be matter of record in the King's exchequer. The 33 H. VIII. ch. 39, sec. 50, made all specialty debts due to the King, of the same force and effect as debts by statute staple, thus giving to such debts the effect of debts of record. In regard to debts due upon simple contract, other than those due from collectors of the revenue and other accountants of the Crown, the practice, from very ancient 278*] *times, has been to issue a commission to inquire as to the existence of the debt.

This commission being returned, the debt found was thereby evidenced by a record, and an extent could issue thereon. No notice was required to be given to the alleged debtor of the execution of this commission (2 Tidd's Pr. 1047) though it seems that, in some cases, an order for notice might be obtained. 1 Ves. 269. Formerly, no witnesses were examined by the commission, (Chitty's Prerog. 267; West, 22); the affidavit prepared to obtain an order for an immediate extent being the only evidence introduced. But this practice has been recently changed. 11 Price, 29. By the Statute 13 Eliz. ch. 4, balances due from receivers of the revenue and all other accountants of the Crown were placed on the same footing as debts acknowledged to be due by statute staple. These balances were found by auditors, the particular officers acting thereon having been, from time to time, varied, by legislation and usage. The different methods of accounting in ancient and modern times are described in Mr. Price's Treatise on the Law and Practice of the Exchequer, ch. 9. Such balances, when found, were certified to what was called the Pipe Office, to be given in charge to the sheriffs for their levy. Price, 231.

If an accountant failed to render his accounts, a process was issued, termed a capias nomine districtionis, against the body, goods and lands of the accountant. Price, 232, 162, note 3.

This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the Act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed *the power to ascertain the amount of [*279 the default, and by such warrant proceed to collect it. Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts Act of 1786: "That if any constable or collector, to whom any tax or assessment shall be committed to collect, shall be remiss and negligent of his duty, in not levying and paying unto the treasurer and receiver-general such sum or sums of money as he shall from time to time have received, and as ought by him to have been paid within the respective time set and limited by the assessor's warrant, pursuant to law, the treasurer and receiver-general is hereby empowered, after the expiration of the time so set, by warrant under his hand and seal, directed to the sheriff or his deputy, to cause such sum and sums of money to be levied by distress and sale of such deficient constable or collector's estate, real and personal, returning the overplus, if any there be; and for want of such estate, to take the body of such constable or collector, and imprison him until he shall pay the same; which warrant the sheriff or his deputy is hereby empowered and required to execute accordingly." Then follows another provision, that if the deficient sum shall not be made by the first warrant, another shall issue against the town; and if its proper authorities shall fail to take the prescribed means to raise and pay the same, a like warrant of distress shall go against the estates and bodies of the assessors of such town. Laws of Massachusetts, Vol. I., p. 266. Provisions not distinguishable from these in principle may be found in the Acts of Connecticut, Revision of 1784, p. 198; of Pennsylvania, 1782, 2 Laws of Penn. 13; of South Carolina, 1788, 5 Stats. of S. C. 55, New York, 1788, 1 Jones & Varick's Laws, 34; see, also, 1 Henning's Stats. of Virginia, 319, 343; 12 Ib. 562; Laws of Vermont (1797, 1800) 340. Since the formation of the Constitution of the United States, other States have passed similar laws. See 7 La Ann. 192. Congress, from an early period, and in repeated instances, has legislated in a similar manner. By the fifteenth section of the "Act to lay and collect a direct tax within the United States," of July 14, 1798, the supervisor of each district was authorized and required to issue a warrant of distress against any delinquent collector and his sureties, to be levied upon the goods and chattels, and for want thereof upon the body of such collector; and failing of satisfaction thereby, upon the goods and chattels of the sureties. 1 Stat. at L. 602. And again, in 1813, 3 Stat. at L. 33, sec. 28, and 1815, 3 Stat. at L. 177, sec. 33, the Comptroller of the Treasury was empowered to issue a similar warrant against collectors of the customs and their sureties. This legislative construction of the Constitution, commencing so

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280*] early in the government, *when the first occasion for this manner of proceeding arose, continued throughout its existence and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was "due process of law."

Prigg v. Pennsylvania, 16 Pet. 621; U. S. v. Nourse, 9 Pet. 8; Randolph's case, 2 Brock. 447; U. S. v. Nourse, 4 Cranch, C. C. 151; U. S. v. Bullock, cited 6 Pet. 485, note.

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the Government from a Collector of Customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, 2 Inst. 47, 50; Hoke v. Henderson, 4 Dev. N. C. 15; Taylor v. Porter, 4 Hill. 146; Van Zandt v. Waddel, 2 Yerger, 260, 599; State Bank v. Cooper, Ibid. 599; Jones' Heirs v. Perry, 1 Yerg. 59; Greene v. Briggs, 1 Curtis, yet, this is not universally true. There may be, and we have seen that there are cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with those proceedings.

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the Act of the President in calling out the militia under the Act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient, to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. United States v. Ferreira, 13 How. 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the 2d section of the 281*] 3d article of the *Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject matter of a suit in which the judicial power can be exerted. The Act of 1820 makes such a provision for reviewing the decision of the accounting officers of the Treasury. But, until reviewed, it is final and binding; and the question is, whether its subject matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not.

Among the legislative powers of Congress are the powers "to lay and collect taxes; duties, imposts, and excises; to pay the debts, and provide for the common defense and welfare of the United States; to raise and support armies; to provide and maintain a navy, and to make all laws which may be necessary and proper for carrying into execution those powers." What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when, and how, and to whom they should account, and what security they should furnish, and to what remedies they should be subjected to enforce the proper discharge of their duties, Congress was to determine. In the exercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the Treasury Department, and to furnish sureties by bond, for the payment of all balances of the public money which may become due from them. And by the Act of 1820, now in question, they have undertaken to provide summary means to compel these officers—and in case of their default, their sureties—to pay such balances of the public money as may be in their hands.

The power to collect and disburse revenue, and to make all laws that shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the Collector. Its purpose is to raise money and use it in payment of the debts of the government; and whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.

As we have already shown, the means provided by the Act of 1820 do not differ in principle from those employed in England from remote antiquity—and in many of the States, so far as we know, without objection—for this purpose, at the time the Constitution *was formed. It may be added, that [*282 probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties; but always in some way observed and yielded to.

It is true that in England all these proceedings were had in what is denominated the Court of Exchequer, in which Lord Coke says, 4 Inst. 115, the barons are the sovereign auditors of the kingdom. But the barons exercise in person no judicial power in auditing accounts, and it is necessary to remember that the exchequer includes two distinct organizations, one of which has charge of the revenues of the Crown, and the other has long been in fact,

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and now is, for all purposes, one of the judicial courts of the kingdom, whose proceedings are and have been as distinct in most respects, from those of the revenue side of the exchequer, as the proceedings of the Circuit Court of this district are from those of the Treasury; and it would be an unwarrantable assumption to conclude that, because the accounts of receivers of revenue were settled in what was denominated the Court of Exchequer, they were judicial controversies between the King and his subjects, according to the ordinary course of the common law or equity. The fact, as we have already seen, was otherwise.

It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject matter under its cognizance, it was not for the government to say that the subject matter was not within the judicial power. That if it were not in its nature a judicial controversy, Congress could not make it such, nor give jurisdiction over it to the district courts. In short, the argument is, that if this were not, in its nature, a judicial controversy. Congress could not have conferred on the District Court power to determine it upon a bill filed by the Collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that Congress has enabled the District Court to pass upon it, is conclusive evidence that it is a judicial controversy.

We cannot admit the correctness of the last 283*] position. If we *were of opinion that this subject matter cannot be the subject of a judicial controversy, and that consequently it cannot be made a subject of judicial cognizance, the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual. But the previous proceedings of the Executive Department would not necessarily be affected thereby. They might be final, instead of being subject to judicial review.

But the argument leaves out of view an essential element in the case, and also assumes something which cannot be admitted.

It assumes that the entire subject matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature, aside from the will of Congress to permit it to be so; and it leaves out of view the fact that the United States is a party.

It is necessary to take into view some settled rules.

Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both. An instance of extrajudicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents. There is, however, an important distinction between these. Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority; and he may be required, by an action at law, to prove those facts; but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent.

At the same time there can be no doubt that the mere question, whether a Collector of the Customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by *the former in obedience to legal pro- [*284 cess, still Congress may provide by law that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extrajudicial remedies for their wrongs, and they may do to such extent, and with such restrictions, as may be thought fit.

When, therefore, the Act of 1820 enacts, that after the levy of the distress warrant has been begun the Collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court; as we have already stated in case of a private person, every fact upon which the legality of the extrajudicial remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the

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United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial, the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title.

Foley v. Harrison, 15 How. 433; Burgess v. Gray, 16 How. 48.

It is true, also, that even in a suit between 285*] private persons to *try a question of private right, the action of the executive power, upon a matter committed to its determination by the Constitution and laws, is conclusive.

Luther v. Borden, 7 How. 1; Doe v. Braden, 15 How. 635.

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification; yet the action of the executive power in issuing the warrant, pursuant to the Act of 1820, passed under the powers to collect and disburse the revenue granted by the Constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of Congress, yet Congress may consent to have a suit brought, to try the question whether the Collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist.

It was further urged that, by thus subjecting the proceeding to the determination of a court, it did conclusively appear that there was no such necessity for a summary remedy, by the action of the executive power, as was essential to enable Congress to authorize this mode of proceeding.

But it seems to us that the just inference from the entire law is, that there was such a necessity for the warrant and the commencement of the levy, but not for its completion, if the collector should interpose, and file his bill and give security. The provision that he may file his bill and give security, and thus arrest the summary proceedings, only proves that Congress thought it not necessary to pursue them, after such security should be given, until a decision should be made by the court. It has no tendency to prove they were not, in the judgment of Congress, of the highest necessity under all other circumstances; and of this necessity Congress alone is the judge.

The remaining objection to this warrant is, that it was issued without the support of an oath or affirmation, and so was forbidden by the 4th article of the Amendments of the Constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process, in this case, is termed, in the Act of Congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a *recognizance, or a stipulation in the ad- [*286 miralty, we are of opinion it was not invalid for this cause.

Some objection was made to the proceedings of the marshal under the warrant, because he did not levy on certain shares of corporate stock belonging to Swartwout, and because it does not appear, by the return of the warrant, that he had not goods and chattels wherewith to satisfy the exigency of the warrant. In respect to the corporate stocks, they do not appear to have been goods or chattels, subject to such levy at the time it was made; and the return of the marshal, that he had levied on the lands by virtue of the warrant, is, at least, prima facie evidence that his levy was not irregular, by reason of the existence of goods and chattels of the collector subject to his process.

The third question is, therefore, to be answered in the affirmative.

This renders the other questions proposed immaterial, and no answer need be returned thereto.

The other two cases—John Den, ex-dem., Jas. B. Murray, et al., v. The Hoboken Land and Improvement Co., and John Den. ex dem., Wm. P. Rathbone, et al., v. Rutsen Suckley et al., are disposed of by this opinion, the same questions having been certified therein.

WILLIAM D. NUTT, Ex'r of Alexander Hunter, Deceased, Plaintiff in Error,

v.

PHILIP H. MINOR.

(See S. C. 18 How. 287-289.)

Where there is evidence of promise, case must go to the jury.

Where the case depended on proof of a promise, and there is evidence from which the jury might infer a promise, it is the duty of the Circuit Court to leave the fact to the jury.

Argued Feb. 7, 1856. Decided Feb. 25, 1856.

IN ERROR to the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

Messrs. Joseph H. Bradley and H. Winter Davis, for the plaintiff in error.

This cause was formerly before this court.

Nutt v. Minor, 14 How. 464.

The evidence is not varied, so as to change the relative rights of the parties. Where there is an entire absence of any evidence from which the jury would be legally justified in finding any fact essential to the case of either plaintiff or defendant, it is proper for the court so to instruct them.

Parks v. Ross, 11 How. 362.

Mr. A. H. Lawrence and Messrs. Badger and Carlisle, for the defendant in error:

The court will not disturb a verdict so well founded in equity and conscience.

Jacobson v. LeGrange, 3 Johns. 199.

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Mr. Justice Catron delivered the opinion of the court:

Minor sued Nutt as executor of Alex. Hunter, and sought to recover on a quantum meruit for services rendered as clerk for Hunter in the Marshal's office for fourteen and a half years.

The defense is, that Minor entered on the service under a special agreement to receive $400 a year.

287*] *The bill of exceptions states, that "on the trial of this cause, the plaintiff, to maintain the issue on his part, gave evidence tending to prove that he had rendered the services mentioned in the declaration, during the period therein stated, and that the said services were faithful, valuable, and unremitting, during all the time aforesaid; and he further gave evidence by Daniel Minor, a competent witness, that the engagement under which the plaintiff commenced to serve as such clerk as aforesaid to the deceased Hunter, was made verbally in the presence of the witness; that the witness was a surety in the official bond of the deceased as Marshal for the District of Columbia; that plaintiff is the brother of witness; that witness was the deputy-marshal of Alexandria County from 1806 or 1807, down to 1826; and that the plaintiff was very familiar with the duties of clerk in the Marshal's office, and that the said Hunter was wholly ignorant of the duties of said office; that the witness was desirous of having plaintiff employed as such clerk by said Hunter, and, with the plaintiff, went to the Marshal's office and there met the said Hunter, and in said office, they there being present, they had a conversation about the employment of the plaintiff and the terms thereof; that witness told the said Hunter that he could find nobody who would suit the place better than the plaintiff; that Hunter said he did not know anything about the emoluments of the office, or the value of the plaintiff's services, but he would be willing to give him $250 per annum; that witness said that was out of the question, that plaintiff could not pay his board with it; the witness then said he would give $150, if Hunter would give $250, making the salary $400 for the first year; that said Hunter said he was willing to do that; that plaintiff was dissatisfied; that witness, then and there continuing the conversation, in the presence of the said Hunter, and speaking in the same tone as in the previous part of the conversation, and standing near to the said Hunter as before, told the plaintiff that he must try and get along with the $400 for the first year, and that afterwards, when Hunter should ascertain the value of the services, he would pay him accordingly; that said Hunter made no comment on the last statement; that said plaintiff thereupon acquiesced, and entered upon the duties of said clerkship. And further proved by another witness, that during the said first year, the plaintiff complained to the witness of the insufficiency of the salary; that witness thereupon saw and had a conversation with Hunter on the subject; that he could not recollect the language of said Hunter but it was to the effect that if he gave plaintiff more now he would waste it; and other remarks which he could not distinctly repeat, but all which 288*] left the clear impression on the *mind of the witness that after the said first year the plaintiff was to be better compensated; that the witness reported the conversation to the plaintiff. Another witness, Smith Minor, a brother of the plaintiff, deposed that the witness had a conversation with Hunter in the year 1843 or 1844, in which he told Hunter that the plaintiff had not been to see witness for ten years; plaintiff had given as a reason that he could not get enough money from said Hunter to hire a horse to ride to the country, where witness resided, in Fairfax County, Virginia. That said Hunter spoke in the highest terms of the plaintiff's services, and of his integrity and industry: said that he owed his fortune to the plaintiff. and that plaintiff had made him from $70 to $100,000, and other words to this effect; and said that he, Hunter, was keeping all he could back from the plaintiff for a rainy day, and to support him in his old age. And further proved by the evidence of Chief Judge Cranch, of Marshal Wallach, Marshal Hoover, and John A. Smith, clerk, and others, that the plaintiff's services were well worth the amount claimed (to wit: $800 per annum), and by said ex-Marshal Wallach and Marshal Hoover, that they respectively paid plaintiff $1,000 per annum for similar services, and for the discharge of the same duties which he had rendered and discharged in the time of their said predecessor Hunter. And further gave evidence tending to show that the said office of Marshal, during the time the said Hunter had held the same, was very profitable, and that said Hunter had amassed a considerable fortune therefrom."

An account was also given in evidence by which it appeared that Minor, as clerk, had for the first year credited payments at the specific sum of $400; but that, afterwards, the credits were at irregular intervals, and usually of small sums—sometimes covering $400 in the year; but often falling short of this amount. The account has the appearance of an open and running account.

The court was asked to charge the jury, on the part of the defendant, that if they believed the plaintiff entered on the service upon an agreement for $400 salary for that year, and continued in it from 1834 to 1848, and during all the time, from time to time received from Hunter in full at that rate for the whole service, then the plaintiff is not entitled to recover. This instruction was given.

The principal instruction demanded and refused was, that there was no evidence legally competent from which the jury could infer that there was any agreement between Hunter and Minor, upon other terms than for the payment of the services at the rate of $400 per annum.

Another instruction was asked and refused, assuming for the *defendant that Minor [*289 was bound to give Hunter notice that more than $400 was claimed after the expiration of the first year, before he could be allowed a higher rate of compensation.

As the case depended on proof of a promise (arising by implication), on the fact that Hunter assented to the proposition made by Daniel Minor to the plaintiff below, no proof of further notice could be required; so that the controversy must be limited to the instruction first refused.

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This instruction, if given, would have taken the case from the jury by rejecting the entire evidence as legally incompetent, except such as established the special contract.

There was evidence from which the jury might infer a promise on part of Hunter to further compensate Minor; and it was the duty of the Circuit Court to leave the fact to the jury: indeed, the first instruction which was given went to the limit of the court's power in its bearing on the facts; the jury being told that if they found the plaintiff was to receive $400 for the first year's service, and had received at that rate for the whole period, then the plaintiff was not entitled to recover.

It is ordered that the judgment of the Circuit Court be affirmed.

246*] *THE NEW YORK AND CUMBERLAND RAILROAD COMPANY, Plffs. in Er.,

v.

JOHN G. MYERS.

(See S. C. 18 How. 246-253.)

Bill of exceptions—facts must be found by court below—arbitrator cannot decide what is not submitted—his mistakes upon matters submitted, cannot be revised—want of writ in record, or supply of copy, not objectionable.

A bill of exceptions in courts of common law of original jurisdiction may embrace all such judgments or opinions of the court that arise in the course of a cause, which are the subjects of revision by an appellate court, and which do not otherwise appear on the record.

But to present a question to this court, the subordinate tribunal must ascertain the facts upon which the judgment or opinion excepted to is founded.

By reference of an action to the determination of an arbitrator, nothing is included in the submission but the subject matter involved in it.

If an arbitrator embraces in his award, matter not submitted, and includes the result in a single conclusion, so it is impossible to separate the matters referred to him from those which have not been, the award is bad.

This court cannot revise his mistakes, either of law or fact, in his final decision upon matters submitted.

The objection to the absence of an original writ, in the record, or to the supply of a copy, is not tenable.

Argued Feb. 19, 1856. Decided Feb. 26, 1856.

IN ERROR to the Circuit Court of the United States for the District of Maine.

This was an action of covenant brought in the Circuit Court of the United States for the District of Maine, by the defendant in error, a contractor, to recover damages alleged to have been sustained by reason of his dismissal by the York and Cumberland R. R. Co., before the completion of his contract. The judgment of the court below having been in favor of the complainant, the defendant brought the case here on a writ of error. A further statement appears in the opinion of the court.

Messrs. **Nathan Clifford** and **George F. Shepley**, for the plaintiffs in error:

The bill of exceptions is within the intent, if not within the very letter, of the statute.

Strother v. Hutchinson, 4 Bing. N. C. 83.

Anyone impleaded in a suit in a court of common law jurisdiction, if aggrieved in a matter of law where the facts and the rulings of the court would not otherwise appear in the record, has a right to allege an exception, and after a final judgment, may bring a writ of error, and have the matter revised in an appellate tribunal.

Boyle v. Zacharie, 6 Pet. 655; Co. Litt. 288, B; 1 Arch. Pr. 530; Stat. Westm. 2, 13th ed. 1 St. C. 31; 1 Bac. Abr. 529.

The action of the court, in accepting a report or award of referees, falls within the statute. A jury is not necessary to entitle the party to a bill of exceptions.

Arthurs v. Hart, 17 How. 6; Ford v. Potts, 1 Halst. 388; Nesbitt v. Dallam, 7 G. & J., 494.

If not strictly a bill of exceptions, it is at least "an exception in the nature of a bill of exceptions," and the legal questions are examinable on a writ of error.

Hyde v. Booraem, 16 Pet. 176; U. S. v. King, 7 How. 866.

The rulings and determination of the Circuit Court are apparent on the record, being incorporated therein. Therefore the writ of error lies.

Thornton v. Carson, 7 Cranch, 596; Parsons v. Armor, 3 Pet. 424; Minor v. Tillotson, 2 How. 394.

This court will not decline to revise the determination of the Circuit Court, on account of the form of the record.

Stimpson v. Balt. & S. R. R. 10 How. 329; U. S. v. Eliason, 16 Pet. 291; U. S. v. King, 7 How. 855; Craig v. Missouri, 4 Pet. 426.

When the report or award of a referee is accepted, it is an adoption of it by the court, as its own act; and consequently, if the referees have exceeded their jurisdiction, it is an error for which the court becomes responsible; and if the court sanctions the error, its action may be revised by a writ of error.

Graves v. Fisher, 5 Greenl. 70; Vance v. Carle, 7 Greenl. 164; Bridgham v. Prince, 33 Me. 174; Miller v. Miller, 2 Pick. 570; Anderson v. Farnham, 34 Me. 161; Sawyer v. Freeman, 35 Me. 542; Boynton v. Frye, 33 Me. 216; Feeter v. Heath, 11 Wend. 481; Waples v. Waples, 1 Harr. Del. 398.

A party may show by parol, what controverted matters were laid before the referees and acted on by them, and they are competent witnesses upon those points.

Buck v. Spofford, 35 Me. 526; 2 Greenl. Ev. sec. 78; McNear v. Bailey, 18 Me. 251; Lincoln v. Taunton, etc., Company, 8 Cush. 417; Boston Water Power Co. v. Gray, 6 Met. 170; In re Williams, 4 Den. 194.

The decision of arbitrators, that a matter comes within the terms of the submission, cannot be conclusive of the fact.

Sawyer v. Freeman, 35 Me. 546; Butler v. Mayor, etc., 7 Hill, 329; Shearer v. Handy, 22 Pick. 419.

An award of referees is void if it includes items not embraced in the submission and not separable.

Lyle v. Rogers, 5 Wheat. 394; Chase v. Strain, 15 N. H. 536; Bigelow v. Newell, 10 Pick. 354; McBride v. Hagan, 1 Wend. 340; Williams v. Paschall, 3 Yeates, 564.

NOTE.—Arbitrament and award—see note to Carnochan v. Christie, 6 L. ed. U. S. 516. When an award will be set aside in equity—see note to Burchell v. Marsh, 15 L. ed. U. S. 96.

Award void as being beyond the submission—see note, 18 L. ed. U. S. 700.

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Mr. **Francis O. J. Smith**, for the defendant in error:

It was competent for the parties thus mutually to conclude themselves by a judgment of the court, to which the award was made returnable, in respect to both law and fact, and to place the subject matter thereby beyond the jurisdiction of all courts to revise, unless fraud, corruption or mistake apparent on the face of the award, is shown, neither of which is alleged in this case.

Kleine v. Catara, 2 Gall. 60; Brown v. Clay, 31 Me. 519; Boston Water Power Company v. Gray, 6 Met. 131; Lowndes v. Campbell, 1 Hall. 600; Spear v. Hooper, 22 Pick. 144; Burchell v. Marsh, 17 How. 351; Anderson v. Farnham, 34 Me. 161; Cranston v. Kenny, 9 Johns. 212.

The burden is on the objecting party, to impeach the report of referees. Every reasonable intendment is to be made in its favor.

Atkinson v. Crooker, 35 Me. 136; Karthaus v. Ferrer, 1 Pet. 222; Fryeburgh Canal v. Frye, 5 Me. 38; Burchell v. Marsh, 17 How. 351.

The several causes of complaint in the plaintiff's bill of exceptions and assignment of errors, are in the nature and of the effect of a motion to set aside the award. As such, they are only fit matters to be addressed to the consideration and discretion of the Circuit Court, and are not subject matters for revision by this court on a writ of error.

Parsons v. Bedford, 3 Pet. 445; Wright v. Lessee of Hollingsworth, 1 Pet. 168; Cutler v. Grover, 15 Me. 159; Walker v. Sanborn, 8 Me. 288; Cumberland v. North Yarmouth, 4 Me. 459; Haskell v. Whitney, 12 Mass. 47; Boardman v. England, 6 Mass. 70; Tolland v. Sprague, 12 Pet. 331; Evans v. Phillips, 4 Wh. 73; Henderson v. Moore, 5 Cr. 11; Harker v. Ellicott, 7 Serg. & R. 285; Zeller's Lessee v. Eckert, 4 How. 289.

248*] *Mr. Justice **Campbell** delivered the opinion of the court:

This is an action by the defendant in this court (Myers) against the Railroad Company, for the breach of the covenants in a contract made between these parties in August, 1850, by which the defendant agreed to perform certain work, incur charges and expenses, and supply equipments and materials in the construction of a railroad from the City of Portland, in Maine, to South Berwick, in New Hampshire; and also to fulfill the unexecuted engagements of certain contractors who had retired before completing their contract. Before the terms of the contract had been accomplished, the defendant was dismissed, as he alleges, without a sufficient cause; and the object of the suit is to recover such damages as he had sustained by the failure of the Company to discharge the obligations they had assumed to him. The declaration recites at large the agreements of the parties, and contains a general averment that he entered upon the construction of the railroad, and the performance of all the matters and things upon his part to be done and performed, and had performed all the things required to be done and performed, until the 19th of August, 1852, and had nearly completed one of the sections of the road so as to be fit for use, and that it had been used; also, that he had expended large sums towards the engineering, surveys, construction, and grading of other parts of the road, until he was unlawfully dismissed, and hindered, and forbidden to prosecute the work any further.

The declaration then contains a general averment of the non-performance by the plaintiffs (Railroad Company) of their obligations to suffer the work to proceed, to abide the decision of their engineer, or to pay the amounts that had become payable prior to his dismissal.

This averment is material, in connection with other parts of the case, and will be extracted hereafter.

The defendant (Myers) proceeds to take up the various stipulations of the Railroad Company, to describe their legal effect, and to denounce their breach by the Company. None of these are of importance to the case here, save those that arise on the 8th and 9th articles of the contract. The first of these articles provides for the payments to be made on account of the first division of the road; and the other, for those on the three remaining sections into which it was divided. The 8th article provides that the Corporation should pay to the defendant for the performance of his undertakings, and in full satisfaction of the obligations of the Company on the prior contracts, $32,000 per mile for the first division of the work; that for all work done by the previous contractors, to the 1st of August, 1850, payments should be made according to their contracts, inclusive of the reserve *fund; [*249 for all lands purchased by them, whether for cash, bonds or stock, payments should be made in cash, bonds or stock, according to the mode of purchase; and for all such work on said first division, from the 1st of August, as the same should progress, current payment should be made at the rate of fifty per cent. in cash, twenty-five per cent. in the six per cent. bonds of the Company, and twenty-five per cent. in stock; one half of the latter to be reserved for an indemnity for the fulfillment of the contract, until said division of the road should be completed.

The 9th section of the agreements refers to the 2d, 3d and 4th sections of the road. For the fulfillment of all its obligations, the Company agreed to pay $27,500 per mile—thirty-three and one third per cent. in cash, on the return and adjustment of each monthly estimates by the engineer; a like sum in the bonds of the Company; and a like sum, reserving one half thereof for indemnity, in the stock certificates of the Company. "The monthly estimates to be governed by the same gradation of actual expenditures as heretofore, and the payment to be made on such estimate of actual expenditures."

And it was provided, that upon the completion of either of the second, third or fourth sections, in work, material, station-houses, and equipments, the whole of the payments of cash, bonds, and certificates of stock, in corresponding amounts, equal to the sum aforesaid, should be made in complete discharge of said Company upon all the contracts pertaining to that section of the road. The breaches laid in the declaration, applicable to the payments, are as follows:

"And the said plaintiff in fact saith, that the said defendants, contrary to the covenants or

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agreements in the indenture aforesaid, did not abide by the decision of their engineer, as to the amount and quantity of the several kinds of work done, in and by said indenture contracted to be done by said plaintiff for said defendants, and which were done and performed by the plaintiff: nor did said defendants pay said plaintiff for the work done by him for them, according to said agreement; but on the contrary, utterly refused to pay the plaintiff therefor, according to the estimate of their engineer; although the plaintiff avers that said engineer made to said defendants a return of the monthly estimates of the work and labor done by plaintiff upon said road."

The declaration recites the 8th article, and avers a breach in reference to the payments, as follows: "And the plaintiff avers that said defendants, in breach of their covenant aforesaid, did not, for all the work performed and material furnished up to said first of August, make a full settlement, as had been heretofore 250*] *estimated, monthly, and pay the plaintiff therefor, in accordance with the covenants aforesaid; neither did said defendants, for all work on said division, as the same progressed, after said first of August, according to their covenants aforesaid, pay therefor fifty per cent. in cash, twenty-five per cent. in bonds, and twenty-five per cent. in stock, one half being retained, as stipulated, for an indemnity; nor did said defendants pay the plaintiffs therefor, according to the monthly estimates of the engineer, as returned by him."

The breach of the covenants contained in the 9th article is averred in language similar to the above, with variances corresponding to the difference of the sums to be paid.

Before a trial, the parties agreed to refer the action to the determination of three persons, to be appointed by the court, whose report, or the report of any two, was to be made as soon as may be; and that judgment thereon was to be final, and execution to issue accordingly.

Afterwards, one of the persons appointed was authorized to act alone, and this person returned a decision in favor of the defendant (Myers), for an ascertained sum as damages.

Upon the return of the award to the court, the Corporation submitted objections, and examined the arbitrator in support of them. These objections are as follows:

First. That the said Hale has acted and awarded upon, and included in said award, damages for a subject matter not referred to him.

Second. That the said Hale has included in his said award damages for a claim not embraced in the plaintiff's writ and declaration, and not sued for in the above action, and not referred to his arbitration or decision.

Third. That, in and by his said award, he has awarded to the plaintiff in said action damages for the non-delivery of the reserved stock specified in said writ and declaration, and in the contracts therein set out and copied, although the said reserved stock is not sued for, nor is any allegation made in the said writ and declaration that the same had been demanded, nor was any proof of demand of the same offered at the hearing before said referee, nor was any claim for the same referred for his arbitration or decision.

Fourth. That the said Hale has awarded damages to the said plaintiff, in lieu of profits for work not performed by the plaintiff under his said contracts, contrary to law.

Fifth. That there having been no proof or claim that the defendants, in fraud of the plaintiff's rights under his said contract, had taken the contract from the plaintiff, and given to any other person at a lower rate, or taken it for the purpose of giving it to *any [*251 other party at a lower rate, the referee has awarded a sum as damages to the plaintiff for prospective profits not earned by him, contrary to law.

Sixth. That it does not appear in and by said award whether the said referee has credited or charged the plaintiff with an amount of bonds deposited in the hands of Levi Morrell, under the terms of the supplementary contract, dated February 6th, 1851, and set out in said writ and declaration.

Seventh. That it does not appear in and by said award what disposition was made by the referee of an amount of bonds in the hands of D. C. Emery, the Treasurer of said Corporation.

Eighth. That it does not appear in and by said award whether the said referee charged the said plaintiff with an amount of bonds in his hands, purporting to have been issued by one Nathaniel J. Herrick, describing himself as Treasurer, pro tempore, of said Corporation.

The arbitrator testified that he had included the twelve and one half per cent. of reserved stock in the award; that he considered the demand for reserved stock as suspended by the proceeding, and that the plaintiff (Myers) was entitled to damages for not having received the stock previous to the breach of the contract. He says there was no distinct claim made before the referee for the reserved stock, but the account embraced it by way of debtor and creditor. The books showed he was entitled to reserved stock but not as subject to his order, or that he had any opportunity to receive it. He said it was admitted that that amount of reserved stock would be due to him on settlement of his account, but not that he had at any time had it under his control, nor was there any evidence that he had demanded it.

This testimony, with more to the same effect, was elicited from the arbitrator upon his examination before the Circuit Court, upon the return of the award, and in support of the exceptions to it. The learned judge who presided, received the evidence but overruled the exceptions, and embodied the testimony and the decision in a bill of exceptions, reserving his opinion of the regularity of that mode of proceeding, and whether the judgment can be revised. We are of the opinion that the equity of the statute allowing a bill of exceptions in courts of common law of original jurisdiction, embraces all such judgments or opinions of the court that arise in the course of a cause, which are the subjects of revision by an appellate court, and which do not otherwise appear on the record.

Strother v. Hutchinson, 4 Bing. N. C. 83; Ford v. Potts, 1 Halst. 388; Nesbitt v. Dallam, 7 G. & J. 494; 9 Port. 136.

But to present a question to this court, the subordinate tribunal *must ascertain [*252 the facts upon which the judgment, or opinion

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excepted to, is founded; for this court cannot determine the weight or effect of evidence, nor decide mixed questions of law and fact.

Zeller v. Eckert, 4 How. 289.

The practice prevails in the courts, where rules of reference are in use, to examine the arbitrators as witnesses, to ascertain facts material to the validity of the award; and the appellate courts are accustomed to revise their decisions, and upon principle, we see no objection to the introduction of the same practice into the courts of the United States under the limitations we have indicated.

Thornton v. Carson, 7 Cr. 597; Butler v. Mayor of N. Y. 7 Hill, 329; Lutz v. Linthicum, 8 Pet. 166; Sawyer v. Freeman, 35 Me. 546; Ward v. Am. Bank, 7 Met. 486.

In the present instance we can collect from the evidence of the referee, as shown in the exceptions, the fact necessary to raise some of the questions contained in the objections to the award, without being involved in the dispute between the parties, as to the condition in which the reserved stock had been placed by the corporation.

The law is well settled, that by the reference of an action to the determination of an arbitrator, nothing is included in the submission but the subject matter involved in it.

Tidd's Pr. 822; 2 T. R. 645.

And if an arbitrator embraces in his award matter not submitted, and includes the result in a single conclusion, so as to render it impossible to separate the matters referred from those which have not been, the award is bad.

Lyle v. Rodgers, 5 Wheat. 394; 33 Me. 219; Sawyer v. Freeman, 35 Me. 546.

The defendant contends that no claim for the reserved stock, or for damages for its non-delivery, was embraced in the declaration or sued for in the action; and as the reference was one of the action merely, no such claim was submitted to the referee. This involves the construction of the declaration.

We have extracted the averments in the declaration that were designed to charge the Corporation with the non-performance of the covenants, for the payment of work done before the dismissal of the contractor.

In one of those the charge is, that the Corporation had neglected and refused to make any payments, and thus a total failure to fulfill its obligations in respect to payments is alleged. The assignments of the breaches of the 8th and 9th articles are made in the language of the covenants themselves, and the failure charged is co-extensive with the obligations. If the Corporation had created no reserved stock, or 253*] had made no appropriation *for the contractor, according to the monthly estimates as the work progressed, and had finally dismissed him, so as to exclude his claim for the stock reserved when his contract had been fulfilled, there could have been no ground for affirming that a breach of the covenants had not been made by the Corporation, and that damages were not due.

There would have been no argument to support the allegation that the contractor was a corporator to the extent of the stock which should have been reserved. But, as we interpret the declaration, its averments have this scope and operation.

It was the duty of the arbitrator to ascertain the truth of these charges. They were the precise subject of the reference. The arbitrator has explained with clearness in his testimony his conclusion on the subject of this stock, that the contractor had no title to the shares; that is, that he had not been paid by the appropriation of so much reserved stock for his use. This conclusion of his is a final decision on the question, for this court cannot revise his mistakes, either of law or of fact, if such had been established.

Burchell v. Marsh, 17 How. 344; Kleine v. Catero, 2 Gall. 61.

The objections, we have noticed, include all that were insisted on in the argument.

The objection taken to the absence of an original writ, or to the supply of a copy, is not tenable. The original writ had fulfilled its function when the defendant had been brought into court, and its loss did not affect the action of the plaintiff; and it was a matter resting in the discretion of the court, upon ascertaining the defective state of the record, to supply the deficiency.

Our conclusion is, there is no error in the record.

Judgment affirmed.

Dissenting, Mr. Justice Daniel.

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*SAMUEL WARD, Claimant of the Barque Mopang, Appt., [*267

v.

WILLIAM M. PECK, Jacob Badger, Freeman Kingsley, and Humphrey Devereux, Libelants.

(See S. C. 18 How. 267-271.)

Admiralty has jurisdiction of petitory suits—abandonment does not ratify unlawful sale by master.

In this country, courts of admiralty retain jurisdiction over petitory suits or causes of property.

The abandonment of a vessel by her owners to the underwriters could not, by estoppel or ratification, affect the title of defendant to whom the master, unauthorized by the circumstances, had sold her.

The defendant, having obtained possession unlawfully, was a trespasser, and can no more plead the abandonment as a confirmation of his title than if he had obtained it by theft or piracy.

If the circumstances would have justified a sale by the master, no abandonment was necessary.

(Mr. Justice CATRON did not sit in this cause.)

Argued Feb. 15, 1856. Decided Feb. 26, 1856.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

Mr. J. P. Benjamin for the appellant.

(No brief filed for the appellant.)

Mr. F. P. Stanton, for the appellees:

If the subject insured be damaged more than half its value, it may be abandoned for total loss.

Phil. Ins. sec. 1576.

It requires more damage, to authorize a sale by the master.

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Pierce v. Ocean Ins. Co. 18 Pick. 83; Abb. Ship. 19.

No abandonment is necessary, when circumstances justify a sale by a master.

Phil. Ins. sec. 1497; Gordon v. F. & M. Ins. Co. 2 Pick. 249; Patapsco Ins. Co. v. Southgate, 5 Pet. 604.

In this case, if the circumstances had justified an abandonment, the master would have been the agent for the underwriters.

Coolidge v. Gloucester Ins. Co. 15 Mass. 341; Schieffelin v. N. Y. Ins. Co. 9 Johns. 21; Peyton v. Delafield, 1 Cai. 363; Pierce v. Ocean Ins. Co. 18 Pick. 83.

Mr. Justice Grier delivered the opinion of the court:

The pleadings in this case present but the single question of the title or ownership of the bark Mopang.

Originally, the Court of Admiralty in England entertained jurisdiction of petitory as well as mere possessory actions. Since the Restoration, that court, through the jealous interference of courts of law, had ceased to pronounce directly on questions of ownership or property. Petitory suits were silently abandoned, and if in a possessory action a question of mere property arose, especially of a more complicated nature, it declined to interfere.

This "submission to authority rather than reason" has continued till the Statute of 3 and 4 Vic. ch. 65, sec. 4, restored to the admiralty plenary jurisdiction of such questions. See case of The Aurora 3 Rob. 133, 136, and The Warrior, 2 Dod. 288, 2 Brown, Civ. C. Ad. 430.

In this country, where the courts of admiralty have not been subjected to such jealous restraints, the ancient jurisdiction over petitory suits or causes of property has been retained. 268*] In the *case of The Tilton, 5 Mas. 465, Mr. Justice Story has examined this question with his usual learning and ability. The authority of this case has never been questioned in our courts. See Taylor v. Royal Saxton, 1 Wall, Jr. 322. In the case of The New England Ins. Co. v. Brig Sarah Anne, 13 Pet. 387, in this court, the only question was the title or ownership of the brig, yet the cause was entertained without any expression of doubt as to jurisdiction.

The following agreed statement of facts presents the merits of this case:

"That the libelants are the owners of the said bark 'Mopang,' unless their title has been devested by the sale made by the master under the following circumstances: the bark sailed from New Orleans on or about the 29th November, 1846, for Tampico and other Mexican ports. That, on or about the 6th of December thereafter she struck aground, was abandoned by her officers and crew on the north breakers off the bar of Tampico; that she floated over the bar, and was boarded by one Clifton, who refused to deliver her to the master; that a claim for salvage was made; that by agreement between the master and Clifton, the vessel was sold to the claimant, Ward, on the ——. It is admitted that the sale to Ward was unauthorized by the circumstances in which the master was placed.

The libelants had a valued policy upon the vessel, taken out at New Orleans. On the 9th day of January, 1847, they gave notice of abandonment to the underwriters as for a total loss, who refused to accept the same. They were sued for a total loss by libelants. Judgment found for defendant."

This statement amounts to an admission of want of title in the claimant. The abandonment by her owners to the underwriters could not affect the title of the claimant, by way of ratification or estoppel. The insurance is but a wager between the parties to it, on the safety of the vessel. By the rule of the contract the ship may be abandoned, and the whole insurance claimed, when the damages exceed half the value.

Nothing but extreme necessity can justify the sale of the vessel by the master. The abandonment was based on the damage done to the vessel at the time of the accident. If accepted, the master became the agent of the insurer; and whether accepted or not, his act, without authority, can receive no ratification from allegations or admissions made by any party in a dispute on the contract of assurance, where the inquiry as to the act of the master was irrelevant. The defendant, having obtained possession unlawfully, was a trespasser, and can no more plead the abandonment as a confirmation of his title than if he had obtained it by theft or piracy; moreover, if the circumstances *would have justi- [*269 fied a sale by the master, no abandonment was necessary. It cannot, therefore, by any possible implication, amount to a confirmation of such sale.

The judgment of the Circuit Court is affirmed.

Mr. Justice Daniel, dissenting:

I dissent from the decision just pronounced: 1st. On the ground that this case is not one regularly appertaining to a court of admiralty. 2d. Because this decision professes to claim a power and jurisdiction admitted by the decision itself never to have been heretofore conceded to, nor exerted by, courts of admiralty in this country, whose power and jurisdiction in future, are to be traced for their origin to this cause alone.

With respect to the objection first stated; this cause presents no example of a maritime contract or of a marine tort. It is simply a contest as to the right of property in a subject situated within the ordinary and settled jurisdiction of the courts of common law and equity of the State of Louisiana, and could have been there as effectively determined by an action of detinue or trover, or by a bill in equity if there was danger of an eloignment of the subject in controversy, as it could possibly be in admiralty: and this fact alone should have been a reason sufficient against an abandonment of the adequate and familiar modes of administering justice, and an unnecessary resort to a tribunal which in England, we are told by Lord Hale, was never established either by common law or by statute, but had grown up entirely by encroachment and sufferance.

It is true that the subject in controversy here is a vessel; but if that single fact could justify the interposition of the admiralty, it would equally imply the same power in that jurisdiction over any dispute concerning the right of property in a vessel, although she might still

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be upon the stocks, and although she had never reached the water, or might, by some casualty, never touch that element.

This was simply a question of property arising out of the extent of power in an agent to dispose of it—a common every-day question of law.

It is admitted that the jurisdiction now asserted for the first time in this court—viz.: the jurisdiction in petitory suits—did not belong to the admiralty in England, or was not exercised by them for several hundred years at least; and that a recent statute in the present reign had been enacted expressly to confer that jurisdiction. It has also been said, that the jurisdiction thus recently authorized, had, in the olden time, existed in the admiralty, and had been restrained or forbidden only by the jealousy of the common lawyers. This appears to me [*270] to be an *argument not founded upon the judicial history of the country, and one which is neither logical nor tenable. A reference to others of the highest and most venerable authorities, which might be added to that of Lord Hale already cited, demolishes entirely the foundation on which this argument is based. The argument is in itself illogical and illusory; for had this jurisdiction been even legitimate in the admiralty, it might doubtless have been vindicated and maintained in despite of an illegal and unfounded jealousy of the common lawyers. It never could have been forced to yield to so baseless an opposition. No authority so potent as that of an express statute could have been required, to create what not only already had being, but which was established and venerable from justice and from lapse of time.

If the inhibition had been the mere creature of jealousy or prejudice, a returning sense of right and a conviction of public advantage, would, in this, as in other instances falling within the power of the courts, have corrected previous errors. The very fact of the enactment of a statute, such as that referred to, is strong evidence to show that the jurisdiction it confers had no previous, or rather no rightful, existence.

But it is said that no jealousy, like that once felt in England against the admiralty, exists in this country; and therefore, the inveterate powers ascribed to it formerly in England, are free and unfettered for its exercise in this country. This course of argument naturally suggests with me the following inquiries: What fetters or limitations are recognized as placed upon the admiralty jurisdiction in the United States? Freed from the checks and restraints imposed upon such a jurisdiction in that country, from which the system was transferred to us, what are the checks imposed upon it here? Are there any such checks? Does it, either in theory or in practice, recognize any such—how or where are they defined or ascertained? Has it any system at all, or is it left to the judgment or fancy of those who assume to exercise power under its name?

Too true does it seem to me the case, that the ambitious and undefined pretensions of this branch of jurisprudence, have found greater favor here than in my view, is compatible with civil liberty, with public policy, or private benefit; and hence I have been the more inclined to watch and prevent its dangerous encroachments, and in all sincerity can, in contemplating the favor extended to those encroachments exclaim, "hinc illæ lachrymæ."

For the jurisdiction here claimed for the admiralty, we are referred to the treatise of Mr Arthur Brown, professor of civil law in Ireland. I have no recollection of having before seen or *heard the doctrines of this pro- [*271] fessor recognized as authority; and with respect to his theories, it may justly be remarked, that if these are to be adopted as law, there is no excess of extravagance to be found in the exploded notions of Sir Leoline Jenkins, or anywhere else, which will not find an apology, nay, a full justification, in the book of this civil law doctor. If the theories of this professor are to be regarded as binding, his disciples may look forward, at no distant day, to an announcement from this bench, as there has been formerly from that of one of the circuits, of the doctrine, that a policy of insurance (a mere wager laid upon the safety of a vessel) is strictly and essentially a maritime contract, because, forsooth, the vessel had to navigate the ocean.

It seems somewhat singular, however, that Mr. Brown should be appealed to in support of the authority now claimed for the admiralty, when in truth his book again and again admits that such jurisdiction had been utterly repudiated in England as a sheer usurpation, and may appropriately be styled a jeremiad over the lost authority and splendor of a system which he would exalt to the control of every other branch of jurisprudence.

I object, in all cases, to the decision of questions not strictly in point, or which have not been regularly discussed, and not only maturely but necessarily considered. If there is any one source of embarrassment more prolific than all others, it is this very practice. I cannot perceive the necessity nor the propriety of deciding matters in advance. The effect of such a practice is either the difficulty of getting clear of irregular and inapposite conclusions, or the sanction of them with the view of maintaining consistency whether right or wrong.

A great portion of the admiralty jurisdiction now permitted in this country, may be traced to a dictum in argument in the case of The General Smith, 4 Wheat, p. 444, in the assertion of a doctrine which, if now for the first time discussed and examined, might not command the sanction of this tribunal.

It is that tendency of error once countenanced or tolerated to grow into precedent, which has ever enjoined it upon me as a sacred duty to resist its approaches before they have been matured into power; and even the conviction of an inability to accomplish this result, is with me no dispensation from the duty of resistance.

ISRAEL KINSMAN and Calvin L. Goddard, Appts.,

v.

STEPHEN R. PARKHURST.

(See S. C. 18 How. 289-295.)

Defense that patent is invalid, is not good in suit to account for sales—agent or joint owner cannot avoid paying over money on the

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ground that it was received on an illegal contract—agreement that one partner alone should conduct the business, not void as in restraint of trade—one partner could not secretly acquire outstanding right, as against other—too late to object to master's report for first time on appeal.

Where one has made and sold machines under the patentee's title and for his account, that the patent is invalid is no defense to patentee's right to an account for the proceeds.

Where money has been received by an agent or joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him.

The invalidity of the patent does not render the sales of the machines illegal, so as to taint with illegality the obligation of the seller to account.

It is competent for two joint owners of a patent, to stipulate in their partnership agreement that one of them should, alone, conduct the business. This is not in restraint of trade.

The partner selling could not secretly acquire an outstanding right to the patent and set it up against his partner.

If the master's report of amount due was too great it should have been excepted to. It is too late to object to it here for the first time.

When agreement stipulates that defendant should be accountable for $100 profit on each machine sold, he takes the risk of bad debts, and must pay whether he collects or not.

Argued Feb. 21, 1856. Decided Feb. 26, 1856.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The bill in this case was filed in the Circuit Court of the United States for the Southern District of New York by the appellee.

The court below found for the complainant, and entered a final decree for $23,220.28 and costs. The defendants brought the case here on appeal.

A further statement appears in the opinion of the court.

Messrs. Keller and Platt for appellants.

Mr. George Gifford for the appellees.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, in a suit in equity brought by the appellee, Parkhurst, against the appellants. The bill states, and the proofs show, that Parkhurst, being the owner of the letters patent for improvements in the machine for ginning cotton and wool, on the 22d of 291*| May, 1845, *entered into a written agreement with Kinsman, the substance of which was, that Parkhurst was to be the owner of two thirds, and Kinsman of one third, of the letters patent; that the business of manufacturing and selling patented machines should be carried on by the parties on their joint account, in the proportions of two thirds and one third, Kinsman giving his personal attention to the business, and advancing a sum not exceeding $1,000 for the purchase of machinery, stock, etc., for which advance he was to be repaid out of the first profits of the business. Kinsman was to pay Parkhurst $2,000 in cash, and give his note for $1,000, payable in sixty days. Under this agreement, the manufacture and sales of the machines were begun and carried on until the 9th day of February, 1846, at which time the parties entered into a new agreement, the substantial part of which was as follows:

"Whereas the party of the first part has advanced moneys, and become responsible for various sums of money which have been expended in getting up machinery, and tools, and stock, etc., for the manufacture of burning and carding machines, which were invented by the said Parkhurst; one third part of which he sold and assigned to the party of the first part: Now, therefore, the party of the first part, in consideration of $1 in hand paid by the part of the second part, the receipt whereof is hereby acknowledged, hereby covenants and agrees, that, as soon as the profits which have accrued and which may hereafter arise, from the manufacture and sale of the said machines, so invented by the party of the second part, and so made and sold by the party of the first part, shall be sufficient to pay all legal demands for the purchase of machinery, tools, etc., etc., and other expenses incurred by said party of the first part, then he, the said party of the first part, shall and will discontinue the manufacture and sale of said machines, invented as aforesaid, and that all machines which he shall manufacture and sell after this date should not be sold for a less profit than $100 each, and that he will be accountable for $100 profit on each and every machine made and sold from this day, unless he has the written consent of the party of the second part to sell at a less price."

"The party of the second part, in consideration of $1 to him in hand paid by the party of the first part, the receipt whereof is hereby acknowledged, and also in consideration of the agreements aforesaid, hereby covenants and agrees with the party of the first part, that he will go on and manufacture the machines aforesaid as soon as the party of the first part discontinues the same, and that he will not sell any machine for a less *profit than $100 [*292 without the written consent of the party of the first part, and that he will pay over to the party of the first part one third part and share of the said profits upon all machines which he makes and sells hereafter; and that, for any machines which he may manufacture, or have manufactured, before the discontinuing of the building of the same by the party of the first part, shall be subject to the same restrictions of selling for at least $100 profit on each machine, one third of which shall be paid to the party of the first part."

The original and supplemental bills aver, that under this agreement Kinsman prosecuted the business, and not only reimbursed himself for the cost of the machinery, tools, etc., and all his other advances, but, in violation of his agreement, continued the manufacture and sale of the machines, so as to receive large profits, of which it prays an account, and also an injunction to restrain the further making or vending of the machines in violation of the agreement. A temporary injunction was applied for and obtained on the third day of July, 1847. On the 29th day of June, 1847, Kinsman made a transfer to the appellant, Goddard, who was then a clerk in his employment, of the tools, stock, etc., used in the manufac-

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ture; and after Kinsman was enjoined, the business was carried on in Goddard's name. A supplemental bill was then filed, making Goddard a party, charging him with notice of all the complainant's rights at the time of the transfer to him, alleging the transfer itself to have been only colorable, and praying an account and decree as against him and Kinsman. The Circuit Court made an interlocutory decree, declaring Parkhurst's right to an account, referring the cause to a master, to take and state the accounts, directing the master, in taking the accounts, to ascertain and report the number of machines made and sold by Kinsman and Goddard, or either of them; the advances made by Kinsman and Goddard, or either of them; and charging a profit of $100 on each machine sold.

The master reported; and his report not being excepted to, was confirmed, and a final decree made, that Kinsman and Goddard should pay to the complainant the amount reported by the master to be due from them. From this decree the appeal now before us was taken.

The principal objection made by the appellants to the decree of the court below is, that Parkhurst was not the original and first inventor of the thing patented. We are not satisfied that this is made out. But we have not found it necessary to come to a decided opinion upon this point, because we are all of opinion that, under the agreement of the 9th of 293*] February, *1846, the invalidity of the patent would not afford a bar to the complainant's right to an account. Having actually received profits from sales of the patented machine, which profits the defendants do not show have been or are in any way liable to be affected by the invalidity of the patent, its validity is immaterial. Moreover, we think the defendants are estopped from alleging that invalidity. They have made and sold these machines under the complainant's title, and for his account; and they can no more be allowed to deny that title and retain the profits to their own use, than an agent, who has collected a debt for his principal, can insist on keeping the money, upon an allegation that the debt was not justly due.

The invalidity of the patent does not render the sales of the machine illegal, so as to taint with illegality the obligation of the defendants to account. Even where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him. Thus, where a vessel engaged in an illegal trade carried freight which came into the hands of one of the part owners, and on a bill filed by the other part owner for an account, the defendant relied on the illegality of the trade, but it was held to be no defense. Sharp v. Taylor, 2 Phil. Ch. 801. So in Tenant v. Elliot, 1 B. & P. 3, the defendant, an insurance broker, having effected an illegal insurance for the plaintiff, and received the amount of a loss, endeavored to defend against the claim of his principal by showing the illegality of the insurance, but the plaintiff recovered. See, also, McBlair v. Gibbes, 17 How. (58 U. S.) 236.

Here, however, as already observed, there was no illegality; it is simply a question of failure of title, and as that does not appear in any manner to have affected the profits which the defendants received, there can be no ground to allow it to be shown in defense. Bartlett, Adm'r. v. Holbrook, 1 Gray, 114; Wilder v. Adams, 2 Wood. & M. 329, are in point.

Similar views are decisive against the objection that this was a contract in restraint of trade. It was certainly competent for two persons, being joint owners of letters patent, whether valid or invalid, to enter into a copartnership for the manufacture and sale of the patented machines, and to stipulate that one of them should alone conduct the business. This was a provision for the prosecution of the business in a particular mode, and not for its restraint. It is a very common and not an illegal stipulation in partnership articles, that neither partner shall carry on that business for which the partnership is formed, outside the partnership and for his own account. Besides, if the contract *to refrain from [*294 the manufacture could not be enforced, as being against public policy, this would afford no answer to a claim for an account of profits actually realized by prosecuting the business, there being no connection between the illegal stipulation and the profits of the business.

It was insisted by the appellants that they did not act under the complainant's title, but under some right acquired from one Sargent. We are not satisfied that Sargent had even an inchoate right to a patent for the machines which the appellants made and sold. But even if he had, the defendant, Kinsman, could not secretly acquire the outstanding right of Sargent, if any, and set it up against his joint owner, Parkhurst, in derogation of his rights under the agreement of the 9th of February, which Kinsman entered into with knowledge of this alleged title of Sargent; and Goddard is bound by the same equities, for he not only purchased pendente lite, and with actual notice of the suit, but we are satisfied the sale to him was made to enable Kinsman to attempt to evade the injunction.

The appellant, Goddard, objects that he has been charged by the final decree, jointly with Kinsman, for the profits on sales of machines made before the transfer to him by Kinsman. If this be so, it arises from the report of the master, who was directed by the interlocutory decree to report the sales made by Kinsman and Goddard, or either of them, and the advances and expenditures of them, or either of them.

If his report was in this or any other particular erroneous, it was incumbent on the defendants to have pointed out the error by an exception filed pursuant to the rules of the court on that subject. But no exception was filed, the report was confirmed, and the final decree was drawn up and entered without objection by the appellant, Goddard, reciting that it appears by the report of the master that the sum of $23,220 $\frac{12}{100}$ is due and owing by Kinsman and Goddard to Parkhurst, and thereupon proceeds to decree them to pay that sum. When a motion to dismiss the appeal was made at a former day, on the ground that

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the master's report not having been excepted to, and the appellants not having objected to the final decree, there was nothing open on this appeal, the appellant's counsel declared that the appeal was designed only to review the interlocutory decree which had decided the merits of the cause, and that, unless error was found therein, there was no ground for the appeal. The motion to dismiss the appeal was overruled, the court being of opinion that it was open to the appellants to review the decision made by the interlocutory decree. But the interlocutory decree does not direct the master to charge Goddard and Kinsman jointly with profits on sales made by Kinsman alone. 295*] If the master *put such an interpretation on the decree, it was an erroneous interpretation, and should have been brought before the court below by an exception. It is too late to object to it here, for the first time.

The appellants also insist that they were charged with profits not actually received, by reason of the failure of the purchasers to pay, and other causes. But this was in accordance with the agreement of the 9th of February, which stipulates that Kinsman shall be accountable for $100 profit on each machine made and sold by him. By force of this stipulation, he and Goddard, who acted with him under this agreement, took the risk of bad debts. It appears, from the master's report, that evidence tending to show that some of these losses were attributable to the interference of Parkhurst was offered to the master and rejected by him. But no exception having been taken to bring this point before the Circuit Court, it is not open here.

We have considered all the objections to the decree of the Circuit Court, and finding them untenable, we order the decree to be affirmed, with damages and costs.

JAMES L. RANSON, Plaintiff in Error,
v.
WILLIAM WINN and Isabella Davis, Administrators of Thomas I. Davis, Deceased.

(See S. C. 18 How. 295-297.)

Petition to be made party to a suit—master's report to be made and excepted to, and exceptions decided, in order to review.

Where a creditor of an intestate filed a petition, praying to be made a party to a suit pending, no answer was put in, nor does any part of the original bill or any proceeding in that suit appear on the record; Held, that the proceeding is irregular and cannot be sustained.

Where a chancery suit involves matters of account, the action of a master should be had in the inferior court, and the items admitted or rejected should be stated, so that exceptions may be taken, and such case should be brought before this court on rulings of the exceptions by the Circuit Court.

Argued Feb. 15, 1856. Decided Feb. 26, 1856.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The case is stated by the court.

Mr. W. S. Coxe for the appellant.

Messrs. J. Marbury and H. Winter Davis, for the appellees:

There is no original bill of any sort, and no answer of any sort; no process showing the pendency of any suit, nor any agreement of counsel, dispensing with those material parts of the record. The petition is entitled as follows:

William S. Heniman v. Isabella Davis and William Winn, Admrs. of Thomas J. Davis, et al.	In chancery.

The appellees submit that the order of the court below, dismissing Ranson's petition to be made a party in this suit, should be affirmed.

*Mr. Justice McLean delivered the [*296 opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Columbia.

The proceedings on which the appeal was taken were had on a petition of the appellant, Ranson, in the Circuit Court of the district, stating that he was the creditor of the intestate for $8,113.48, a balance due on merchandise furnished, and other matters of account. An account was filed with the petition, showing the items charged, and he prayed to be made a party in a suit pending; and he adopts the allegations and prayers of the bill, and calls upon the defendants to answer, etc.

No answer was filed by the defendants, nor does any part of the original bill to which reference is made, or any proceeding in that suit, appear on the record.

An account is stated of the value of produce purchased by Ranson, and forwarded to Thomas J. Davis, and priced as of the 28th May, 1847, which, in the whole, amounted to $31,879.80. The entire expenditure in purchasing the produce, including losses, amounted to the sum of $21,280.43, leaving a profit of $10,599.37. A further account is stated in detail of purchases of grain amounting to a large sum. An auditor was appointed by the court, who, in a long report, states the correspondence between Ranson and Davis, which conduces to show that Ranson was engaged in purchasing wheat and other grain, to be forwarded to Davis, who owned a mill in Georgetown. Exceptions were taken to the report of the auditor, and the court ordered that the cause be again referred to him, with instructions to take such testimony as may be offered by Ranson, on the points mentioned in his affidavit filed in the cause, and that he report to this court, as soon as convenient, the substance of such testimony, and what changes, if any, such additional testimony may render proper in the report heretofore made by said auditor in reference to said claim.

The auditor returned the additional testimony which he took, but made no alteration in his former report. It was admitted in the argument that the estate of Davis was insolvent, and the object of Ranson seemed to be, to enforce his claim against the estate of Davis in preference to other creditors.

From the record, the nature of the suit, in which Ranson prayed to become a party, does not appear. It may have been a suit by other creditors, but no notice is taken of them in the subsequent proceeding, nor is there any pleading except the petition to be made a party.

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This proceeding is irregular, and cannot be sustained. The exceptions to the report of the auditor were overruled by the Circuit Court, and the petition of Ranson was dismissed.

297*] *Where a chancery suit involves matters of account, the action of a master should be had in the inferior court, and the items admitted or rejected should be stated, so that exception may be taken to the particular items or class of items, and such a case should be brought before this court on the rulings of the exceptions by the Circuit Court.

The bill is dismissed at the plaintiff's costs, without prejudice.

JOHN DOE, ex dem. JAMES B. McCALL, Jr., Henry V. McCall, and Mary Sidney McCall, Plffs. in Error,

v.

WILLIAM CARPENTER and John A. Reitz.

(See S. C. 18 How. 297-307.)

Deed may be impeached, although basis of title in former action where parties were non-residents and infant, and no judgment on the deed having been given—not res judicata—judgment only conclusive on matter involved—cannot conclude party who had no interest.

In an action of ejectment it is competent for plaintiffs to impeach a deed, although some defendants claimed under the same deed in a former action of partition, between same parties, two of the plaintiffs in ejectment having been non-residents and not having appeared, and another, an infant when the partition suit was pending, and no judgment having been given or question involved upon the deed in the partition suit.

The right of the plaintiffs to impeach the deed was not involved in the partition suit so as to be deemed res judicata.

Proceedings in partition are not appropriate for a litigation between the parties in respect to title.

A judgment is conclusive between the parties only upon a matter legitimately within the issue, and necessarily involved in the decision.

Two of the defendants in the partition suit, plaintiffs here, were non-residents of the State, and neither appeared nor were served with process. As to them the proceedings were purely in rem, and the decree acted only on the res or subject matter, and only upon such interest as was shown in the bill.

Those proceedings may conclude the question of partition from being afterwards agitated, but they cannot conclude the title of even a party to them whom the proceedings themselves show had no interest or concern in the question of partition.

(Mr. Justice Curtis, apprehending that one of his connections is interested in the subject matter of this case, did not sit therein.)

Submitted Jan. 15, 1856. Decided Feb. 26, 1856.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

The case is stated by the court.

NOTE.—When a deed is void for fraud, insanity, drunkenness, duress, undue influence, imbecility, infancy, or fraud on marriage, from ward to guardian, from cestui que trust to trustee, from heir to executor. See note to Harding v. Handy, 6 L. ed. U. S. 429.

Service of notice to appear and defend, when necessary to validity of a judgment. See note to Hollingsworth v. Barbour, 7 L. ed. U. S. 923.

Estoppel by recitals in deed, will or other instrument. Effect of recitals generally. See note to Carver v. Jackson, 7 L. ed. U. S. 761.

Messrs. David M'Donald and George G. Dunn, for the plaintiffs in error:

On the evidence in the record, the plaintiffs made out a prima facie case.

Ricard v. Williams, 7 Wheat. 59; Jackson v Porter, 1 Paine, C. C. 457.

This is the law of Indiana.

Doe v. West, 1 Blackf. 133; Robinoe v. Doe, 6 Blackf. 85.

"In such a case, it is incumbent on a party setting up the defense to establish the existence of such an outstanding title beyond controversy."

Greenleaf's Lessee v. Birth, 6 Pet. 312; Jackson v. Hudson, 3 Johns. 375; Jackson v. Todd, 6 Johns. 257.

We think that no court can examine the transcript in question without being convinced that there was fraud in it.

But the defendants insist that a fraudulent decree cannot be attacked collaterally. The contrary is decided in Fermer's Case, 3 Co. 77; see, also, Kennedy v. Daly, 1 S. & L. 355; Philipson v. Earl of Egremont, 6 Q. B. 537, 605; 2 Blackf. 103; 1 Carter, 133; Broom. Leg. Max. 577.

Mr. C. Baker, for defendants in error:

The defendants insist that the plaintiff's prima facie case was rebutted by them in two ways:

1. By proof of a subsisting outstanding title in the original patentees of the land.

2. By showing that the rights of the lessors of the plaintiff were not concluded by certain proceedings of the Vandenburg Circuit Court to which they were parties, and the record of which was given in evidence by the defendants.

In ejectment the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary.

Eldon v. Doe, 6 Blackf. 344.

The judgment or decree of the court having jurisdiction is conclusive upon the rights of the parties thereto, and cannot be impeached collaterally.

Horner v. Doe, 1 Cart. (Ind.) 133; Doe v. Smith, 1 Cart. (Ind.) 460; Carpenter v. Doe, 2 Cart. (Ind.) 465; Doe v. Rue, 4 Blackf. 263; Grignon's Lessee v. Astor, 2 How. 339; 10 Pet. 449.

It is also objected that two of the defendants were infants, and a decree was taken against them without proof. Such a decree is erroneous.

8 Blackf. 273, 300; 2 Carter, 161.

It is also objected, that on a bill for partition, it is not competent for a court of equity to try a question of title. This is not the law in Indiana.

5 Blackf. 335.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of United States for the District of Indiana.

The suit in the court below was an action of ejectment by the plaintiffs to recover the possession of certain town lots in the City of Lamasco. They proved on the trial that their father James B. McCall, was the owner of an undivided fourth *of a certain part of [*299 said City, and had been in the possession of

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the same, and died in 1840; and that they were his heirs at law.

The defendants set up, in bar of the action, certain proceedings in partition, embracing the premises in question, in the Circuit Court of the Fourth Judicial District of Indiana.

The bill in partition was filed by the tenants in common of the town lots with McCall in his lifetime, against his children and heirs, the present plaintiffs. The two sons were non-residents of the State, at the time. and did not appear or answer to the bill. The daughter was a resident of the State, and was served personally with the subpœna. She and the younger brother were under age, for whom guardians ad litem were appointed by the court.

The bill, after setting out the interests of the respective tenants in common, and that partition had been agreed upon between them, describing particularly the manner in which the partition was to be made, and the portions assigned to each in the arrangement, charges, that after the agreement, J. B. McCall sold and conveyed all his undivided interest, to wit: one undivided fourth part of the town property. to Hugh Stewart for the sum of $11,500, and that shortly afterwards, and before he executed deeds of partition, according to the agreement, departed this life, leaving three children, his heirs at law, James B. McCall, non-resident of this State, and Henry McCall, also a non-resident, and Mary S. McCall, who are infants under the age of twenty-one years. The bill further charges. that the several proprietors. including Stewart, the grantee of McCall, had already interchanged deeds of partition, according to the agreement, or were ready so to do; and that they were ready to execute to the heirs deeds of all their right to subdivision Nos. 3 and 6 of the southeast quarter of section twenty-three, in town 6, and of all other portions to which the heirs were entitled; and then closes by stating, that, inasmuch as your orators are unable to obtain relief in the premises, except by an interposition of the Court of Chancery, they, for the purpose of perfecting their several titles to their respective portions of said property, pursuant to the agreement in partition, pray that the heirs be made defendants; that a guardian ad litem be appointed for the first two infant heirs, that they may answer the bill; and if the same shall be found true, that the court would appoint three commissioners to make deeds of partition, etc.

The bill was taken as confessed against the adult heir, and against the others upon the answer put in by the guardian; no proof, for aught that appears. having been given. The court decreed that the prayer of the complain-
300*] ants be granted and *that C. D. Bourne, C. Baker and J. E. Blythe be commissioners to make deeds, etc., to the complainants, agreeably to the partition mentioned in the bill, and pursuant to. and agreeable with the said sale and conveyance made by James B. McCall, deceased, of his undivided interest in said town property, to the complainant, Hugh Stewart.

Deeds were executed in pursuance of the directions in the decree, and reported to the court and confirmed.

It appeared that McCall, besides being a joint owner in the town property which he had conveyed to Stewart, also owned, jointly with the complainants (except Stewart), one fourth of the southeast quarter of section No. 23, township 6, adjoining the town, and which descended to his heirs and was embraced in the bill of partition.

The counsel for the plaintiffs, when this record of partition was offered in evidence by the defendants, objected to the admission, on the ground that the decree was void for want of jurisdiction of the court; and also for fraud apparent on the face of the proceedings. The objection was overruled. It appeared that the defendants claim title from Stewart, the grantee of McCall.

They then rested, and the counsel for the plaintiffs then produced and read the conveyance from their father to Stewart mentioned in the bill of partition, and offered to prove that the conveyance was obtained by fraud on the part of Stewart, and also, that, at the time of its execution, their father was of unsound mind and incapable of making a valid contract; that said unsoundness was well known to Stewart, and that he took advantage of it in obtaining the deed; that the consideration of $11,500 mentioned was never paid; that $6,000 in depreciated state scrip was all that was ever paid or agreed to be paid, and that the defendants purchased of Stewart with full knowledge of all the facts; that the real estate, purported to be conveyed by the deed, was worth at the time at least $20,000.

To all which evidence the defendant's counsel objected, on the sole ground that the plaintiffs were barred by the record of the proceedings in partition, which objection was sustained by the court, and the evidence excluded.

The jury, under the direction of the court, rendered a verdict for the defendants.

We think the court erred in excluding this evidence.

The binding effect of the decree, in the chancery suit, is sought to be maintained upon the ground that the proceedings were instituted not only for the purpose of making partition, but also to quiet the title between parties, and especially the title of Stewart under the conveyance from McCall; and that the children *and heirs were made parties for this [*301 reason; and that the proceedings, in this aspect, being in the nature of proceedings in rem. would operate upon the title and bind the heirs. whether they appeared or not, if notice had been given in conformity with the statute or law of the State.

But we think the obvious answer to this view is, that the bill has not been framed in any such aspect, or for any such purpose, either in the body of it or in the prayer. There is no suggestion of any imperfection in the title of Stewart, under the deed of McCall, or of any imputation or questioning of the genuineness or validity of it; nor does the prayer ask for a decree to confirm the deed or the title to Stewart.

The only pretext for the ground now taken to bind the heirs, is in the allegation as follows, namely: "As your orators are unable to obtain relief in the premises, except by the interposition of a court of chancery, they, for the purpose of perfecting their several titles to the respective portions of said property, agreeably with and in pursuance of said agreement of partition, would respectively pray, etc.," and then follows the prayer for partition.

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Now, it is manifest that this allegation refers simply to the subject of providing for the mutual releases or conveyances of the joint interest in the property, so that each might become vested, severally, with the title to his respective share, and nothing beyond this, as is further evinced by the prayer of the bill, which is, that if the allegations in this bill should be found true, not that Stewart should be quieted in his title under McCall, but that three commissioners be appointed to make the partition, etc. So in respect to the decree. It simply orders that the prayer of the bill of the complainants be granted, appoints the commissioners, and directs them to make the partition, by the execution of the deeds of conveyance, release, and partition to the complainants, according to their respective rights, etc.

The deeds of the commissioners have also been referred to as helping out the binding effect claimed for these proceedings.

The deed of the commissioners to Stewart may be taken as a sample of all of them. It recites their appointment, the object of it, to wit: execute the partition deeds, etc., and adds: "and to perfect the title of said Hugh Stewart to the interests heretofore conveyed to him in said property, by the said McCall in his lifetime"—they then go on and convey "all the right, title and interest, claim and demand whatsoever of the said James B. McCall, deceased, at the time of his death, and of his heirs, naming the three defendants, since his decease or at any other time, and of all or any other heirs or heir what-302*] soever, of the said *James B. McCall, deceased," etc.; seeking to bind those not made defendants as well as those who were.

The answer to all these recitals is, that they have no binding force or effect beyond what is derived from the decree of the court appointing the commissioners; and as that simply conferred authority on them to execute mutual conveyances and releases for the purpose of making partition between the parties, any recital going beyond this is nugatory. Neither should the simple confirmation of the deeds by the court be construed as intending to go beyond the terms and directions of the decree.

The case, then, is brought down to the question, so far as the effect and operation of the chancery suit are concerned, whether or not these defendants are estopped by the decree from impeaching the deed of their father to Stewart. And, in respect to this question, we may concede that, for the purposes of partition, the court, under the statute and law of Indiana, had jurisdiction of the subject matter and were competent to make the partition.

The point is whether or not the right of the plaintiffs to impeach this deed was involved in these proceedings, so as to be deemed res judicata, and all further examination or inquiry foreclosed.

As we have already seen, the question as to its validity was not presented upon the pleadings in that suit, nor did it become the subject of inquiry or examination in the course of the proceeding, nor did it enter into the decree of the court in the determination of the case. And the better opinion is, that no such question could have been raised by the defendants in that proceeding, if they had sought to invalidate the deed. The most that the court would have been justified in doing, in the usual course of proceeding, would have been to have stayed the suit in partition till the question could have been settled at law. The proceedings in partition are not appropriate for a litigation between parties in respect to the title.

As to the binding effect of judgments or decrees, the general rule, is, that the judgments of courts of concurrent jurisdiction are not admissible in a subsequent suit, unless they are upon the same matter, and directly on the point; when the same matter is directly in question, and the judgment in the former suit upon the point, it will then be as a plea, a bar, or as evidence, conclusive between the parties. 2 Phillips Ev. 13. So a judgment is conclusive upon a matter legitimately within the issue, and necessarily involved in the decision.

4 Cow. 559; 8 Wend. 9; C. & H. notes, part 2, note 22.

Testing the case by this principle, it seems quite clear that the proceedings in partition constituted no defense to this *action; [*303 no question was made upon the deed by the pleadings, nor any judgment given upon it; nor was any such questions necessarily involved in the partition suit.

Besides, two of the defendants, plaintiffs here, were non-residents of the State, and neither appeared, nor were served personally with process. As to them, the proceedings were purely in rem, and the decree acted only upon the res or subject matter. And, as to the subject matter, the bill on its face shows, that these two plaintiffs had no interest in or connection with the partition, except as respected the southeast quarter of section twenty-three. This tract was not included in the deed to Stewart, and of course descended to the heirs. Being tenants in common with the complainants, the decree of partition might operate upon it and bind them. But, as to the premises now in dispute, it could have no effect, as it appears, by the averment of complainants themselves, the defendants had no interest in it. The title was in Stewart. The decree, therefore, operating simply in rem, could only operate upon such interest or estate of the defendant as was shown in the bill, and properly the subject of the partition against them. Beyond this, it was ineffectual, either as to its direct operation, or when in question collaterally.

Proceedings of this character are allowed to conclude the rights of the absent party, only as it respects property, whether real or personal, involved in the suit, the property of the party proceeded against. They act upon the thing, and bind the party in respect to it. Now, that in this case, so far as the two non-resident defendants were concerned, was their interest in the southeast quarter of section twenty-three? They were strangers as regarded any other piece or parcel of land involved in the proceedings.

Then, as to Mary, the daughter, the process was served personally upon her; she was an infant, and appeared by a guardian ad litem. But this was simply an appearance, as the representative of her interest in the undivided parcel which had descended to the heirs. The bill shows that she had no interest in the partition, except as to this: all the other parcels of which partition was sought belonged to other

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parties, and concerned them alone; as to these, John Doe might have been made a party with as much propriety as this defendant. It may be, as we have already said, that these proceedings conclude the question of partition from afterwards being agitated—a question which it is not now necessary to decide; but we think it clear that they cannot conclude the title even of a party to them, whom the proceedings themselves show had no interest or concern in the question of partition.

304*] *Upon the whole, after the best consideration we have been able to bestow upon the case, we think the court erred in excluding the evidence offered to impeach the deed of McCall to Stewart, and that the judgment below should be reversed, and a venire de novo awarded.

Mr. Justice Campbell, dissenting:

The Circuit Court of Vanderburgh County, Indiana, exercising chancery jurisdiction, in 1842, pronounced a decree, appointing three commissioners to make deeds of conveyance, release and partition to the plaintiffs in the suit, of certain lots in the Town of Lamasco, in that county, and which embrace the land included in this suit, according to an agreement for a partition made by a portion of the plaintiffs and James B. McCall, the ancestor of the lessors of the plaintiffs in this cause, and also of a sale and conveyance by him to one Stewart of his undivided interest in the property, and directed that the deed should convey the fee simple to the complainants respectively.

The deeds were executed by the commissioners, were reported to the court, and were confirmed by an order.

This decree was rendered in a chancery cause, prosecuted by persons who had held in common the site of the Town of Lamasco with McCall, and who had entered into the agreement, by which specified lots were set apart to each of the tenants, and for which mutual conveyances were to be made, and one Stewart, on whose behalf it was alleged that, after the agreement, and before deeds were made, McCall had sold and conveyed to him his entire undivided interest in the tract.

The object of the bill was to perfect in the complainants, according to the agreement of partition and the sale of conveyance to Stewart, their titles. One of the children of McCall was served with process, and two were called in by publication, and a guardian ad litem was appointed for the minors. The prayer of the bill was for the appointment of commissioners to make the conveyances according to the agreement and the sale.

The defendants claiming to hold the lands under these complainants, offered the record of the proceedings in evidence upon the trial in the Circuit Court, which was opposed, for the reason that the court had no jurisdiction, and for fraud, apparent on the face of the bill, the evidence was admitted as conclusive of the title, and an issue was formed on the bill of exceptions for this court.

The decree operates upon a title to lands 305*] within the county *and state where the Circuit Court that rendered it was held. That court possess, under the constitution and laws of Indiana, a general chancery jurisdiction, and a special authority to appoint commissioners to execute decrees like the present. One of the defendants was before the court by process, and was defended by a guardian, and the others by publication according to the authorized practice of that court. This being the state of the record—the jurisdiction of the court spreading over the subject matter, and embracing the parties—the inquiry arises on what principle can its authority be impeached in a collateral proceeding? It is said that it being apparent from the bill that James B. McCall had sold his entire interest in the Town of Lamasco to Stewart, that Stewart might have completed his agreement for a partition, and that the heirs of McCall, having inherited no estate, were not proper parties to the bill, and that the deeds of conveyance, release and partition under the decree did not conclude their rights. But who is to decide whether they were proper parties to the bill, and whether it was proper to terminate all contest upon the title, by requiring them to release their rights, whatever they might happen to be, to the plaintiffs? Upon whom was the duty devolved by the constitution and laws of Indiana to determine whether the bill was framed according to the course of chancery practice and the decree a proper expression of chancery jurisprudence? Certainly not this court, nor the Circuit Court of the United States for Indiana.

A court of the State of Indiana, with a plenary jurisdiction in chancery, having the subject matter and parties within that jurisdiction, has pronounced the decree; from whence comes the power of this court to pronounce its jurisdiction usurped and its decree a nullity? This court, of old, was accustomed to say, "that a judgment or execution irreversible by a superior court, cannot be declared a nullity by any authority of law, if it has been rendered by a court of competent jurisdiction of the parties and the subject matter, with authority to use the process it has issued; it must remain the only test of the respective rights of the parties to it." And also, "the line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record imputing absolute verity; in the other mere waste paper." 10 Pet. 449.

We have only now to ascertain the extent of the jurisdiction of courts of chancery in the matters of partition, and to quiet title by removing dormant equities, and the effect of decrees in *such cases. The first branch [*306 of the inquiry is satisfactorily answered by Judge Story. "In all cases of partition," he says, "a court of equity does not act merely in a ministerial character and in obedience to the call of the parties who have a right to the partition, but it founds itself upon its general jurisdiction as a court of equity and administers its relief ex æquo et bono, according to its own notions of general justice and equity between the parties. It will, therefore, by its decree, adjust all the equitable rights of the parties interested in the estate, and courts of

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equity, in making these adjustments will not confine themselves to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all other parties interested in the estate which have been derived from any of the original tenants in common."

Such being the enlarged jurisdiction upon the subject matter, the question arises as to the effect of the decrees upon the titles that are or might have been involved in a suit of that nature.

In Reese v. Holmes, 5 Rich. Eq. 531, the court determined that the parties to such a record were concluded by the decree from showing that they had a greater estate than, or one derived from a different source from, that set out in the proceedings and established by the decree.

The court said, "if any relievable fraud or mistake entered into the decree when it was pronounced, the party affected by it might have been heard, if he had come within a reasonable time, with a direct proceeding to set the proceeding aside, but while it stands it is the standard to which every party taking under it must resort for the measure of his rights, and cannot be set aside or modified collaterally." In Stewart v. Migell, 8 Ired. Eq. 242, the court decide that a bill cannot be supported to set aside a decree formerly made between parties, though it be alleged that the facts found by the court did not exist; and that the decree was conclusive, in respect to the thing which the parties had, or admitted, or it was declared they had, and also in respect to the share to which each was entitled in severalty, and to the parcel so allotted. In Mills v. Witherington, 2 Dev. & B. 433, where land belonging to one in severalty was included in the petition as land held in common, and allotted to another in severalty, it was held, in an action of ejectment, that the lessor of the plaintiff, who had been a party to the judgment, "was concluded, bound and estopped, to controvert anything contained in it." In Clapp v. Bronoghon, 9 Cow. 537, the court say, "that the judgment in partition, it is true, does not change the possession, but it establishes the title, and in an ejectment must be conclusive."

1 Md. Ch. Dec. 455; 14 Ga. 521; 17 Ves. 355; 29 Me. 128.

307*] *I do not consider it necessary to inquire whether the fact of an absolute sale and a perfect conveyance by McCall to Stewart did not relieve the heirs from the duty of completing the agreement of their ancestor. Nor do I consider it necessary to inquire whether, having such a sale and conveyance, Stewart had a good case to go into chancery to cut off possible but unpublished equities; nor do I consider it necessary to inquire whether there was sufficient or any evidence to support the decree. Those questions were all subject to the jurisdiction of the Circuit Court of Vanderburg County, and might have been revised in the Supreme Court of Indiana.

Those courts had entire jurisdiction of the parties and the cause, and its decree cannot be collaterally impeached.

I am authorized to say that Mr. Justice Daniel concurs in this opinion.

JOHN I. ORTON, Appt.,
v.
GEORGE SMITH.

(See S. C. 18 How. 263-266.)

Only he who has legal title and possession, can maintain bill to quiet title—circuit court should not enjoin state court where same question is pending.

Those only who have a clear, legal and equitable title to land, with possession, have right to claim the interference of a court of equity to give them peace, or dissipate a cloud on the title.

The volunteer purchaser of a litigious claim, the assignee of a secret equity for nominal consideration, and of the bare legal title for like consideration, improperly assigned to him during a suit to ascertain to whom it belonged, cannot maintain such a suit for injunction.

The Circuit Court should refuse to entertain a bill of peace for an injunction, when the title is in litigation in a state court of concurrent jurisdiction of the case.

Argued Feb. 8, 1856. Decided Feb. 28, 1856.

APPEAL from the District Court of the United States for the District of Wisconsin.

The case is stated by the court.

Messrs. William P. Linde and R. H. Gillet, for the appellants:

Mere inadequacy of consideration will not defeat the sale, as fraudulent for that reason alone.

1 Sto. Eq. sec. 245; 2 Hovenden, 14.

The bill makes an affirmative allegation of fraud which cannot be presumed, but must be strictly proved.

1 Sto. Eq. 190.

If Hubbard kept his interest concealed to defraud his creditors, he has no remedy, nor has his grantee even against the party thus fraudulently holding the title.

Warburton v. Aken, 1 McLean, 460.

Much less has he or his grantee a remedy against an intervening purchaser, without notice of the legal title.

Bean v. Smith, 2 Mason, 252.

A bona fide purchaser for valuable consideration, without notice in the grant to his vendor, should hold the estate against an original grantor and his heirs.

Dexter v. Harris, 2 Mason, 531; Fletcher v. Peck, 6 Cranch, 133.

If Hubbard, holding an adverse title to a paper title in the hands of another, stands by silently and is apprised that purchaser is buying the paper title, the purchaser will be protected.

1 Sto. Eq. sec. 376; Bank U. S. v. Lee, 13 Pet. 107.

Messrs. D. A. J. Upham and J. S. Brown, for the appellee:

The assignee of a chose in action, as for instance, of a mortgagee, is not protected as a bona fide purchaser.

Ellis v. Messeroie, 11 Paige, 467; Webster v. Wise, 1 Paige, 319; Scott v. Shreeve, 12 Wheat. 605; 10 Miss. 378; 2 Ohio, 400; Barrow v. Bispham, 6 Halst. 110; Bury v. Hartman, 4 S. & R. 177.

It is unnecessary to defeat specific performance, to consider the transaction as absolutely fraudulent.

NOTE.—Necessity and sufficiency of possession as condition of bill to remove cloud on title—see notes, 8 L.R.A. 728; 10 L.R.A. 295.

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Circumstances of hardship, suspicion, surprise or fraud, are sufficient.

Seymour v. Delancey, 6 Johns. Ch. 222; Henderson v. Hays, 2 Watts, 148; Mortlock v. Buller, 10 Ves. 305; Waters v. Taylor, 15 Ves. 25.

The courts will presume fraud from the relation of Butler with the other parties. It is for Butler and his assignee to purge the transaction of the character of fraud, which it bears on its face.

Whelan v. Whelan, 3 Cow. 537; Parkist v. Alexander, 1 Johns. Ch. 394; 6 Johns. Ch. 543; Reed v. Warner, 5 Paige, 650; Church v. Sterling, 16 Conn. 388; In re Brown's Estate, 2 Barr. 463; Mosley v. Buck, 3 Munf. 232.

Mr. Justice Grier delivered the opinion of the court:

The bill in this case is in the nature of a "bill of peace," as authorized by the statutes of Wisconsin. Smith, the claimant below, claimed to be owner of certain lands, to which Orton claimed also to have some title. The bill prays an injunction against Orton, to prohibit him from setting up his claim, and thereby "casting a cloud" over the good legal title of complainant.

The facts of the case are somewhat complex, and its merits will be better apprehended by a succinct history of them, as elicited from the pleadings and evidence.

Hubbard had settled in Wisconsin, having escaped from his creditors, with some pecuniary means, which he thought it prudent to conceal. Hence, though he speculated in the purchase and sale of lands, the title to them was held by friends. He had contracted to sell certain lots 264*] in Milwaukee to Schram. *But Schram would not pay his money without a good legal title, or good security that it should be conveyed to him. Hubbard resided in the family of his friend Butler, and being addicted to idleness and intemperance he confided the management of his affairs, in a great measure, to Butler. Schram would not pay his money on the security of Butler or the promise of Hubbard to obtain a title; and one Knab at length was prevailed on to enter into a bond with Butler, conditioned that a good legal title should be made to Schram for the lots. But Knab was unwilling to enter into this bond without security also. For this purpose the land in dispute in this suit was conveyed to him in fee by one Cyrus D. Davis, who held the legal title as friend and trustee of Hubbard. This deed was put on record by Knab, who, at the same time, gave his title bond covenanting to convey the land to Butler, when the covenants of their bond to Schram would be satisfied or released. This title bond was not given to Davis, because he claimed no beneficial interest in the land, nor to Hubbard, because his policy required him not to appear to have any title to property; but to Butler, the friend and active agent of Hubbard. Notwithstanding the testimony of Butler, that he paid Hubbard for the land, and did not hold as secret trustee for him, the fact may be considered doubtful; and it is not necessary to decide it, in our view of the present case. Hubbard is now deceased; but in his lifetime he assigned, for the consideration of one dollar, all his interest in the land in dispute to one Gruenhagen (under whom Smith, the complainant, claims), by deed dated in June, 1851.

On the 22d of February, 1851, Butler assigned to Orton, the defendant, the title bond of Knab for the consideration of $2,100. This consideration has been paid without any knowledge or notice of any secret equity in Hubbard; and the covenants of the bond to Schram being fulfilled or released, Orton filed his bill in chancery on the 6th of August, 1851, against Knab, demanding from him a conveyance of the legal title according to the exigency of his bond.

During the pendency of this bill, which would settle the legal and equitable rights of all persons having any claim to the land in dispute, the complainant, Smith, becomes the purchaser of the real or supposed secret equity of Hubbard. And not only so, but he has obtained from Knab the transfer of the legal title for a nominal consideration; thereby substituting himself in the place of Knab in the contest pending in the State Court. The charge of fraud made in the bill, because Knab's title bond was made to Butler and not to Hubbard, is not substantiated. It was a matter of indifference to Knab whether Hubbard or Butler *held the bond. He had no concern [*265 with the private arrangements or secret trusts between them. When the condition of his bond to Schram was released, Knab was bound to convey to Butler, by the exigency of his own contract, and could not make himself a judge of the equities between Butler and Hubbard. His assignment to Smith, under the circumstances, could have no effect but to substitute Smith in his own place, under the same liabilities.

On this state of the facts the court below decreed the title to the land to be in Smith.

"And further, that the said defendant, John J. Orton, be, and hereby is, perpetually enjoined and forever barred from setting up or asserting any claim in or right to said premises, by virtue of or upon said bond and assignment. But this injunction and decree are not in any way to affect or operate against him, the said John J. Orton, in the prosecution of a bill pending in the Circuit Court of Milwaukee County, in this State, wherein he is complainant and David Knab is defendant; this court not intending to enjoin a proceeding in the state court."

We think the court erred in entering such a decree. Those only who have a clear, legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.

The complainant in this case is the volunteer purchaser of a litigious claim; he is the assignee of a secret equity for apparently a mere nominal consideration, and of the bare legal title for a like consideration. This legal title was improperly assigned to him, during the pendency of a suit in chancery to ascertain the person justly entitled to it.

Besides, the decree in this case demonstrates the impropriety of the interference of the court of the United States, and of its entertaining jurisdiction of a question of title then pending in the State Court. It is true, if this were an ejectment in a court of law, the pendency of another ejectment between the same parties might not have afforded sufficient ground for a plea of

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autre action pendente; nor would the court have been bound, even by comity, to await the decision of the State Court, or suffer the cause pending before them to be in any way affected by it. But a decree of a court of chancery, on a bill of peace, must necessarily operate by way of estoppel, as to the title of the land, and conclude all the parties to it, because it should put an end to all litigation between them. If they have suits pending in other courts, on the same question of title, they must cease. This bill acts by injunction on the party—no injunction ever goes to the court having a concurrent 266*] jurisdiction *of the question. The courts of the United States have no such power over suitors in a state court. But a decree on a bill of peace which does not put an end to litigation is a mere brutum fulmen. Unless the court can make a decree which it can execute, it is a sufficient reason for refusing to take cognizance of the case. It is a rule absolutely necessary to be observed by courts who have a concurrent jurisdiction, that in all cases "where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court." This rule, it is said, "has its foundation not merely in comity, but in necessity. If one may enjoin, the other may retort by injunction, and thus the parties be without remedy.

See Peck v. Jenness, 7 How. 625; Taylor v. Royal Saxon, 1 Wall. Jr. 311.

If the decree in this case can be of any value whatever, let us look at the consequences which may possibly and probably will arise, in case it is enforced.

Orton, claiming as the bona fide assignee and purchaser of the title bond given by Knab, has a bill pending in the State Court to compel a transfer of the legal title. Pending this litigation, Knab assigns the legal title to a citizen of another state, who comes into the court of the United States, praying an injunction against Orton from setting up his title. Suppose the State Court decrees the title to be in Orton, and compels Knab and Smith, his assignee, to release the legal title to him. Now, the court below has made a decree that enjoins Orton from ever setting up his title against Smith. It is true the decree protests against interference with proceedings in a state court; but unless it is construed so as to be a perfect "felo de se," it must be enforced in favor of the complainant somehow. When the sheriff puts Orton in possession under the decree of the State Court, and expels Smith, the Circuit Court, by its officer, must replace Smith, or imprison Orton for a contempt. This would indeed be a humiliating spectacle. Such a disreputable collision of jurisdictions should be sedulously avoided. This can only be done by refusing to entertain a bill of peace for an injunction when the title is in litigation in a court of concurrent jurisdiction; otherwise, the result of a bill of peace may be not peace but war; and instead of dispelling a "cloud" from the title of either party, will doubly increase the darkness and difficulty with which it was environed.

Decree of the Circuit Court is, therefore, reversed, and the bill dismissed with costs, but without prejudice.

RICHARD C. STOCKTON, Appt.,

v.

JAMES C. FORD.

(See S. C. 18 How. 418–420.)

Former judgment involving same question, is a bar to another suit.

A judgment between same parties, in which a claim of plaintiff was decided, or was properly involved and might have been there raised and determined, is a bar to another action for the same cause.

The neglect of the plaintiff to avail himself of it furnishes no reason for another litigation.

Submitted Feb. 24, 1856. Decided Feb. 28, 1856.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court. See, also, S. C. 11 How. 232.

Mr. R. C. Stockton, in person, and Mr. Reverdy Johnson for the appellant.

Mr. Garnett Duncan for the appellee.

*Mr. Justice Nelson delivered the [*419 opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Louisiana.

The bill was filed by the plaintiff to charge the plantation and slaves of the defendant with a judicial mortgage, originally obtained by one Prior, against the firm of N. & E. Ford & Co. The plaintiff claims an interest in this mortgage, first, by purchase on execution against Prior; and second, by a trust created in the assignment of the same by Prior, under which the defendant derived title to it. The bill sets out the sale of the mortgage and purchase by the plaintiff, and also the assignment of the same by Prior to Jones, and by him to the defendant. The assignment to Jones provided for the payment first of the attorney's fees and all other costs out of the proceedings of the judgment, and the balance to be applied to the debts of Prior for which Jones was responsible, and the surplus, if any, to the assignor.

The plaintiff prayed that the defendant might be decreed to pay the attorney's fees and costs on obtaining the judicial mortgage, according to the condition of the assignment; and also, any balance that might be found due after satisfying the debts for which Jones was responsible.

The defendant, among other defenses, set up a former suit in bar.

A previous bill had been filed by the plaintiff against the defendant, seeking to foreclose this judicial mortgage, in which the same title as in case under the execution and sale against Prior was relied on. And among other defenses to that suit, the defendant set up the assignment of the mortgages by Prior to Jones previous to the said sale on execution, and by Jones to the defendant.

This right of the plaintiff to the judicial mortgage under the sale on execution, and of the defendant under the assignments, were di-

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rectly involved in that suit, and presented the principal questions in the case. The validity of the assignments over the claim of the plaintiff was maintained by the judgment of the court below, and which was affirmed on appeal to this court. 11 How. 232. This court, after a full examination of the pleadings and proof, say, "that in any view, therefore, that can be properly taken of the case, the plaintiff has shown no right or interest in the judicial mortgage, which he seeks to enforce against the plantation and slaves in question. The whole interest is in the defendant."

The court also observed, "that the assignment (to Jones) was made upon full consideration, without any concealment, or, for aught that appears, intent to hinder and delay credit-420*] ors; and *was well known to plaintiff long before he became the purchaser at the sheriff's sale. It passed the legal interest in the judicial mortgage out of Prior, and vested it in Jones, as early as the 12th of March, 1840, and we are wholly unable to perceive any ground of equity in the plaintiff, or of those under whom he holds, for disturbing it through a judgment against the assignor, rendered nearly two years afterwards, The sheriff's sale, therefore, could not operate to pass any interest in it to the plaintiff."

One of the questions now sought to be agitated again is precisely the same as this one in the previous suit, namely: the right of the plaintiff to the judicial mortgage under the execution and sale against Prior. The other is somewhat varied, namely: the equitable right or interest in the mortgage of the plaintiff, as the attorney of Prior, for the fees and costs provided for in the assignment to Jones. But this question was properly involved in the former case, and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if it were tenable, furnishes no reason for another litigation. The right of the respective parties to the judicial mortgage was the main question in the former suit. That issue, of course, involved the whole or any partial interest in the mortgage. We are satisfied, therefore, that the former suit constitutes a complete bar to the present.

The court, in the former suit, also expressed the opinion that the plaintiff was not in a situation to maintain his claim of title to the mortgage under the execution and sale against Prior; as it appeared in that case that he was the attorney of Prior in the judicial mortgage, and stood in that relation to Jones at the time of the purchase, and, for aught that appears, had made the purchase without his knowledge or consent; and that, under such circumstances, the purchase would inure to the benefit of the client and those holding under him.

It is due to the plaintiff to say, that the evidence in this case, explanatory to the point in the former, shows that he did not stand in the relation of attorney to Jones at the time of the sale; or, at least, had no reason to suppose that he stood in that relation; and that no just ground for censure exists in the transaction against him—the explanatory evidence has fully removed it.

We think the decree below is right, and should be affirmed.

JOHN WILKINS, Tenant, and Francis G. Bailey, Joseph Pennock and Samuel Bailey, Executors of Michael Allen, Deceased, Plffs. in Er.

v.

DAVID ALLEN, Martha Allen, Catherine Allen and Isabella Allen.

(See S. C. 18 How. 385-392.)

Will in Pennsylvania—word "surplus" does not carry lands—will construed by laws of testator's domicil—heirs must take unless disinherited by words or necessary implication—extrinsic evidence of memoranda, declarations, amount and condition of estate, etc., not admissible to explain.

Where a testator in Pennsylvania devised to his wife for life his dwelling house and garden, his household furniture and library and an annuity, secured on his real and personal estate and then makes certain bequests of money, and then in his will declares "after paying all claims and bequests, there will remain a considerable surplus, which I give and bequeath in trust to my executors, to be applied to the religious and benevolent purposes of the several institutions of the General Assembly of the Presbyterian Church in the United States:"

Held, that the testator's language must be construed with reference to the laws and policy of the country of his domicil, Pennsylvania.

In Pennsylvania, the heirs must take unless they are disinherited by express words, or necessary implication; a doubtful intention will not be followed.

The terms of the will proprio vigore, were insufficient to disinherit the heirs.

The court may put itself in the place of the testator, by looking into the state of his property, and the circumstances by which he was surrounded when he made the will.

But such evidence is only admissible to explain ambiguities arising out of extrinsic circumstances, as to persons provided for, objects of disposition, and the like.

But evidence cannot be heard to show a different intention in the testator from that which the will discloses.

Extrinsic evidence from memoranda, made by testator at the time of the execution of the will, upon the basis of which the will was prepared by him, and his declarations at and about the same time, are not admissible to show what was his real meaning in employing the word "surplus" in the residuary clause; nor that the same was intended to embrace his whole estate, real and personal.

Nor was evidence of the actual amount and condition of his personal estate, and that the same was insufficient to pay the legacies, admissible to explain the residuary clause, or the word "surplus," by showing that if the same did not embrace the real estate, such clause would be inoperative, because there would be no surplus.

Argued Feb. 22, 1856. Decided Apr. 7, 1856.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

This is an action of ejectment, brought in the Circuit Court of the United States for the Western District of Pennsylvania, by the defendants in error, as heirs at law of a certain Michael Allen, deceased, to recover certain premises in the City of Pittsburg. The trial below having resulted in a verdict and judgment for the plaintiffs, the defendants brought the case here on a writ of error.

Mr. Thomas Williams, for the plaintiffs in error:

The case presents two questions only:

1st. Whether the terms of the will are sufficient proprio vigore, and interpreting the same

NOTE.—Conflict of laws as to wills—see note, 2 L.R.A.(N.S.) 408.

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by the context to carry the real estate to the executors; and,

2d. Whether the interpretation thereof may not be aided if necessary by extrinsic circumstances, to wit: memoranda, declarations, and the actual amount and condition of the estate, as offered to be shown by the defendants.

The intention must be collected from the whole writing and every word and sentence thereof. To serve it, words may be used either in the technical or general sense, and even supplied, transposed or changed.

Ruston v. Ruston, 2 Dall. 244; Findlay v. Riddle, 3 Binn. 149; Lynn v. Downes, 1 Yeates, 518; Beltzhoover v. Costen, 7 Barr. 16; Turbett v. Turbett, 3 Yeates, 187; Hunter's Estate, 6 Barr. 97; Earp's Will, 1 Par. 457; Den v. Blackwell, 3 Green, 386; Den v. McMurtrie, Ibid. 276; 1 Jarman, Wills, ch. 27, and cases there cited.

Real estate may pass under a devise by any form of expression, not properly and technically descriptive thereof, if such an intent can be collected from the context. General expressions may be restrained, and special expressions enlarged, and the same words sometimes understood in one sense and sometimes in another.

Huxtep v. Brooman, 1 Bro. C. C. 437; Taylor v. Webb, 2 Sid. 75; Pitman v. Stevens, 15 East, 505; Wilce v. Wilce, 5 Moore & Payne, 382; Tolar v. Tolar, 3 Hawks. 74; Hope v. Taylor, 1 Burr. 268; Doe v. White, 1 East, 33; Den v. Trout, 15 East, 394; King v. Shrives, 4 Moore & Scott, 149; Anon. 3 Dall. 477; Jackson v. Housel, 17 Johns. 281; Ferguson v. Zepp, 4 Wash. C. C. 645; Hogan v. Jackson, Cowp. 299; Marhant v. Twisden, Gilb. Eq. Ca. 30; Wilkinson v. Merryland, Cro. Car. 447, 449; Cliffe v. Gibbons, 2 Ld. Raym. 1326; Bullard v. Goffee, 20 Pick. 252; Doe v. Rout, 7 Taunt. 79; Woollam v. Kenworthy, 9 Ves. 137; Timewell v. Perkins, 2 Atk. 102; Roe v. Yend. 2 B. & P. (N. R.) 214.

A previous specific devise of land always favors the extension of the subsequent general words to property of the same description.

1 Jarman, Wills, 575.

The word "surplus" may operate by reference, to carry either realty or personalty, or both.

Bebb v. Penoyre, 11 East, 160; and Dewey v. Morgan, 18 Pick. 295.

The interpretation of the testator's language is to be made with reference to the law and usages of the place of his actual domicil.

2 Greenl. Ev. sec. 671; Sto. Confl. of Laws, sec. § 479; Harrison v. Nixon, 9 Pet. 483.

By the law of Pennsylvania, the whole interest of a testator passes without words of inheritance or perpetuity, unless a different intent appears.

Act 8th April, 1833, sec. 9 (Ph. L. 249); Purdon's Dig. 844.

Real estate is assets for the payment of debts, and legacies are chargeable on lands, where the personalty is insufficient to meet them.

Nichols v. Postlethwaite, 2 Dall. 131; English v. Harvey, 2 Rawle, 309.

The construction may be aided by proof of extrinsic circumstances.

1 Jarm. Wills. 355, and note 1; Wilde's Case, 6 Rep. 16; Roper, 60, 67, 3d ed.; Cartwright v. Vawdry, 5 Ves. 530; Lord Woodhouselee v. Dalrymple, 2 Mer. 419; Rose v. Bartlett, Cro. Car. 293; Davis v. Gibbs, 3 P. Wms. 26; Knotsford v. Gardiner, 2 Atk. 450; Thompson v. Lawley, 2 B. & P. 303; Day v. Trigg, 1 P. Wms. 286; Fonnereau v. Poyntz, 1 Bro. C. C. 472; Druce v. Denison, 6 Ves. 397; Finch v. Inglis, 3 Bro. C. C. 420; Atty.-Gen. v. Grote, 3 Mer. 316; Colpoys v. Colpoys, Jac. 463; Smith v. Doe, dem. Jersey, 2 Brod. & Bing. 553; Peacock v. Falkener, 1 Bro. C. C. 296; Selwood v. Mildmay, 3 Ves. 306; Doe, d. Belasyse v. Lucan, 9 East, 448; Atty.-Gen. v. Vigor, 8 Ves. 256; Standen v. Standen, 2 Ves. 589; 3 Kent, 334, 335; Lowe v. Lord Huntingtower, 4 Russ. 531; 8 Co. 155; Rewalt v. Ulrich, 11 Harr. Pa. 388.

The court may and ought to put themselves in the place of the testator.

1 Greenl. Ev. secs. 287-290, and notes; Ruston v. Ruston, 2 Dall. 244; Brownfield v. Brownfield, 8 Harr. Pa. 59; Root v. Stuyvisant, 18 Wend. 257; Jarvis v. Buttrick, 1 Met. 483; Morton v. Perry, Ibid. 446; Fox v. Phelps, 17 Wend. 393; Wigram on Wills, 5th prop. p. 5, and cases cited in illustration thereof.

The court may look into the facts, where the construction claimed would render the devise or bequest inoperative.

Smith v. Smith, 1 Edw. Ch. 189; Whilden v. Whilden, Riley's Ch. 205; Trustees v. Peaslee, 15 N. H. 317; Kinsey v. Rhem, 2 Ired. 192; Ayres v. Weed, 16 Conn. 291; Hand v. Hoffman, 3 Halstead, 71; Allen v. Lyons, 2 Wash. C. C. 475; and cases cited of misnomer and misdescription generally.

Even the declarations of the testator to prove a fact collateral to the question of intention, in aid of the interpretation of the words, may be admitted in evidence.

1 Greenl. Ev. sec. 291, and note; Trustees v. Peaslee, 15 N. H. 317; Ryerss v. Wheeler, 22 Wend. 148.

Messrs. **E. M. Stanton** and **A. W. Loomis**, for defendants in error:

1. In the disposition, by the will of Michael Allen, of the surplus remaining after the payment of all claims and bequests, there is neither doubt, uncertainty nor ambiguity.

2. If that disposition be doubtful or uncertain, it must receive appropriate construction from the words of the will itself; and no parol proof or declaration ought to be admitted out of the will, to ascertain it.

Bradford v. Bradford, 6 Whart. 244; Weatherhead's Lessee v. Baskerville et al. 11 How. 357, 358, 359; Murrell v. Devereux, 5 Barn. & Ald. 18.

3. In determining such construction, the heir at law is not, and especially those standing in the place of the common law heir, are not to be disinherited, except by express devise, or by implication so inevitable that an intention to the contrary cannot be supposed.

1 Pow. on Dev. 199; French v. M'Ilhenny, 2 Binn. 20; Clayton v. Clayton, 3 Binn. 484; Brown v. Dysinger, 1 Rawle, 415; Finley v. King's Lessee, 3 Pet. 379; Bradford v. Bradford, 6 Whart. 244; Doe ex dem. Spearing v. Buckner, 6 T. R. 611, 612, 613; Hayden v. Stoughton, 5 Pick. 536; Roosevelt v. Heirs of Fulton, 7 Cow. 79-187; Roper on Wills, 352, 358.

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4. The application of these principles shows clearly and conclusively, that the title of the heirs of the testator to the real estate of which he died seised has not been thereby devested.

5. Parol evidence cannot be adduced to contradict, add to or explain the contents of a will.

1 Johns. Ch. 231; 1 Jarman on Wills, ch. 14, pp. 349, 358; 11 How. 357, 358; Farrar v. Ayres, 5 Pick. 409; Barrett v. Wright, 13 Pick. 48; Mann v. Mann, 14 Johns. 9, 14; Wigram on Wills, 1st & 2d Rules; Ib. 24, 27, 80-83, 88, 92, 96, 130.

6. Parol evidence is only admissible to explain a latent ambiguity.

1 Greenl. Ev. sec. 289; Hiscocks v. Hiscocks, 5 Mees. & W. 363, 367; Atkinson's Lessee v. Cummins, 9 How. 486; Miller v. Travers, 8 Bing. 244; 21 Eng. Com. Law, 290; Aspden's Estate, 2 Wall. Jr. 448.

7. A testator's parol declarations are not admissible to control the construction of his will, nor his evidence as to the state of his property admissible for that purpose.

Ryerss v. Wheeler, 22 Wend. 151; Fonnereau v. Poyntz, 1 Brown Ch. 447; Brown v. Selwin, Cas. temp. Talb. 240; Atty.-Gen. v. Grote, 3 Mer. 316; 10 Wheat. 229; 3 Halt. 71; Robert's on Wills, 24, 34.

Mr. Justice Catron delivered the opinion of the court:

Michael Allen, of the City of Pittsburg, made his will in 1849, by which he bequeathed to his wife, for life, his dwelling-house in said City, with two lots of ground occupied by him and her as a garden. He also gave her the household furniture and library. "And still furthermore," he declares, "that, first and foremost, there shall be secured to my dear wife, on my real and personal estate an annuity of $1,200 a year, to be punctually paid semi-annually during her lifetime, and that my executors pay all the taxes on the premises occupied by my dear wife during her lifetime."

The testator then bequeaths. 1st. To the five children of Dr. Robert Wray, $500 each. 2d. To the managers of the orphan asylums of the Cities of Pittsburg and Alleghany, $2,000 each. 3d. To the pastor and sessions of the First Presbyterian Church, $2,000. 4th. To the General Assembly of the Presbyterian Church, $10,000. 5th. To the trustees of the Board of Sessions of said General Assembly, $4,000. 6th. To the Foreign Evangelical Society, located in New York, $3,000. 7th, 8th and 9th, he gave for the use of the Presbyterian Church, $11,000. 10th. To the American Bible Society, $6,000. 11th. To the American Tract Society, $4,000. 12th. For the use of the Sunday School Union, situate in Philadelphia, $4,000.

He next declares: "As to my debts, they will amount to very little; but, and after paying all claims and bequests, there will remain a considerable surplus, which I give and bequeath in trust to my executors, be the same more or less, to be applied to the religious and benevolent purposes of the several institutions of the General Assembly of the Presbyterian Church in the United States of America, as before mentioned;" and then constitutes and appoints his executors (who are the plaintiffs in error) to carry out the provisions of the will.

The defendants in error are the heirs at law of Michael Allen. They sued his executors in ejectment to recover a portion of the lands situate in the City of Pittsburg, of which he died seised, insisting that the lands did not pass by the will.

The residuary clause was supposed to be of doubtful meaning and obscure. To remove the alleged obscurity, the defendants below offered to prove on the trial, "from memoranda made by the testator at the time of the execution of said last *will and testament, [*391 and upon the basis of which the same was prepared by him, and also by declarations made by him at and about the same time. what was his real meaning in the employment of the word 'surplus' in the residuary clause of said will, and that the same was intended to comprehend his whole remaining estate, as well real as personal."

"And further, to show by other evidence, besides the said memoranda, the actual amount and condition of the personal estate at the time of the execution of the said last will and testament, as well as at the period of the testator's death, and that the same was entirely insufficient, at either of the said periods, to pay the specific and pecuniary legacies provided therein; and this, for the purpose of explaining the meaning of the testator in the said residuary clause, and the employment of the said word 'surplus' therein, by showing that, if the same did not embrace the real estate, the said residuary clause would be entirely inoperative, for the reason that there was, in point of fact, under such construction, at neither of said periods, any surplus whatever, as supposed and declared by the testator himself."

On motion of the plaintiffs, the court rejected the evidence, and instructed the jury that no title vested in the executors by the residuary clause.

On this state of facts, the first question presented for our consideration is, whether the terms of the will are sufficient in themselves, when interpreted by their context, to carry the real estate to the executors.

As, in this instance, the testator's language must be construed with reference to the laws and policy of the country of his domicil, it is our duty to ascertain what the laws and policy of Pennsylvania are, so far as they may have a controlling influence in the construction of this will.

In the first place, Pennsylvania has only so far altered the English common law as to substitute all the children for the sole heir, carrying out this rule of descent through the collateral branches. This is the will the law makes in case of intestacy, and is the policy of the State. Under the law, the heirs must take, unless they are "disinherited by express words or necessary implication." "Conjecture, nor uncertainty, shall never disinherit him." Such was the ground assumed by counsel in the case of Clayton v. Clayton, 3 Binn. 481, and which assumption was sustained by the court (486). Chief Justice Tilghman says: "The rule of law gives the estate to the heir, unless the will takes it from him; and in order to take it from him, it must give it to some other person. Thus we are brought back to the question, are there any words in the will suf-

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ficient to convey more than an estate for life to the devisees? I can find none."

392*] *In the case referred to, the testator devised a homestead to his niece, Sarah Evans, and her children, without adding the word "heirs." That he intended to give an estate in fee was hardly open to controversy, but the words of the will did not carry the fee, and the court refused to follow a doubtful intention. It there came fairly up to the rule laid down in the English case of Mudge v. Blight et ux. Cowp. 355, that "where there are no words of limitation, the court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life, because the principle is fully settled and established, and no conjecture of a private imagination can shake a rule of law. If the intention of the testator is doubtful, the rule of law must take place; and so if the court cannot find words in the will sufficient to carry a fee. Though they should themselves be satisfied beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law."

This decision was made in 1811, and the principles then laid down have since been adhered to with uncommon care and strictness.

In speaking of expressions in a will necessary to disinherit the heir, Chief Justice Gibson, in delivering the opinion of the court in the case of Bradford v. Bradford, 6 Whart. 244, says: "The intention must be manifest, and rest on something more certain than conjecture. The court must proceed on known principles and established rules, not on loose conjectural interpretations, nor considering what a man may be imagined to do in the testator's circumstances. The principle is applicable in all its force in a case like the present, in which the question goes to the birthright of those who, standing in place of the common law heir, are not to be disinherited except by express devise, or as is said in 1 Powell on Devises, 199, by implication so inevitable that an intention to the contrary cannot be supposed."

It is there admitted that when the testator provided that "all his worldly goods of all sorts and kinds" should be vested in trust and held as one fund, for an hundred years, and his children and their descendants should receive the rents and profits, that he most probably intended to include his lands. This, however (the court declares), is no more than a confident conjecture, and that it must come at last to an analysis of the testator's language to ascertain the legal meaning of the will.

Now, testing the will before us by these rules, and where can any provision be found in it showing a plain intention to disinherit the heirs? The lands are never named except where the wife is given a life estate in the homestead and two lots; and second, where her annuity of $1,200 is imposed on the goods and lands as a charge.

393*] *But as the residuary clause is mainly relied on as carrying the real estate to the executors, it is proper that some further notice should be taken of its import. The testator declared that his debts amounted to very little, and that, after paying all claims and bequests, there would remain a considerable surplus, and this he bequeathed to his executors, to be applied to religious and benevolent purposes. He did not indicate any new fund, nor a surplus arising from the sale of lands, in the concluding clause of the will more than in any previous clause, where he provided for the support of the Presbyterian Church.

The terms of the will, proprio vigore, being insufficient to disinherit the heirs, the next question is, whether the interpretation thereof may not be aided by extrinsic circumstances, to wit: memoranda, declaration, and the actual amount and condition of the estate, as offered to be shown by the defendants below.

That the court may put itself in the place of the testator, by looking into the state of his property, and the circumstances by which he was surrounded when he made the will, is not only true as a general proposition, but without such information it must often happen that the will could not be sensibly construed. Wigram (10, 61) lays down the rule with much distinctness. Such evidence, however, is only admissible to explain ambiguities arising out of extrinsic circumstances, as to persons provided for, objects of disposition, and the like. For instance, if the testator gave to his grandson, J. S., a plantation, and he had two grandsons of that name; or he devised his son J. his plantation on a certain river, and he had two plantations there—in each case proof might be heard to show the person or thing intended. But evidence cannot be heard to show a different intention in the testator from that which the will discloses.

Such is the established doctrine of this court, as was held in the case of Weatherhead v. Baskerville, 11 How. 357.

The only English case we will refer to is that of Miller v. Travers, 8 Bing. 248. There the testator devised and vested in trust "all his freehold and real estates whatsoever in the County of Limerick, and the City of Limerick." At the time of making the will, he had no real estate in the County of Limerick, but had a small estate in the City of Limerick, and considerable real estate in the County of Clare; and the question was, whether the devisees could be admitted to have an issue and trial at law on the ground that they offered to prove that, by the original draft of the will, the estates in Clare were included, and the county left out by oversight or mistake; and also that the testator so expressed himself.

The Lord Chancellor was assisted by the Chief Justice of the Common Pleas and the Chief Baron, and they all concurred in *holding that the evidence offered could [*394 not be heard to change the import of the will, and refused the issue. And so it is manifest here, that if the evidence were to show all that is assumed for it, yet it could not be heard to affect this will.

It is ordered that the judgment of the Circuit Court be affirmed.

EUPHROSINE FOUVERGNE et al.,
Appellants,
v.
THE MUNICIPALITY NO. 2 OF THE CITY OF NEW ORLEANS et al.

(See S. C. 18 How. 470-473.)

Probate of will by alcalde of New Orleans good—federal courts have no probate juris-

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diction—bill to set aside probate cannot be sustained—remedy is in state courts.

Decree of first alcalde of New Orleans, in 1792, declaring a will to be valid and subsisting and directing its execution, is the judicial act of a court of competent jurisdiction.

Courts of the United States have no probate jurisdiction, and must receive the sentences of courts having jurisdiction over testamentary matters as conclusive of the validity and contents of a will.

An original bill cannot be sustained upon an allegation that the probate of a will is contrary to law. The remedy is in the state courts.

Argued Feb. 25, 1856. Decided Apr. 7, 1856.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

Messrs. **Henry St. Paul, Miles Taylor, H. H. Taylor** and **Thomas H. Lewis**, for the appelants:

The alcaldes were inferior officers, possessing very limited civil and criminal jurisdiction within their district. It is impossible to discover that they ever exercised jurisdiction of matters of probate.

Tapia, Vol. IV. p. 20, sec. 12.

Judgments or decrees rendered by an incompetent tribunal are null.

Curia philipica, p. 99, sec. 23; verbo sentencia, secs. 13, 22.

To claim under a will, the party must show that it has been recognized as such by the proper tribunal.

Vidal v. Duplantier, 7 La. 45; 6 N. S. 263, 264.

Even if the judicial power of the alcalde extended to the probate of the will, it could not be delegated to a notary public.

White's Recop. Vol. I. p. 304; Curia philipica, sec. 18, 3.

Whenever a judgment is set up as part of a title of the defendant, it may be inquired into, even collaterally, the decree of a probate court, ordering a will to be executed, does not amount to a judgment; and when the will is offered as title by which property is claimed, its validity may be inquired into.

2 La. Ann. 274; O'Donogan v. Knox, 11 La. 384; Robert v. Allier, 17 La. 14; Girod's case, 10 Rob. 196.

Mr. **Louis Janin**, for the appellees:

A Spanish court of Louisiana in 1782, was a foreign court to the United States, and all its official acts will, even now, be looked upon as those of a foreign court. Foreign courts are exclusive judges of their own jurisdictions, under the municipal law.

Rose v. Himely, 4 Cranch, 241.

Mr. Justice **Campbell** delivered the opinion of the court:

The plaintiff filed her bill in chancery to recover a share of the succession of Marie Josefa Deslondes (wife of Bertrand Gravier) who died at New Orleans in November, 1792, without lineal heirs, she claiming to be one of the heirs at law of said decedent. After the death of his wife, Bertrand Gravier placed a petition before the first alcalde of New Orleans, stating that his wife had made a will before a notary and three assisting witnesses; that the testamentary dispositions, as set down, conformed to her instructions, and were given while she was of a sound mind, but she lost her consciousness before she had signed the paper; and prayed that the assisting witnesses might be examined to prove the will, and that the same might be declared valid in all its parts, in the same manner as if she had signed it. An order was made by the alcalde on this petition, with the approbation of the assessor of the intendancy, and the sanction of the Governor and Intendant-General, directing the notary to take the examination of the witnesses, as the petitioner had solicited. The witnesses, on their examination, testified that the notary had drawn the will in accordance with the directions of the testatrix, and they were given when her mind and memory were sound; but that before the formal writing was finished she had lost her consciousness, and did not, therefore, *sign the same. Upon the return [*472 of the depositions to the alcalde, he entered the following decree:

DECREE.

Under advisement [vistos]. The will, proved by a legalized notarial act to have been made by Dona Maria Josefa Deslondes, who was the lawful wife of Don Bertrand Gravier, is declared valid and subsisting; let it be kept and executed in all its parts; and in order that this declaration, relative to said will, may remain permanent, there shall be placed on the notarial register, and on the original will, a note referring to the proceedings, giving to the parties interested certified copies of both documents, whenever they may ask for them. And whereas the said Don Bertrand Gravier, sole heir, has attained the age of majority, and that the property is notoriously large, there is, for this reason, no necessity for judicial proceedings: and for security for payment of the six thousand dollars to the absent heirs, he (Gravier) will immediately mortgage the plantation until final payment, or till otherwise agreed to by the parties. Whereupon, these proceedings terminated, let the costs be taxed by D'n Louis Liotaud, after acceptance and oath, and let them be paid by the heir, twenty-four reals having been received as the assessor's fee.

(Signed) Pedro de Marigny,
Licentiate Manuel Serrano.

Thus decreed by D'n Pedro de Marigny, Knight of the order of St. Louis, and first alcalde for his majesty, having original jurisdiction in this city and its judicial precincts, with the approbatory opinion of D'n Manuel Serrano, assessor-general of this intendancy, and he signed the same in the City of New Orleans, the 21st November, 1792.

(Signed) Pedro Pedesclaux,
Not. Pub.

By this will, the testatrix bestowed legacies in favor of a number of her relations, and instituted her husband for her sole and universal heir, in order that after her death he should inherit the remainder of her property. The defendants claim the property described in the bill, under titles derived from this heir.

The bill charges that Bertrand Gravier fraudulently induced the notary to prepare a will for his wife, and witnesses to attest the act, and although the legal formalities were wanting which were necessary to its validity, a "sham decree" of probate was procured from the alcalde by the corrupt agency of the said in-

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stituted heir. The defendants deny these alle-
473*] gations, and they *have not been supported by the testimony.

The will has remained without contestation for above a half century. The alcalde, assessor, notary and witnesses, maintained during their lives a good reputation for probity. The property of the testatrix was distributed without opposition, according to the provisions of the will, and is now held under titles derived from the instituted heir. This evidence disposes of the allegations of the bill, except those which impugn the sufficiency of the act as a legal instrument.

That question, in our opinion, is closed by the decree of the alcalde. That decree declares the will to be valid and subsisting, and directs its execution. We are obliged to treat the decree as the judicial act of a court of competent jurisdiction. In fact, it was the only judicial authority in the Province of Louisiana, except that exercised by the Governor.

This decree remains in full force, never having been impeached, except in this collateral way. The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contents of a will; an original bill cannot be sustained upon an allegation that the probate of a will is contrary to law. If any error was committed in allowing the probate, the remedy is in the state courts, according to their appropriate modes of proceeding; such was the decision of this court in Tarver v. Tarver, 9 Pet. 174.

The decision of this question is sufficient to dispose of the case, and we decline any inquiry in reference to any other which was discussed at the hearing.

Decree of the Circuit Court affirmed.

GEORGE C. DODGE, Appt.,
v.
JOHN M. WOOLSEY.

(See 18 How. 331-380.)

Equity jurisdiction over corporations at suit of stockholder—jurisdiction of circuit court—concurrent jurisdiction of federal and state courts—supreme court, tribunal for interpretation of Constitution and laws of Congress—law unconstitutional as impairing obligation of contracts—not affected by change of state constitution.

Courts of equity have jurisdiction over corporations at the suit of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of their charters, or to prevent any misapplication of their capitals or profits which might lessen the dividends of stockholders or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create a breach of trust.

Circuit Court has jurisdiction of an action by a stockholder of a bank against the bank and others to enjoin the collection of a tax assessed against the bank by virtue of a state law, on the ground that the law violates the contract contained in the charter, and is, therefore, unconstitutional under that clause of the United States Constitution, which provides that no state shall pass a law impairing the obligation of contracts; when the directors have refused to bring the action.

Courts of the United States and courts of the states have concurrent jurisdiction in all cases between citizens of different states, whatever may be the matter in controversy, if it be one for judicial cognizance.

The Constitution provides the Supreme Court as a jurisdiction for its final interpretation and for the laws passed by Congress to give them equal operation in all the States.

The Act, incorporating the Bank having provided that it shall, at stated times, set off to the State six per cent. of its net profits, and that the sum so set off shall be in lieu of all taxes to which the Company or its stockholders would be otherwise subject, such provision is a relinquishment of the legislative power to tax, binding upon the Legislature which passed the Act, and upon succeeding Legislatures as a contract not to tax the Bank more than six per cent. upon its profits.

A subsequent law taxing its entire business, capital, circulation, etc., to an amount exceeding that provided for in its charter, is unconstitutional.

That the state constitution has been changed since the passage of the Act chartering the Bank cannot release the State from the contract contained in the charter.

Argued Feb. 6, 1856. Decided, Apr. 8, 1856.

APPEAL from the Circuit Court of the United States for the District of Ohio.

The bill in this case was filed in the Circuit Court of the United States for the District of Ohio, by the appellee, seeking to enjoin the collection of a tax assessed by the State of Ohio on the Commercial Branch Bank of Cleveland, a branch of the State Bank of Ohio, in which the said complainant is a stockholder.

The Circuit Court rendered a final decree for complainant, perpetually enjoining the collection of the tax in question. From this decree the present appeal was taken.

A further statement of the case appears in the opinion of the court.

Mr. Rufus P. Spaulding for the appellant:

It is insisted for the appellant, that the court below, sitting as a court of chancery, ought not to have taken cognizance of the subject matter of the suit.

Baker v. Biddle, Bald. C. C. 394.

The case of Osborn v. The U. S. Bank, 9 Wheat. 738, was decided upon the strong ground, peculiar to itself, that the leading object of the Ohio law was, to deprive the Bank of the exercise of its franchises in that State.

It is definitely settled by a great weight of authority, that where the charter has vested the Board of Directors with power to manage the concerns of the corporation, no one stockholder, nor any number of them, has a right to compel these, the charter agents of the body corporate, to do any act contrary to their own judgment, exercised in good faith.

Commonwealth v. Trustees of St. Mary's Church, 6 Serg. & R. 508; Hersey v. Veazie, 24 Me. 9; Smith v. Hurd, 12 Met. 371; State of La. v. Bank of La. 6 La. 745; Russell v. McLellan, 14 Pick. 69; 2 Hare, Eng. Eq. 461; 1 Phil. Eq. 790; 11 Ga. Eq. 556; Ang. & Ames, Corp. 565, sec. 560; Scott v. Depeyster, 1 Edw. Ch. 513; Robinson v. Smith, 3 Paige, 222; Bayless v. Orne, Freem. (Miss.) Ch. 161; Hodges v. N. E. Screw Co., 1 R. I. 312; Oswego Falls Bridge Co. v. Fish, 1 Barb. Ch. 547.

NOTE.—What laws are void as impairing the obligation of contracts. Vested rights, how affected by subsequent repeal of statute. Vested rights defined. See note to Fletcher v. Peck, 3 L. ed. U. S. 162.

Corporate taxation as affected by contract clause in federal constitution—see note, 60 L.R.A. 33.

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In order to enjoin the tax collector, suit should have been instituted in the name of the Corporation.

Osborn v. Bank of U. S. 9 Wheat. 738; Forbes v. Whitlock, 3 Edw. Ch. 446; Smith v. Hurd, 12 Met. 371; Russell v. McLellan, 14 Pick. 69; Angell & Ames on Corp. p. 565, sec. 560.

A bill in chancery to obtain a perpetual injunction against collecting a tax assessed in the ordinary way, cannot be sustained as a general rule, even if the law authorizing the tax be unconstitutional.

McCoy v. Corp. of Chilicothe, 3 Ohio, 370; Mechanics' and Traders' Bank v. Devolt, 1 Ohio St. 501.

As the appellant had an adequate remedy at law, the court below, sitting as a court of chancery, ought not to have taken cognizance of the subject matter of the suit.

Baker v. Biddle, Bald. C. C. 394.

This suit is improperly brought in the federal court, being merely a contrivance to create a jurisdiction where none fairly exists; the stockholder being made complainant, because he is a citizen of Kentucky.

Maxfield's Lessee v. Levy, 4 Dall. 330; Hurst v. McNeil, 1 Wash. C. C. 83.

The case at bar is distinguished from Piqua Branch Bank v. Knoop, 16 How. 369; that case being predicated upon the Tax Law of Ohio, passed March 21, 1851, under the constitution of 1802, which, it was claimed, permitted the Legislature to impose restrictions upon bank taxation not known to other property. The present case is predicated upon the Tax Law of April 18, 1852.

Every legislative enactment which conserves the internal policy of the State, and nothing beyond it, must give way to any counter regulation subsequently adopted by the people, into their organic law.

McCulloch v. Maryland, 4 Wheat. 404; Terrett v. Taylor, 9 Cranch, 43; Mumma v. Potomac Company, 8 Pet. 281.

Messrs. S. F. Vinton and Henry Stanbury, for the appellee:

The jurisdiction of a court of equity, to give relief by injunction in such a case as the present, is settled on two grounds, either of which is sufficient. First, on the ground of irreparable mischief to the franchise. Second, on the ground of the protection to the moneys and choses in action of a bank, from sale and alienation under the tax proceedings. Both of these grounds are made out in the present case.

Osborn v. U. S. Bank. 9 Wheat. 738.

The Ohio cases cited by the appellant are distinguished from the case at bar; but even if they were not, they could have no weight after the case of Osborn v. U. S. Bank.

As to the right of the plaintiff to bring this bill, he sues in the character of a stockholder, and makes the Bank and the directors parties defendant. The act threatened is in violation of law, which, if not prevented, will result in irreparable mischief to the Corporation, and to his interest as a stockholder. The directors of the Bank refuse to take any step to prevent the threatened injury. They suffered a distraint to be made for the tax of 1852, and took no step to prevent the distraint for that of 1853, which was impending when the bill was filed. There was no time for delay. The application for the injunction was not made until the day before the distraint was to be made.

Under such circumstances, a stockholder has a clear right to intervene.

We say, then, that a case is made in which a stockholder had a right to bring the bill.

Colquitt v. Howard, 11 Ga. 569; Robinson v. Smith, 3 Paige, 233; Bayless v. Orne, Freem. Miss. Ch. 173; Hodges v. New England Screw Co. 1 R. I. 312; Le Clercq v. Gallipolis, 7 Ohio, part 1, 218; Smith v. Swormstedt, 16 How. 288; Angell & Ames on Corp. sec. 312.

On the merits of the case, it will be insisted for the appellee, first, that so much of the Act of the Legislature of the State of Ohio of the 13th of April, 1852, as imposed a tax on the Commercial Bank of Cleveland, other and greater than that which by section 60 of its charter, it obligated itself to pay, and the State bound itself to receive in lieu of all other taxes, is repugnant to the Constitution of the United States, and is therefore null and void.

Piqua Branch Bank v. Knoop, 16 How. 369.

Second. It will be insisted that the fact that the Act of 13th of April, 1852, was passed in conformity with the requirement of the constitution of the State, adopted in 1851, which directs the Legislature to provide by law for taxing of the notes discounted, etc., of all banks that then existed, and that might be thereafter created, can give no validity by reason of said command, in said constitution, to said Act of said Legislature, so far as it impairs the obligation of the contract between the state and the bank.

The constitution of every state must be made in subordination to the Constitution of the United States. In this respect the constitution of a state in no way differs from any other law, and it cannot direct the Legislature to pass a law impairing the obligation of a contract.

See Briscoe v. Bank of Kentucky, 11 Pet. 257; see, also, Gordon v. Kerr, 1 Wash. C. C. 322.

Mr. Justice Wayne delivered the opinion of the court:

It must often happen, under such a government as that of the United States, that constitutional questions will be brought to this court for decision, demanding extended investigation and its most careful judgment.

This is one of that kind; but fortunately it involves no new principles, nor any assertion of judicial action which has not been repeatedly declared to be within the constitutional and legislative jurisdiction of the courts of the United States, and by way of appeal or by writ of error, as the case may be, within that of the Supreme Court.

It is a suit in chancery, which was brought by John M. Woolsey, in the Circuit Court of the United States for the District of Ohio, seeking to enjoin the collection of a tax assessed by the State of Ohio on the Commercial Branch Bank of Cleveland, a branch of the State Bank of Ohio. He makes George C. Dodge, the tax collector, the directors of the Bank, and the Bank itself, defendants.

Woolsey avers that he is a citizen of the State of Connecticut, that he is the owner of thirty shares in the Branch Bank of Cleveland, that Dodge and the other defendants are

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all citizens of the State of Ohio, and that the Commercial Bank of Cleveland is a Corporation, and was made such, as a Branch of the State Bank of Ohio, by an Act of the General Assembly of that State, passed the 24th of February, 1845, entitled "An Act to incorporate the State Bank of Ohio and other banking companies." He alleges that the Commercial Bank has in all things complied with the requirements of its charter, and that, by the 337*] *60th section of the Act, it is declared that each banking company organized under it and complying with its provisions, shall, semi-annually, on the 1st of May and 1st of November of each year, those being the days for declaring dividends, set off to the State of Ohio six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company, for six months next preceding each dividend day; and that the sums so set off shall be in lieu of all taxes to which said company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject; and that the cashier of such company shall, within ten days thereafter, inform the auditor of the State of Ohio of the amount set off, and shall pay the same to the Treasurer of the State on the order of the auditor.

It is averred that the Bank of Cleveland had at all times complied with the requirements of the Act. That, in the year 1853, it set off to the State six per cent. on the two semi-annual dividends which had been made in that year, on the first day of May and the first day of November, which amounted in the aggregate to the sum of $3,206.65. That the same had been notified to the auditor, and that the Bank had always been ready to pay the same when demanded. The complainant then avers, that three years before bringing his suit, having full confidence that the State of Ohio would observe good faith towards the Bank, in respect to its franchises and privileges conferred upon it by the Act of Incorporation, and that it would adhere with fidelity to the rule of taxation provided for in the charter, he had purchased thirty shares of the capital stock of the Bank, and that he was then the owner of the same. He further states, after he had made such purchases, that on the 17th of June, 1851, a draft of a new constitution had been submitted to the electors of the state for their acceptance or rejection, which, if accepted by a majority of the electors who should vote, was to take effect as a constitution of the State, on the 1st of September, 1851. It is admitted that it was accepted, that it became and now is the constitution of the State of Ohio. It is provided in sections two and three of the 12th article of that constitution, that laws shall be passed, taxing by an uniform rule, all moneys, credits, investments in bonds, stock, joint stock companies, or otherwise; and that the General Assembly shall provide by law for taxing the notes and bills discounted or purchased, money loaned, and all other property, effects or dues whatever, without deduction, of all banks now existing, or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals. And in the 4th section of the 13th article of the constitution of 1851, it is further declared, *that the property [*338 of corporations now existing, or hereafter created, shall be subject to taxation, as the property of individuals.

It appears also by the bill, that the General Assembly of the State of Ohio passed an Act on the 13th of April 1852, for the assessment and taxation of all property in the State, and for levying taxes on the same according to its true value in money, in which it is declared to be the duty of the president and cashier of every bank, or banking company, "that shall have been, or may hereafter be, incorporated by the laws of the State, and having the right to issue bills for circulation as money, to make and return, under oath, to the auditor of the county in which such banks may be, in the month of May, annually, a written statement containing, first, the average amount of notes and bills discounted or purchased, which amount shall include all the loans or discounts, whether originally made, or renewed during the year, or at any time previous; whether made on bills of exchange, notes, bonds, mortgages, or other evidence of indebtedness, at their actual cost value in money; whether due previous to, during, or after the period aforesaid, and on which said banking company has, at any time, recovered or received, or is entitled to receive, any profit or other consideration whatever, either in the shape of interest, discount, exchange, or otherwise; and second, the average amount of all other moneys, effects, or dues of every description, belonging to such bank, or banking company, loaned, invested or otherwise used or employed, with a view to profit, or upon which such bank, or banking company receives, or is entitled to receive, interest.

The Act then makes it the duty of the auditors, in the counties in which a bank or banking companies may be, to receive from them returns of notes and bills discounted, and all other moneys and effects or dues, as provided for in the 19th section of the Act, to enter the same for taxation upon the grand duplicate of the property of the county, and upon the city duplicate for city taxes, in cases where the city tax is not returned upon the grand duplicate, but is collected by city officers; which amounts so returned and entered shall be taxed for the same purposes and to the same extent that personal property is, or may be taxed, in the place where such bank or banking company is situated. It is then averred that the president and cashier of the Commercial Bank of Cleveland, fearing the penalty imposed by the Act for a refusal or neglect to make a return according to the Act, did, in the month of May, in the year 1852, make a return, protesting against the right of the State to assess a tax upon the Bank, other than that which was provided for in the charter of its incorporation of the 24th February, 1845. But it appears *that [*339 the return so coerced from the President and directors of the Bank had been assessed by the auditor, for the tax of 1852, at $10,197.55, exceeding by $7,526.72 the amount of tax for which the Bank was liable under its charter, which George C. Dodge, as collector of taxes, seized and collected by distress on its moneys. It is also shown by the bill, that there has been another entry of taxation against the Bank for

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the year 1853, of $14,771.87, exceeding the sum to which it is liable under its charter by $11,665.22 for that year.

It is against the collection of this tax that John M. Woolsey, as a stockholder in the Bank, has brought this suit, claiming an exemption from it as a stockholder, upon the ground that the Act of the General Assembly of the State of Ohio, and the tax assessed under it upon the Bank, are in violation of the 10th section of the 1st article of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts. And he seeks the aid of the Circuit Court to enjoin Dodge, the defendant, from collecting the same from the Bank, as collector of taxes, as he had threatened to do by distress, and as he had done for the assessed tax for the year 1852.

The complainant gives a further aspect to his suit which it is also proper to notice. It is, if the taxes are permitted to be assessed and collected from the Bank, under the Act of the 13th of April, 1852, it will virtually destroy and annul the contract between the State and the Bank in respect to the tax which the State imposed upon it by the charter of its incorporation, in lieu of all other taxes upon the Bank or the stockholders thereof, on account of stock owned therein; that his stock will be thereby lessened in value, his dividends diminished; and that the tax is so onerous upon the Bank, that it will compel a suspension and final cessation of its business. He finally declares, that as a stockholder, on his own behalf, he had requested the directors of the Bank to take measures, by suit or otherwise, to assert the franchises of the Bank against the collection of what he believes to be an unconstitutional tax, and that they had refused to do so.

To this bill the defendant, George C. Dodge, filed an answer. The other defendants did not answer. He admits the material allegations of the bill, except the allegation that the tax law of April 13, 1852, is unconstitutional; says that the Act is in conformity with the constitution of Ohio, which took effect Sept. 1, 1851, and that it is in harmony with the Constitution of the United States. He denies that any application was made by Woolsey to the directors of the Bank, to take measures by suit or otherwise, to prevent the collection of the 340*] tax and *insists that this averment was inserted merely for the purpose of giving color to a proceeding in chancery. That the complainant would not have sustained an irreparable injury, even if he had, as Treasurer, proceeded to distrain for the tax; for that the Bank would have had a remedy at law against him for all damages which might have been sustained in consequence of such distress, as he is worth, at a reasonable estimate, $80,000, after the payment of all his debts. And he insists that the complainant had not exhibited such a case as entitled him to the interposition of a court of equity. To this answer a general replication was filed. But it was agreed by the counsel in the cause, that the complainant had, by his attorney, addressed a letter to the Commercial Bank of Cleveland, to institute proper proceedings to prevent the collection of the tax by Dodge, in the same manner as had been done by the attorney of a stockholder in the Canal Bank of Cleveland, for a tax assessed upon it under the same Act, and that the action of the board of the Commercial Bank, in answer to Woolsey's application, was the same as had been given by the directors of the Canal Bank. That resolution was in these words: "Resolved, that we fully concur in the views expressed in said letter as to the illegality of the tax therein named, and believe it to be in no way binding upon the Bank; but, in consideration of the many obstacles in the way of testing the law in the courts of the State, we cannot consent to take the action which we are called upon to take, but must leave the said Kleman to pursue such measures as he may deem best in the premises."

Upon the foregoing pleadings and admission, the Circuit Court rendered a final decree for the complainant, perpetually enjoining the Treasurer against the collection of the tax, under the Act of the 13th February, 1852, and subjecting the defendant, Dodge, to the payment of the costs of the suit. From that decision the defendant, Dodge, has appealed to this court.

His counsel have relied upon the following points to sustain the appeal:

First. The complainant does not show himself to be entitled to relief in a court of chancery, because the charter of the Bank provides that its affairs shall be managed by a board of directors, and that they are not amenable to the stockholders for an error of judgment merely. And that in order to make them so, it should have been averred that they were in collusion with the tax collector in their refusal to take legal steps to test the validity of the tax.

Second. It was urged that this suit had been improperly brought in the Circuit Court of the United States for the District of Ohio, because it is a contrivance to create a jurisdiction, where none *fairly exists, by substi-[*341 tuting an individual stockholder in place of the Commercial Bank as complainant, and making the directors defendants; the stockholder being made complainant, because he is a citizen of the State of Connecticut, and the directors being made defendants to give countenance to his suit.

Third. It was said, if the foregoing points were not available to defeat the action, that it might be contended that the defendant was in the discharge of his official duty when interrupted by the mandate of the Circuit Court, and that the tax had been properly assessed by a law of the State, in conformity with its constitution, of the 1st September, 1851.

We will consider the points in their order. The first comprehends two propositions, namely: that courts of equity have no jurisdiction over corporations, as such, at the suit of a stockholder for violation of charters, and none for the errors of judgment of those who manage their business ordinarily.

There has been a conflict of judicial authority in both. Still, it has been found necessary for prevention of injuries for which common law courts were inadequate, to entertain in equity such a jurisdiction in the progressive development of the powers and effects of private corporations upon all the business and interests of society.

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It is now no longer doubted, either in England or the United States, that courts of equity in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law.

Cunliffe v. Manchester & Bolton Canal Company, 1 Russ. & Mylne Ch. 131 n; Ware v. Grand Junction Water Co. 1 Russ. & Mylne, 136; Bagshaw v. Eastern Counties Railway Co. 7 Hare Ch. 144; Angell & Ames, 4th ed. 424, and the other cases there cited.

It was ruled in the case of Cunliffe v. The Manchester & Bolton Canal Co. 1 Mylne & Russ. Ch. 131, that where the legal remedy against a corporation is inadequate, a court of 342*] *equity will interfere, and that there were cases in which a bill in equity will lie against a corporation by one of its members. "It is a breach of trust against a shareholder in a joint stock incorporated company, established for certain definite purposes prescribed by its character, if the funds or credit of the Company are, without his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of a majority; and therefore he may file a bill in equity against the Company in his own behalf, to restrain the Company by injunction from any such diversion or misapplication. In the case of Ware v. The Grand Junction Water Co. 1 Russ. & Mylne a bill filed by a member of the Company against it, Lord Brougham said: "It is said this is an attempt on the part of the Company to do acts which they are not empowered to do by the Acts of Parliament," meaning the charter of the Company; "so far as I restrain them by injunction." "Indeed, an investment in the stock of a corporation must, by everyone, be considered a wild speculation, if it exposed the owners of the stock to all sorts of risk in support of plausible projects not set forth and authorized by the Act of Incorporation, and which may possibly lead to extraordinary losses. The same jurisdiction was invoked and applied in the case of Bagshaw v. The Eastern Counties Railway Co. 7 Harr. 114; so, also, in Colman v. The Same Company, 10 Beavan's Ch. It appeared in that case that the directors of the Company, for the purpose of increasing their traffic, proposed to guaranty certain profits, and to secure the capital of an intended Steam Packet Company, which was to act in connection with the railway. It was held such a transaction was not within the scope of their powers, and they were restrained by injunction. And in the second place, that in such a case one of the shareholders in the Railway Company was entitled to sue on behalf of himself and all the other shareholders, except the directors, who were defendants, although some of the shareholders had taken shares in the Steam Packet Company. It was contended in this case that the corporation might pledge, without limit, the funds of the Company for the encouragement of other transactions, however various and extensive, provided the object of that liability was to increase the traffic upon the railway, and thereby increase the traffic to the shareholders. But the Master of the Rolls, Lord Langdale, said "there was no authority for anything of that kind."

But further, it is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied. It is an improper *application for a railway company to [*343 invest the profits of the company in the purchase of shares of another company. The dividend (says Lord Langdale, in Salomons v. Laing, 14 Jurist. 279, 471) which belongs to the shareholders, and is divisible among them, may be applied severally as their own property; but the company itself or the directors, or any number of shareholders, at a meeting or otherwise, have no right to dispose of his shares of the general dividends, which belong to the particular shareholder, in any manner contrary to the will, or without the consent or authority of, that particular shareholder.

We do not mean to say that the jurisdiction in equity over corporations at the suit of a shareholder has not been contested. The cases cited in this argument show it to have been otherwise; but when the case of Hodges v. The New England Screw Co. et al. 1 R. I. 312, was cited against it (we may say the best argued and judicially considered case which we know upon the point, both upon the original hearing and rehearing of that cause) the counsel could not have been aware of the fact that, upon the rehearing of it, the learned court, which had decided that courts of equity have no jurisdiction over corporations as such at the suit of a shareholder for violations of charter, reviewed and recalled that conclusion. The language of the court is: "We have thought it our duty to review in this general form this new and unsettled jurisdiction, and to say, in view of the novelty and importance of the subject, and the additional light which has been thrown upon it since the trial, we consider the jurisdiction of this court over corporations for breaches of charter, at the suit of shareholders, and how far it shall be extended, and subject to what limits, is still an open question in this court. 1 R. I. 312—rehearing of the case September Term, 1853."

The result of the cases is well stated in Angell & Ames, paragraphs 391, 393. "In cases where the legal remedy against a corporation is inadequate, a court of equity will interfere, is well settled, and there are cases in which a bill in equity will lie against a corporation by one of its members." "Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obed-

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ience to the provisions of its constitution, the will of the majority, duly expressed at a legally constituted meeting, must govern; yet beyond the limits of the Act of Incorporation, the will of the majority cannot make an act valid; and the powers of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed, 344*] that there is an important *distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors." [1]

We have then the rule and its limitation. It is contended that this case is within the limitation; or that the directors of the Commercial Bank of Cleveland, in their action in respect to the tax assessed upon it, under the Act of April 18, 1852, and in their refusal to take proper measures for testing its validity, have committed an "error of judgment merely."

It is obvious, from the rule, that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought. That the pleadings must be relied upon to collect what they are, to ascertain in what character, and to what end a shareholder invokes the interposition of a court of equity, on account of the mismanagement of a board of directors. Whether such acts are out of or beyond the limits of the Act of Incorporation, either of commission contrary thereto, or of negligence in not doing what it may be their chartered duty to do.

This brings us to the inquiry, as to what the directors have done in this case, and what they refused to do upon the application of their cocorporator, John M. Woolsey. After a full statement of his case, comprehending all of his rights and theirs also, alleging in his bill that his object was to test the validity of a tax upon the ground that it was unconstitutional, because it impaired the obligation of a contract 345*] made by the State of Ohio *with the Commercial Bank of Cleveland, and the stockholders thereof; he represents in his own behalf, as a stockholder, that he had applied to the directors, requesting them to take measures, by suit or otherwise, to prevent the collection of the tax by the Treasurer, and that they refused to do so, accompanying, however, their refusal with the declaration that they fully concurred with Woolsey in his views as to the illegality of the tax; that they believed it in no way binding upon the Bank, but that in consideration of the many obstacles in the way of resisting the collection of the tax in the courts of the State, they could not consent to take legal measures for testing it. Besides this refusal, the papers in the case disclose the fact that the directors had previously made two protests against the constitutionality of the tax, because it was repugnant to the Constitution of the United States, and to that of Ohio also; both concluding with a resolution that they would not, as then advised, pay the tax unless compelled by law to do so, and that they were determined to rely upon the constitutional and legal rights of the Bank under its charter. Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty than of an error of judgment. It was a nonperformance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true, of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the Bank. A sense of duty, and conduct contrary to it, is not "an error of judgment merely," and cannot be so called in any case. It amounted to an illegal application of the profits due to the stockholders of the Bank, into which a court of equity will inquire to prevent its being made.

Thinking, as we do, that the action of the Board of Directors was not "an error of judgment merely" but a breach of duty, it is our opinion that they were properly made parties to the bill, and that the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require. This conclusion makes it unnecessary for us to notice further the point made by the counsel that the suit should have been brought in the name of the Corporation, in support of which they cited the case of Osborn v. The Bank of the U. S. 9 Wheat. 738. The obvious difference between this case and that is, that the Bank of the United States brought a bill in the Circuit Court of the United States for the District of Ohio, to resist a tax assessed under an Act of that State, and executed by its auditor, and here the *directors of the Commercial [*346 Bank of Cleveland, by refusing to do what they had declared it to be their duty to do, have forced one of its corporators, in self-defense, to

1.—So it has been repeatedly decided, that a private corporation may be sued at law by one of its own members. The text upon this subject is so well expressed, with authorities to support it, that we will extract the paragraph 390, from Angell & Ames, entire. "A private corporation may be sued by one of its own members. This point came directly before the court, in the State of South Carolina, in an action of assumpsit against the Columbia Company. The plea in abatement was, that the plaintiff himself was a member of that company, and therefore could maintain no action against it in his individual capacity. The court, after hearing argument, overruled the plea as containing principles subversive of justice; and they moreover said, that the point had been settled by two former cases, wherein certain officers were allowed to maintain actions for their salaries due by the company. In this respect, the cases of incorporated companies are entirely dissimilar from those of ordinary copartnerships, or unincorporated joint stock companies. In the former, the individual members of the company are entirely distinct from the artificial body endowed with corporate powers. A member of a corporation who is a creditor, has the same right as any other creditor to secure the payment of his demands, by attachment or by levy upon the property of the corporation, although he may be personally liable by statute to satisfy other judgments against the corporation. An action was maintained against a corporation on a bond securing a certain sum to the plaintiff, a member of the corporation, the member being deemed by the court a stranger. Pierce v. Partridge, 3 Met. Mass. 44; so of notes and bonds, accounts and rights of dividends. Hill v. Manchester and Salford Waterworks, 5 Barn. & Adol. 866; Dunston v. Imperial Glass Company, 3 B. & Adol. 125; Geer v. School District, 6 Vt. 76-83; Sawyer v. Methodist Episcopal Society, 18 Vt. 405; Rogers v. Danby Universalist Society, 19 Vt. 187."

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sue. If the directors had done so in a state court of Ohio, and put their case upon the unconstitutionality of the Tax Act, because it impaired the obligation of a contract, and had the decision been against such claim, the judgment of the State Court could have been re-examined, in that particular, in the Supreme Court of the United States under the same authority or jurisdiction by which it reversed the judgment of the Supreme Court of Ohio, in the case of The Piqua Branch of the State Bank of Ohio v. Jacob Knoop, Treasurer of Miami County, 16 How. 369.

But it was said, in the argument, that this suit had been improperly brought in the Circuit Court of the United States, because it was a contrivance by Woolsey, or between him and the directors of the Bank, to give that court jurisdiction, on account of their residence and citizenship being in different states. That the subject matter of the suit was within the exclusive jurisdiction of the state courts, and that, if the jurisdiction in the courts of the United States was sustained, it would make inoperative to a great extent the 7th amendment of the Constitution of the United States and the 16th section of the Judiciary Act of 1789, this last being a declaratory Act, settling the law, as to cases of equity jurisdiction, in the nature of a proviso, limitation, or exception to its exercise. And further, that it would make the judiciary of the United States paramount to that of the individual States, and the Legislative and Executive Departments of the federal government paramount to the same departments of the individual States.

We first remark as to the imputation of contrivance, that it is the assertion of a fact which does not appear in the case; one which the defendants should have proved if they meant to rely upon it to abate or defeat the complainant's suit, and that, not having done so, as they might have attempted to do, we cannot presume its existence. Mr. Woolsey's right, as a citizen of the State of Connecticut, to sue citizens of the State of Ohio in the courts of the United States, for that State, cannot be questioned. The papers in the case also show, that the director and himself occupy antagonistic grounds in respect to the controversy which their refusal to sue forced him to take in defense of his rights as a shareholder in the Bank. Nor can the counsel for the defendant assume the existence of such a fact in the argument of their case in this court, in the absence of any attempt on their part to prove it in the Circuit Court.

We remark, as to the subject matter of the suit being within the exclusive jurisdiction of 347*] the state courts, that the courts of *the United States and the courts of the States have concurrent jurisdiction in all cases between citizens of different states, whatever may be the matter in controversy, if it be done for judicial cognizance. Such is the Constitution of the United States, and the legislation of Congress in "pursuance thereof." And when it is urged that the jurisdiction of the case belonged exclusively to the state courts of Ohio, under the 7th article of the amendments to the Constitution, and the 16th section of the Judiciary Act of 1789 was invoked to sustain the position, it seems it was forgotten that this court and other courts of the United States had repeatedly decided that the equity jurisdiction of the courts of the United States is independent of the local law of any State, and is the same in nature and extent as the equity jurisdiction of England, from which it is derived, and that it is no objection to this jurisdiction that there is a remedy under the local law.

Garden v. Hobart, 2 Sumn. C. C. 401.

It was also said by both of the counsel for the defendant, and argued with some zeal, that if the court sustained the jurisdiction in this case, it would be difficult to determine whether anything, and how much of state sovereignty may hereafter exist. We shall give to this observation our particular consideration, regretting that it should be necessary, but not doubting that such a jurisdiction exists at the suit of a shareholder, and that the appellate jurisdiction of this court may be exercised in the matter, not only without taking away any of the rights of the States, but by doing so, giving additional securities for their preservation, to the great benefit of the people of the United States. If it does not exist and was not exercised, we should indeed have a very imperfect national government, altogether unworthy of the wisdom and foresight of those who framed it; incompetent, too, to secure for the future those advantages hitherto secured by it to the people of the United States, and which were in their contemplation, when, by their conventions in the several States, the Constitution was ratified.

Impelled, then, by a sense of duty to the Constitution, and the administration of so much of it as has been assigned to the judiciary, we proceed with the discussion.

The Departments of the government are Legislative, Executive and Judicial. They are coordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. The Constitution is supreme over all of them, because the people who ratified it have made it so; consequently, anything which may be done unauthorized by it is unlawful. But it is not only over the departments of *the government that the Constitution [*348 is supreme. It is so, to the extent of its delegated powers, over all who made themselves parties to it; states as well as persons, within those concessions of sovereign powers yielded by the people of the States, when they accepted the Constitution in their conventions. Nor does its supremacy end there. It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two thirds of both houses shall propose them; or where the Legislatures or two thirds of the several States shall call a convention for proposing amendments, which in either case become valid, to all intents and purposes, as a part of the Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths of them, as one or the other mode of ratification may be proposed by Con-

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gress. The same article declares that no amendment, which might be made prior to the year 1808, should, in any manner, affect the 1st and 4th clauses in the 9th section of the 1st article, and that no state, without its consent, shall be deprived of its equal suffrage in the Senate. The first being a temporary disability to amend, and the other two permanent and unalterable exceptions to the power of amendment.

Now, whether such a supremacy of the Constitution, with its limitations in the particulars just mentioned, and with the further restriction laid by the people upon themselves, and for themselves, as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme, as has been stated, and that the statement is in exact conformity with it.

Further, the Constitution is not only supreme in the sense we have said it was, for the people in the ratification of it have chosen to add that "this Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." And in that connection, to make its supremacy more complete, impressive and practical, that there should be no escape from its operation, and that its binding force upon the States and the members of Congress should be unmistakable, it is declared that "the Senators and Representatives, before mentioned, and the members of the state Legislatures, and all executive and judicial officers, both of the United States and of 349*] *the several States, shall be bound by an oath or affirmation to support this Constitution.

Having stated, not by way of argument or inference, but in the words of the Constitution, the particulars in which it is declared to be supreme, we proceed to show that it contains an interpreter, or has given directions for determining what is its meaning and operation, what "laws are made in pursuance thereof, and to fix the meaning of treaties which had been made, or which shall be made, under the authority of the United States, when either the Constitution, the laws of Congress, or a treaty, are brought judicially in question, in which a state, or a citizen of the United States, or a foreigner, shall claim rights before the courts of the United States, or in the courts of the States, either under the Constitution or the laws of the United States, or from a treaty."

All legislative powers in the Constitution are vested in a Congress of the United States which shall consist of a Senate and House of Representatives. Then stating of whom the House shall be composed, how they shall be chosen by the people of the several States, the qualification of electors, the age of representatives, the time of their citizenship, and their inhabitancy in the State in which they shall be chosen; how representatives and direct taxes shall be apportioned, how the Senate shall be composed, with sundry other provisions relating to the House and the Senate, the powers of Congress are enumerated affirmatively. The 9th section then declares what the Congress shall not have power to do, and it is followed by the 10th, consisting of three paragraphs, all of them prohibitions upon the States from doing the particulars expressed in them.

Our first suggestion now is, as all the legislative powers are concessions of sovereignty from the people of the States, and the prohibitions upon them in the 10th section are likewise so, both raise an obligation upon the States not to legislate upon either: each, however, conferring rights, according to what may be the constitutional legislation of Congress upon the first; and the second giving rights of equal force, without legislation in respect to such of them as execute themselves, on account of their being prohibitions of what the States shall not do. For instance, no legislation by Congress is wanted to make more binding upon the States what they have bound themselves in absolute terms not to do. As where it is said "no State shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

*Our next suggestion is, that the [*350 grants of legislative powers, and the negation of the exercise of other powers by the States, some of them being declarations that they would not legislate upon those matters which had been exclusively given up for the legislation of Congress, do not imply that the States would be willfully disregardful of the obligations solemnly placed upon them by their people; but that there might be interferences from their legislation in some of those particulars, either with the Constitution, or between their enactments and those of Congress. But this apprehension (not without cause) was founded upon the legislation of some of the States during the continuance of the Articles of Confederation, affecting the rights and interests of persons in their contracts, from which they could get no relief, unless it was granted by the same state Legislatures which passed the Acts. This suggested the necessity, or rather made it obvious, that our national Union would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity, in all the States, to the interpretation of the Constitution and the legislation of Congress; with powers also to declare judicially what Acts of the Legislatures of the States might be in conflict with either. Had this not been done, there would have been no mutuality of constitutional obligation between the States, either in respect to the Constitution or the laws of Congress, and each of them would have determined for itself the operation of both, either by legislation or judicial action. In either way, exempting itself and its citizens from engagements which it had not made by itself, but in common with other States of the Union, equally sovereign; by which they bound their sovereignties to each other, that neither of them should assume to settle a principle or interest for itself, in a matter which was the common interest of all of them. Such is certainly the common sense view of the people, when any number of them enter into a contract for their mutual benefit, in the same proportions of interest. In such a case, neither

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should assume the right to bind his compeers by his judgment, as to the stipulations of their contract. If one of them did so, any other of them might call in the aid of the law to settle their differences, and its judgment would terminate the controversy. It must not be said that the illustration is inappropriate, because individuals have no other mode to settle their disputes; and that states and nations, from their equal sovereignty, have no tribunal to terminate authoritatively their differences, each having the right to judge and do so for itself.

But ours is not such a government. The States, or rather the people forming it, though sovereign as to the powers not delegated 351*] *to the United States by the Constitution, nor prohibited by it to the States, are not independent of each other in respect to the powers ceded in the Constitution.

Their union, by the Constitution, was made by each of them conceding portions of their equal sovereignties for all of them, and it acts upon the States conjunctively and separately, and in the same manner upon their citizens, aggregately in some things, and in others individually, in many of their relations of business, and also upon their civil conduct, so far as their obedience to the laws of Congress is concerned.

In such a union, the States are bound by all of those principles of justice which bind individuals to their contracts. They are bound by their mutual acquiescence in the powers of the Constitution, that neither of them should be the judge, or should be allowed to be the final judge of the powers of the Constitution, or of the interpretation of the laws of Congress. This is not so, because their sovereignty is impaired; but the exercise of it is diminished in quantity, because they have, in certain respects, put restraints upon that exercise, in virtue of voluntary engagements. Vattel, ch. 1, section 10.

We will now give two illustrations—one from the Constitution, and the other from one of the cases decided in this court, upon a Tax Act of the State of Ohio—to show that the framers of the Constitution and the conventions which ratified it, were fully aware of the necessity for and meant to make a department of it, to which was to be confided the final decision judicially of the powers of that instrument, the conformity of laws with it, which either Congress or the Legislatures of the States may enact, and to review the judgments of the state courts, in which a right is decided against, which has been claimed in virtue of the Constitution or the laws of Congress.

The third clause of the 2d section of the 1st article of the Constitution is, "that representatives and direct taxes shall be apportioned among the several States, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons." We will suppose that Congress shall again impose a direct tax, and that a citizen liable to assessment should dispute its application to a kind of his property, alleging it not to be a direct tax, in the sense of that provision of the Constitution; and that he should apply to a state court for relief from an execution which had been levied upon his property for its collection, making the United States collector of the tax a party to his suit; and that the court should enjoin him from further proceedings to collect the tax. It is plain, if such a judgment was final, *and could not be re- [*352 viewed by any other court, or by the Supreme Court of the United States, in virtue of its appellate jurisdiction, as that has been given by the Act of Congress, the result would be, that the citizens of the State in which the judgment was given, would be exempted from the payment of a tax which had been intended by Congress to be apportioned upon the property of all of the citizens of the United States, in conformity with the Constitution. This would practically defeat the rule of apportionment, if it was acquiesced in by the government of the United States, and the constitutional collection of the tax could not be made in any State according to the Act. We do not mean that the officers of the United States could not collect the tax in those States in which no such judgment had been given; but if the judgment could not be reviewed, that the constitutional rule for the imposition of direct taxes could not be executed by any legislation of Congress which a state Legislature or a state court might not say was unconstitutional. We should not then have a more perfect union than we had under the Articles of Confederation. Each State then paid the requisition of Congress, when it pleased to do so. Had it been continued, the Union would be more feeble for all national purposes than it had been. Then the States only disregarded their obligations to suit their convenience. Had it not been corrected, as it has been done in the Constitution, we have no reason to believe that there would not be like results, or that the courts of the States would not be resorted to, to determine the constitutionality of taxes laid by Congress. This was certainly not meant by the framers of the Constitution, nor can its disallowance be brought under the 10th article of its amendments, which declares "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The illustration given, and its results, have been drawn from the Constitution of the United States, also from what might be the action of the state Legislatures and state courts, which could not be prevented unless the Supreme Court of the United States had the power to review the action of the state courts upon a matter exclusively of national interest, made so by the legislation of Congress.

Hitherto, no such case as we have supposed has happened, but a reference to the case of The United States v. Hylton, 3 Dall. 171, in which an attempt was made to test the constitutionality of a tax assessed by the United States, will show that a case of the kind is not unlikely to occur, when Congress shall impose a tax apportioning representation and direct taxation; or, under the general declaration in the 8th section of the 1st article of the *Constitution, that "Congress shall have [*353 power to lay and collect taxes, duties, imposts and excises, but that all duties shall be uniform throughout the United States." Let it be understood, too, that the power is not only to impose duties and taxes, but to collect them,

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and from the power to collect must necessarily be inferred the disability of the Legislatures of the States, or of the courts of the States, in any way to interfere with its execution, as that may be directed by Congress. If the courts of the States, or their Legislatures, could finally determine against the constitutionality of a tax laid by Congress, there would be no certainty or uniformity of taxation upon the citizens of the United States, or of the apportionment of representation and direct taxation according to the Constitution.

Other illustrations of the propriety and necessity for a judicial tribunal of the United States to settle such questions finally, might be made from other clauses of the Constitution. We will, however, cite but one of them in addition to such as have been already mentioned. It is the power of Congress to regulate commerce, and we refer to the case of Brown v. The State of Maryland, 12 Wheat. 419, as an instance of the attempt of that State to lay a tax upon imports, which this court pronounced to be unconstitutional.

We will now give other illustrations, in which the rights of property are involved, to show the cautious wisdom of that provision of the Constitution which secures to the citizens of the different States a right to sue in the courts of the United States, and to claim either in them, or in the courts of the States, the protection either of the Constitution or of the laws of Congress.

The Legislature of Ohio passed an Act in 1803, incorporating the proprietors of the half million of acres of land south of Lake Erie called the "Sufferers' Land." This Act required the appointment of directors who were authorized to extinguish the Indian title, to survey the land into townships, or otherwise make partition among the owners; and, among other things, provided, "that, to defray all necessary expenses of the company in purchasing and extinguishing the Indian claim of title to the land, surveying, locating and making partition, and all other necessary expenses of said company, power is hereby vested in the said directors, and their successors in office, to levy a tax or taxes on said land, and enforce the collection thereof." It was also provided that the directors should have power and authority to do whatever it shall appear to them to be necessary and proper to be done for the well ordering and interest of the proprietors, not contrary to the laws of the State. Subsequently the Legislature of Ohio imposed a tax upon these lands as a part of the revenue to be raised for the State. The directors assessed a 354*] tax upon *the share of each proprietor, to pay the tax to the State. A sale of a part of the land was made for that purpose, and the question subsequently raised in the Circuit Court of the United States for the District of Ohio, in a suit at the instance of the heirs of one of the proprietors whose land had been sold, was, whether the sale conveyed a title to the land to the purchaser. It was determined by this court that it did not, because the directors had not power to make an assessment upon the lands to pay the State tax, and that the tax, as laid by the State, had been done in violation of the corporate powers given to the directors. In this case the plaintiffs sought protection against the tax laid by Ohio, and acquiesced in by the directors of the Corporation, because that tax was contrary to the contract which the State had made with the Corporation for the benefit of the proprietors of the land. The State, without being a party to the record, was interested in the question. It was a suit between citizens of different states, brought by the plaintiffs in the United States Circuit Court for Ohio; and the motive for seeking that tribunal was, that his rights might be tried in one not subject either to state or local influences. It placed both parties upon an equality, in fact and in appearances; and whatever might have been the result, neither could complain of the disinterestedness of the court which adjudged their rights.

Beaty v. The Lessee of Knowler, 4 Pet. 152.

The foundation of the right of citizens of different states to sue each other in the courts of the United States, is not an unworthy jealousy of the impartiality of the state tribunals. It has a higher aim and purpose. It is to make the people think and feel, though residing in different states of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject matter of the controversy between the parties to a suit.

Men unite in civil society, expecting to enjoy peaceably what belongs to them, and that they may regain it by the law when wrongfully withheld. That can only be accomplished by good laws, with suitable provisions for the establishment of courts of justice, and for the enforcement of their decisions. The right to establish them flows from the same source which determines the extent of the legislative and executive powers of government. Experience has shown that the object cannot be attained without a supreme tribunal, as one of the departments of the government, with defined powers in its organic structure, and the mode for exercising them to be provided legislatively.

This has been done in the Constitution of the United States. Its framers were well aware of their responsibilities to secure justice to the people; *and well knew, as the object of [*355 all trials in courts was to determine the suits between citizens, that it could not be done satisfactorily to them, unless they had the privilege to appeal from the first tribunal which had jurisdiction of a suit to another which should have authority to pronounce definitively upon its merits. Vattel, 9th chapter, on justice and polity. Without such a court the citizens of each State could not have enjoyed all the privileges and immunities of citizens in the several States, as they were intended to be secured by the 2d section of the 4th article of the Constitution. Nor would the judicial power have been extended in fact to "all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, to all cases affecting ambassadors and other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; to those between citizens of different states, or between citizens of the same state, claiming lands under grants

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of different states; and between a state and the citizens thereof and foreign states, citizens or subjects." Article 3d, section 1st.

Without the Supreme Court, as it has been constitutionally and legislatively constituted, neither the Constitution nor the laws of Congress passed in pursuance of it, nor treaties, would be, in practice or in fact, the supreme law of the land, and the injunction that the judges in every State should be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding, would be useless, if the judges of state courts, in any one of the States, could finally determine what was the meaning and operation of the Constitution and laws of Congress, or the extent of the obligation of treaties.

But let it be remembered, that the appellate jurisdiction of the Supreme Court, as it is, is one of perfect equality between the States and the United States. It acts upon the Constitution and laws of both, in the same way, to the same extent, for the same purposes, and with the same final result. Neither the dignity nor the independence of either are lessened by its organization or action.

The same electors choose the members of the House of Representatives, who choose the members of the most popular branch of the state Legislatures. The Senators of the United States are chosen by the Legislatures of the States. The Senate and House of Representatives of the United States exercise their legislative powers independently of each other, their concurrence being necessary to pass laws. The States are represented in the one, the people in the other and in both. But as it was thought 356*] that *they and the state Legislatures might pass laws conflicting with the letter or the spirit of the Constitution under which they legislated, it became necessary to make a Judicial Department for the United States, with a jurisdiction best suited to preserve harmony between the States, severally and collectively, with the national government, and which would give the people of all of the States that confidence and security under it anticipated by them when they announced, "that we, the people of the United States, in order to form a more perfect union, establish justice and domestic tranquillity, provide for the common defense, and promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain this Constitution for the United States." Without a Judicial Department, just such as it is, neither the powers of the Constitution nor the purposes for which they were given could have been attained.

We do not know a case more appropriate to show the necessity for such a jurisdiction than that before us.

A citizen of the United States, residing in Connecticut, having a large pecuniary interest in the Bank in Ohio, with a Board of Directors opposed, in fact, to the only course which could be taken to test the constitutional validity of a law of that State bearing upon the franchises of their Corporation, is told by the directors, that though they fully concur with him in believing the tax law of Ohio unconstitutional and in no way binding upon the Bank, they will not institute legal proceedings to prevent the collection of the tax, "in consideration of the many obstacles in the way of resisting the tax in the state courts." Without partaking, ourselves, in their uncertainty of relief in the courts of Ohio, it must be admitted their declaration was calculated to diminish this suitor's confidence in such a result, and induce him to resort to the only other tribunal which there was to take cognizance of his cause. Besides, it was not his interest alone which would be affected by the result. Hundreds, citizens of the State of Ohio and citizens of other states, are concerned in the question. Millions of money in that State, and millions upon millions of banking capital in the other states, are to be affected by its judicial decision; all depending upon the assertion, in opposition to the claim of the complainant, that a new constitution of a state supersedes every legislative enactment touching its own internal policy, and bearing upon the interest of persons, which may have been the subject of legislation under a preceding constitution. In the words of the counsel for the defendant, that all such legislation must give way when found to contravene the will of the sovereign people, subsequently expressed in a new state constitution. The assertion may be met and confuted, without further argument, by what *was said by Mr. Madison, in [*357 the 43d number of the Federalist, upon the 6th article of the Constitution, which is: "All debts and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation." His remark is: "This can only be considered as a declaratory proposition, and may have been inserted, among other reasons, for the satisfaction of foreign creditors, who cannot be strangers to the pretended doctrine, that a change in the political form of civil society has the magical effect of dissolving its moral obligations."

And here we will cite another passage from the writings of that great statesman, and venerated man by every citizen of the United States who knows how much his political wisdom contributed to the establishment of our American popular institutions. He says, in the 22d number of the Federalist: "A circumstance which shows the defects of the confederation remains to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as a part of the law of the land. Their true import, as regards individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted to a supreme tribunal; and this tribunal ought to be instituted under the same authorities which form the treaties themselves. These ingredients are both indispensable. If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts, but the judges of the same court, differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatures, all nations have found it necessary to establish

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one tribunal paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice. This is the more necessary where the frame of the government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts. In this case, if the particular tribunals are invested with a right of ultimate decision, besides the contradictions to be expected from difference of opinion, there will be much to fear from the bias of local views and prejudices, and from the interference of local institutions. As often as such an interference should happen, there would be reason to apprehend that the provisions of the particular laws might be preferred to those of the general laws, 358*] *from the deference with which men in office naturally look up to that authority to which they owe their official existence."

Hitherto we have shown from the Constitution itself that the framers of it meant to provide a jurisdiction for its final interpretation, and for the laws passed by Congress, to give them an equal operation in all of the States.

But there are considerations out of the Constitution which contribute to show it, which we will briefly mention. Without such a judicial tribunal, there are no means provided by which the conflicting legislation of the States with the Constitution and the laws of Congress may be terminated, so as to give to either a national operation in each of the States. In such an event, no means have been provided for an amicable accommodation; none for a compromise; none for mediation; none for arbitration; none for a Congress of the States as a mode of conciliation. The consequence of which would be a permanent diversity of the operation of the Constitution in the States, as well in matters exclusively of public concern as in those which secure individual rights. Fortunately it is not so. A supreme tribunal has been provided, which has hitherto, by its decisions, settled all differences which have arisen between the authorities of the States and those of the United States. The legislation under which its appellate power is exercised has been of sixty-seven years' duration, without any countenanced attempt to repeal it. It is rather late to question it; and in continuing to exercise it, this court complies with the decisions of its predecessors, believing, after the fullest examination, that its appellate jurisdiction is given in conformity with the Constitution.

The last position taken by the counsel for the defendant, now the appellant here, is, that George C. Dodge was in the discharge of his official duty as Treasurer of Cuyahoga County, in the State of Ohio, when interrupted by the mandate of the Circuit Court; that the tax in his hands for collection against the Bank was regularly assessed under a valid law of the State, passed April 18, 1852, in conformity with the requisitions of the Constitution, adopted June 17, 1851, which took effect 1st September, 1851.

It was admitted, in the argument of it, that the only difference between this case and that of The Piqua Branch of the State Bank of Ohio v. Jacob Knoop, 16 How. 369, is, that the latter was a claim for tax under a law of Ohio, of March 21, 1851, under the former constitution of Ohio, of 1802; and that the tax now claimed is assessed under the Act of April 18, 1852, under the new constitution of Ohio.

Both Acts, in effect, are the same in their operation upon the charter of the Bank, as that was passed by the General *Assembly of [*359 Ohio, in the year 1845. Each of them is intended to collect, by way of tax, a larger sum than the Bank was liable to pay, under the charter of 1845. This is admitted. It is not denied, the record shows that the tax assessed for the year 1853 exceeds the sum to which it was liable, under its charter, $11,565.22. The tax assessed is $14,771.87. The tax which it would have paid, under the Act of 1845, would have been $3,206.65.

The fact raises the question whether the tax now claimed has not been assessed in violation of the 10th section of the 1st article of the Constitution, which declares that no State shall pass any law impairing the obligation of contracts.

The Law of 1845 was an agreement with the Bank, quasi ex contractu—and also an agreement separately with the shareholders, quasi ex contractu—that neither the banks, as such, nor the shareholders as such, should be liable to any other tax larger than that which was to be levied under the 60th section of the Act of 1845.

That 60th section is, "that each banking company under the Act, on accepting thereof and complying with its provisions, shall semi-annually, on the days designated for declaring dividends, set off to the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject. The sum so set off to be paid to the Treasurer, on the order of the Auditor of the State." The Act under which the tax of 1853 has been assessed is: "That the president and cashier of every bank and banking company that shall have been, or may hereafter be, incorporated by the laws of this State, and having the right to issue bills of circulation as money, shall make and return, under oath, to the auditor of the county in which such bank or banking company may be situated, in the month of May annually, a written statement containing, first, the average amount of notes and bills discounted or purchased, which amount shall include all the loans or discounts, whether originally made or renewed during the year aforesaid, or at any previous time, whether made on bills of exchange, notes, bonds, or mortgages, or any other evidence of indebtedness, at their actual cost value in money, whether due previous to, during or after the period aforesaid, and on which such banking company has at any time reserved or received, or is entitled to receive, any profit or other consideration whatever; and second, the average amount of all other moneys, effects, or dues of every description belonging to the bank or banking company, loaned, invested or otherwise used with a view to profit, or upon which the bank, etc., receives, or is entitled to receive, interest."

*The two Acts have been put in con- [*360 nection, that the difference between the modes

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of taxation may be more obvious; and it will be readily seen that the second is not intended to tax the profits of the Bank, but its entire business, capital, circulation, credits, and debts due to it, being professed to be intended to equalize the tax to be paid by the Bank with that required to be paid upon personal property. A careful examination of the two Acts and of the tabular returns annexed to this opinion, will prove that such equality of taxation has not been attained. It will show that the Bank is taxed more than three times the number of mills upon the dollar than is assessed upon personal property, whatever may be comprehended under that denomination by the Act of the 13th April, 1852. But if it did not, it could make no difference in our conclusion. For the tax to be paid by the Bank under the Act of 24th February, 1845, is a legislative contract, equally operative upon the State and upon the Bank, and the stockholders of the Bank, until the expiration of its charter, which will be in 1866. No critical examination of the words, "that on the days designated for declaring dividends, to wit: on the first Monday in May and November of each year, the Bank shall set off to the State of Ohio six per cent. on the profits, deducting therefrom the expenses and ascertained losses of said Company for six months next preceding each dividend day, and that the sums or amounts so set off shall be in lieu of all taxes to which said Company or the stockholders thereof, on account of stock owned therein, would otherwise be subject," could make them more exact in meaning than they are. The words "would otherwise be subject" relate to the legislative power to tax, and is a relinquishment of it, binding upon that Legislature which passed the Act, and upon succeeding Legislatures as a contract not to tax the Bank during its continuance with more than six per cent. upon its semi-annual profits. A change of constitution cannot release a state from contracts made under a constitution which permits them to be made. The inquiry is, is the contract permitted by the existing constitution? If so, and that cannot be denied in this case, the sovereignty which ratified it in 1802 was the same sovereignty which made the constitution of 1851, neither having more power than the other to impair a contract made by the State Legislature with individuals. The moral obligations never die. If broken by states and nations, though the terms of reproach are not the same with which we are accustomed to designate the faithlessness of individuals, the violation of justice is not the less.

This case is coincident with that of The Piqua Branch of the State Bank of Ohio v. Knoop, 16 361*] How. 369, decided by this *court in the year 1853. It rules this in every particular: and to the opinion then given we have nothing to add, nor anything to take away.

We affirm the decree of the Circuit Court, and direct a mandate accordingly.

(No. 1.)

Statement of the Commercial Branch Bank, Cleveland, made to the Auditor of Cuyahoga County, May 25th, 1853.

1st.	The average amount of notes and bills discounted and purchased by the Commercial Branch Bank of Cleveland, including all loans or discounts whether made or renewed during the year, from May 1st, 1852, to May 1st 1853, inclusive, is.....	$582,735
2d.	The average amount of all other moneys, effects, or dues of every description belonging to said Commercial Branch Bank, loaned, invested, or otherwise used or employed with a view to profit, or upon which said bank received, or was entitled to receive, interest during the above period, was, ...	88,714
	Total, ...	$671,449

W. A. Otis, President.
F. P. Handy, Cashier.

State of Ohio, Cuyahoga County, ss.:
Cleveland, May 25, 1853.

Personally appeared William A. Otis, President, and Freeman P. Handy, Cashier of the Commercial Branch Bank of Cleveland, and made oath that the aforesaid statement is true and correct, according to their best knowledge and belief.

Before me, witness my hand.
John T. Newton, Notary Public.

The following resolutions have been adopted by the directors of this Bank:

Resolved, That in the opinion of the directors of the Commercial Branch Bank of Cleveland, that the Act for the assessment and taxation of all property in this State, and for levying taxes thereon according to its true value in money, passed April 13, 1852, so far as it imposes a tax on this Bank or Banking Company, or the listing or valuing of its property different from that required by its charter, without the consent of the corporators, is unconstitutional and void, and is also repugnant to the constitution of the State of Ohio—which declares that all laws shall be passed taxing by uniform rule all investments in stock or otherwise, and that property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals; and, again, that the property of corporations now existing or hereafter created, shall be forever subject to taxation the same as the property of individuals, and therefore creates no legal liability against this Bank, and that this Bank will not, as at present advised, pay such additional tax unless compelled by law, and hereby enters its protest against its imposition and collection.

Resolved, That the Cashier attach a copy of these resolutions, signed by the President and Cashier of this Bank, to the return of this Bank, made under said law. Also file a copy so attested with the Treasurer of this county, and transmit a like copy to the *Auditor of State, as an evidence of [*362 the dissent of this Bank from all the provisions of said law, and its determination to rely upon the constitution and legal rights of this Bank under its charter.

F. P. Handy, Cashier.
W. A. Otis, President.

Commercial Branch Bank, Cleveland, May 25, 1853.

Auditor's Office, Cuyahoga County,
Cleveland, February 22, 1856.

I hereby certify, that the foregoing is a true copy of the statement of the Commercial Branch Bank, made to the Auditor of Cuyahoga County, May 25, 1853.

William Fuller, County Auditor.

(No. 2.)

Auditor's Office, Cuyahoga County,
Cleveland, February 22, 1856.

I hereby certify, that there was entered upon the tax duplicate of this county, for the year 1853, for taxation, in the name of the Commercial Branch Bank of Cleveland, the sum of six hundred seventy-one thousand four hundred and forty-nine dollars, in accordance with the statement of said Bank, made to the Auditor of said County, May 25, 1853.

And that the amount of taxes assessed thereon in said year, for state, county, city, and road purposes, is fourteen thousand seven hundred and

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seventy-one dollars eighty-seven cents and seven mills ($14,771.877), as follows.

William Fuller, County Auditor.

Owners' Names.	Personal property.	Value—dolls.	Total taxes on duplicate.			State, county, and city taxes.			Road Tax.		
			Dolls.	Cts.	Ms.	Dolls.	Cts.	Ms.	Dolls.	Cts.	Ms.
Commercial Branch Bank.....	.....	671,449	14,771	87	7	14,234	71	8	537	15	9

Mr. Justice Campbell dissenting:

The following case is made upon the record of this cause:

The Commercial Bank of Cleveland, Ohio, was organized in 1845, according to the Act of the General Assembly of February, 1845, for the incorporation of the State Bank of Ohio and other companies, with a capital which was increased in 1848 to $175,000, and placed under the management of five directors.

From its organization until 1851 the taxes of the Bank were determined by the 60th section of the Act aforesaid, which required the banks semi-annually to set off to the State six per cent. of the net profits for the six months next preceding, and the sum so set off the Act de-363*] clared should be "in lieu of all taxes *to which such company or the stockholders thereof, on account of stock owned therein, would otherwise be subject." In the year 1851 the General Assembly of Ohio altered this rule of taxation, and required that the capital stock, surplus and contingent funds of the banks should be listed for taxation at their money value, and should be assessed for the same purposes and to the same extent that personal property might be in the place of their location.

During the same year the people of Ohio, in the mode prescribed in their fundamental law, adopted a new constitution. One of the articles (art. 12, sec. 3) requires "the General Assembly to provide by law for taxing the notes and bills discounted or purchased, and all other property, effects, dues of every description (without deduction) of all banks now existing or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals." In 1852 the General Assembly fulfilled this direction by a law which required the banks to disclose the average amount of all bills, notes discounted or purchased, and the average amount of their moneys, dues and effects, so as to afford a basis for taxation; and by the same Act taxes were directed to be laid upon these amounts without deduction.

The directors, stockholders and officers of this Bank have disputed the validity of these charges in the rule of taxation, as violating a right derived by contract, obligatory on the State, and contained in the 60th section of the Act first mentioned, and no voluntary obedience has been rendered to them; but, on the contrary, the successive measures taken for the collection of these taxes have met with opposition from the Corporation, and submission has always been accompanied with a protest on the part of the directors, in which their determination was expressed to rely upon the constitutional and legal rights of the Bank.

The taxes for the year 1852 were collected in current bank bills, and the packages were prepared and placed within the reach of the Treasurer, who held the duplicate for collection, by the officers of the Bank, and immediately after they were assigned by the Bank to one Deshler, who replevied the same by a writ from the Circuit Court of the United States for Ohio, and thus made a case which subsequently came to this court. Deshler v. Dodge, 16 How. 622.

In December, 1853, some five days before the taxes were payable, John M. Woolsey, a stockholder of the Bank for thirty shares, at the par value of $100 each, addressed the directors of the Bank a letter, requiring them "to institute the proper legal proceedings to prevent the collection" of the assessment for that *year, [*364 averring that the Bank was not bound to pay them. The Board of Directors replied, "that they considered the tax to have been illegally assessed, but in consideration of the many obstacles in the way of resisting said tax in the courts of Ohio they could not take the action they were called upon in the letter to take," but must leave Mr. Woolsey to take such a course as he might be advised. It sufficiently appears that the Treasurer is able to pay any damages which the Bank might sustain, and no evidence exists of any indisposition of the directors to meet all the obligations of their station, except what is found in the letter I have described.

This bill was filed by Woolsey, as a stockholder of the Bank, against the Treasurer of the County of Cuyahoga, the five Directors of the Bank, and the Corporation itself, alleging his apprehensions that the Treasurer would proceed to make the collection of the excess above the tax due under the 60th section, and that it would impair the credit of the Bank, invade its franchise, and ultimately compel its dissolution; and that the Directors had refused to take

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measures to prevent its collection, on his requisition, and prays for an injunction on the officer to restrain his further proceedings. The Circuit Court affirmed the bill so as to restrain the collection of all taxes assessed upon the Bank, except such as were laid under the Act of 1845.

The first inquiry that arises is, has this court a jurisdiction of the parties to the suit? The case is one of a stockholder of a Corporation, bringing the Corporation before the courts of United States to redress a corporate wrong in which both are similarly interested. The early decisions of this court on this question would be conclusive against the bill. They require that the plaintiff should be from a state different from all the individual members of the corporation. The Chief Justice said, that invisible, intangible, and artificial being, that mere legal entity—a corporation aggregate—is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in their corporate name.

5 Cranch, 57, 61, 78; 6 Wheat. 450; 14 Pet. 60.

These cases required that the citizenship of all the corporators should appear on the record, so that the court might be sure that the controversy had arisen between citizens of different states, or citizens of a state and foreign states, citizens or subjects. In Marshall v. Baltimore & Ohio Railroad Co. 16 How. 314, the court relaxed its strictness in reference to this averment, and was satisfied by an allegation of the habitat of the corporation, but still intimated that the national character of the corporators was an essential subject of inquiry in a question 365*] of jurisdiction. *The court says: "The persons who act under these faculties and use the corporate name may be justly presumed to be resident in the State which is the necessary habitat of the corporation, and where alone they can be made subject to suit, and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there, and nowhere else." And again: "The presumption arising from the habitat of a corporation being conclusive of those who use the corporate name and exercise the faculties of it"

This case is one of a corporator suing the Corporation of which he is a member, and is the first instance of such a case in the court. He cannot aver against the manifest truth, that all the corporators, himself included, are of a different state from himself, to give the court jurisdiction upon the principle of the earlier cases. And if the doctrine of an equitable estoppel can be applied to a subject where facts, and not arbitrary presumptions, were the only objects of consideration; and if, indeed, the character of the corporator, as a matter of law, is to be assumed to be that of the situs of the Corporation, then all the corporators, plaintiffs as well as defendants, stand upon this record as citizens of the same state, and this suit cannot be maintained. But if no inquiry into the citizenship of stockholders may be made: if a foreign stockholder, upon the real or affected indifference of a Board of Directors, or on some imaginary or actual obstacle to relief, arising in the state of opinion in the courts of the State, can draw questions of equitable cognizance into the courts of the United States, in which corporate rights are involved, or evils are threatened or inflicted on corporate property, making the Corporation and its managers parties, then a very compendious method of bringing into the courts of the United States all questions in which these artificial beings are concerned has been invented, and the most morbid appetite for jurisdiction among all their various members will be gratified, and upon a class of cases where grave doubts exist whether those who made the Constitution ever intended to confer any jurisdiction whatever. Nor can this jurisdiction be supported by affirming that the Corporation is not a necessary party to the bill. The subject of the bill is the title of the Corporation to an exemption under the Act of Incorporation, and its object is the protection of corporate franchises and property. The being of the Corporation is charged to be an issue involved in the prayer for relief, and the inaction of the directors affords the motive for the suit.

The conduct of the Directors was determined in the course of their duty as the governing body of the Corporation, under the law of their organization. Their measures and judgments were the acts of the Corporation. Whether these were conclusive *upon the corpor- [*366 ators, or whether they might be impeached at the suit of a single dissenting shareholder; whether the relations between the State and the Corporation were to be settled in a suit between them or in this suit, are the matters in issue, and the Corporation was an essential party to their adjudication. The principle of the bill is, that in declining to take effective measures of prevention—that is, refusing to apply for an injunction—the Directors abdicated their controlling powers, and any stockholder became entitled to intervene for the interests of himself and his associates. The decree in this cause is not a decree for the relief of this corporator, but is a decree for the Corporation, and does not differ from a decree proper to a case of the Corporation against the Treasurer. It is clear, therefore, that the Corporation was a necessary party to the bill, and so on the adjudged cases.

Bagshaw v. East Union R. R. Co. 7 Hare, 114; Cunningham v. Pell, 5 Paige, 607; Rumney v. Mead, Finch, 303; 1 Danl. Ch. Pr. 251; Charles Ins. & T. Co. v. Sebring, 5 Rich. Eq. 342.

The case is one between a corporator and the Corporation and the jurisdiction cannot be affirmed unless the court is prepared to answer the question whether a mere legal entity, an artificial person, invisible, intangible, can be a citizen of the United States in the sense in which that word is used in the Constitution; and relying on the case of Marshall v. The Baltimore & Ohio Railroad Co. 16 How. 314, with a long list of ancestors, I am forced to conclude that it cannot be.

The court has assumed this jurisdiction, and I am therefore called to inquire whether a court of chancery can take cognizance of the bill. The Act of Incorporation of the Bank charges the Board of Directors with the care of the corporate affairs, subject to an annual responsibility to the stockholders. The principle of a court of chancery is, to decline any interference with the discretion of such directors, or to regulate their

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conduct or management in respect to the duties committed to them.

The business of that court is to redress grievances illegally inflicted or threatened, not to supply the prudence, knowledge or forecast requisite to successful corporate management. The facts of this case involve, in my opinion, merely a question of discretion in the performance of an official duty. In 1852 the taxes were withdrawn from the Treasurer of Cuyahoga County, by an assignee of the Bank, and were never passed into the State Treasury. The Supreme Court of Ohio, subsequently to this, pronounced the taxes to be legally assessed upon these banks, and that there was no contract between the State and the banks, and there was no exemption from the tax by anything apparent in the Act of 1845. Some of these 367*] judgments were pending in *this court upon writs of error then undecided, no judgment having been given contrary to that of the authorities, legislative, executive and judicial, as well as by the people of Ohio. It was under these conditions that this stockholder, who purchased stock after the controversy had arisen in Ohio, some five days before the taxes were payable, addressed the directors of the Commercial Bank to take preventive measures—that is, I suppose, to file a bill for an injunction instantly —and upon their suggestion of difficulties, proceeds to take charge of the corporate rights of the Bank by this suit, in the Circuit Court of the United States. The Directors were elected annually; they were, collectively, owners of one tenth of the stock of the Bank, and no evidence is shown that any other stockholder supposed that "preventive measures," under the circumstances, could be sustained. There is no charge of fraud, collusion, neglect of duty, or of indifference by the directors, save this omission to take some undefined "preventive measures," which the plaintiff affected to suppose might be proper.

I understand the rule of chancery, in reference to such a case, to be that no suit can be maintained by an individual stockholder for a wrong done, or threatened, to such a corporation, unless it appears that the plaintiff has no means of procuring a suit to be instituted in the name of the corporation; and that the rule is universal, applicable, as well to the cases where the acts which afford the ground for complaint were either such as a majority might sanction, or whether it belonged to the category of those acts by which no stockholder could be bound except by his own consent. This principle has the highest sanction in the decisions of that court.

Foss v. Harbottle, 2 Hare, 461; affirmed 1 Phil. 790; 2 Phil. 740; 7 Hare, 130.

The principle is an obvious consequence from the relations between the officers and members of a chartered corporation, and the corporation itself. These are explained in Smith v. Hurd, 12 Met. 371. The court says: "There is no legal privity, relation, or immediate connection, between the holders of shares in a bank in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailers, the factors, agents, or trustees of such individual stockholders. The bank is a corporation and body politic, having a separate existence, as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers and servants, are responsible for all contracts, express or implied, made in reference to such capital; and for all torts and injuries, diminishing or impairing it." The Corporation, therefore, must vindicate its own wrongs, and assert its own rights, in the modes pointed out by law.

*I do not say that a court of chancery [*368 will never permit an individual stockholder to come before it to assert a right of the corporation in which he is a shareholder, where there is an obstacle of such a nature that the name of the corporation cannot be employed before legitimate tribunals in their regular modes of proceeding, but the burden is thrown upon the plaintiff to establish the existence of an urgent necessity for such a suit.

The consideration of analogous cases will strengthen this conclusion; cases where courts of chancery are more free to intervene, from the fiduciary relations between the parties and the extent of its general jurisdiction over them Such are cases of danger to the interests of a creditor of an estate from the collusion of an executor with the debtor of the estate, or the insolvency of the executor; or where an executor wrongfully fails to make a settlement with a surviving partner, and a residuary legatee seeks one entire settlement of the estate against the executor and partner; or where a decedent in his life has fraudulently conveyed assets, and his executor is estopped to impute fraud, and there are creditors; or where the managers of a joint stock company have been guilty of fraud, illegality, waste, and their stockholders desire relief. In all these cases the court of Chancery will suffer a party remotely interested to institute the suit, which his trustee, or other representative, should have brought, and will grant relief on that suit which would have been appropriate to the case of him who should have commenced it. Sir John Romilly, in a late case belonging to one of these categories, says: "To support such a bill as this it is not sufficient to prove that it may be an unpleasant duty to the executors and trustees to take the necessary steps for protecting the property intrusted to them. It is not sufficient to show that it will be for their interests not to take such steps. It is necessary to show that they prefer their own interests to their duty, and that they intend to neglect the performance of the obligation incidental to the office imposed upon them, and which they assumed to perform; or, as said in Travis v. Milne, that a substantial impediment to the prosecution by the rights of the parties interested in the estate against the surviving partner exists."

Staunton v. Carron Co. 23 L. & Eq. 315; Travis v. Milne, 9 Hare, 141; Hersey v. Veazie, 11 Shep. 1; Colquitt v. Howard, 11 Ga. 556.

These cases afford no support to this suit. The Cleveland Bank has betrayed no purpose to abandon its corporate duty. The interests and obligations of the Directors coincide to support its pretensions. There is no supineness in their past conduct, nor indifference to the existing peril. The evidence, at the most, convicts them only of a present disinclination to commence suits, *which were likely to [*369 be unproductive, at the request of the share

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holder. The answer shows that the taxes for 1852 had not been recovered by the State, but had been retaken by an assignee of the Bank. Nor does the correspondence show that the Directors had decided to abandon the contest. The case here does not at all fulfill the conditions on which the interposition of a shareholder is allowable.

Elmslie v. McAulay, 3 Bro. C. C. 624, 1 Phil. 790; Law v. Law, 1 Coll. 41; Walker v. Trott, 4 Ed. Ch. 38.

But the evidence does not allow me to conclude that any impediment whatever existed to a suit in the name of the Corporation, from any disposition of the Directors to resist the claims of the State. Their protest appears at every successive stage of the action of the fiscal officers. This suit is evidently maintained with their consent; there has been no appearance either by the Directors or the Corporation, but they abide the case of the stockholder. The decree is for the benefit of the Corporation. The question then is, can a corporation belonging to a state, and whose officers are citizens, upon some hope or assurance that the opinions of the courts of the United States are more favorable to their pretentions, by any combination, contrivance, or agreement with a non-resident shareholder, devolve upon him the right to seek for the redress of corporate grievances, which are the subjects of equitable cognizance in the courts of the United States by a suit in his own name. In my opinion, there should be put but one answer to the question.

I come now to the merits of the case made by the bill.

In the suit of the Piqua Bank v. Knoop, 16 How. 369, I gave the opinion that the Act of February, 1845, did not contain a contract obligatory between the State of Ohio and the banking corporations which might be originated by it, in reference to the rule of taxation to be applied to their capital or business. That the Act imposed no limit upon the power of the General Assembly of the State, but that the rate of taxation established in that Act was alterable at their pleasure. To that opinion I now adhere.

But assuming a contract to be collected from the indeterminate expressions of the 60th section of the Act, as interpreted by its general objects and the supposed policy of the State, the question is presented, what consequence did the reconstitution of the political system of the State by the people in 1851, and their direction to the Legislature to adopt equality as the rule of assessment of taxes upon corporate property, accomplish to the claims of these corporations?

Certainly no greater question—none involving a more elemental or important principle—has ever been submitted to a judicial 370*] *tribunal. It involves the operation and efficiency of the fundamental principles on which the American constitutions have been supposed to rest.

The proposition of this confederacy of some fifty banking corporations, having one fortieth of the property of the State, is, that by the law of their organization for the whole term of their corporate being, there exists no power in the government nor people of Ohio to impair the concessions contained in the Act of 1845, particularly that determining the amount of their contribution to the public revenue. This proposition does not depend for its truth upon the limitation of time imposed upon the corporate existence of the banks. It would not affect the proposition if the charters were for a century, or in perpetuity. Nor does the proposition derive strength from the fact that the Statute applies only to banking corporations, or corporations confined to a single form of commercial dealing. The proposition would have had the same degree of accuracy if the Act had been universal, applicable to all private corporations, whether for manufactures, trades, intercourse, mining, morals, or religion. It is said by a competent authority, that in the State of Massachusetts there are near twenty-five hundred trading corporations, and that more than seven tenths of the real and personal property of that State is held by corporations. The proportion between the property of corporations and individuals is greater there than in other states, but the property held by corporations in other states is large enough to awaken the most earnest attention. A concession of the kind contained in this Act, by a careless or a corrupt Legislature, for a term or in perpetuity, would impair in many states their resources to an alarming extent.

Writers upon the condition of the Turkish Empire say, that three fourths of the landed property of the Empire is held in mortmain, as vakuf by mosques or charitable institutions, for their own use, or in trust for their owners. This property ceases to contribute to the public revenues, except in a specific form of certain objectionable taxes of produce, and is inalienable. If held in trust, it is exempt from forced sales and confiscations, and, on the death of the owner without children, passes to the mosque or other Charitable trustee. In that Empire the ecclesiastical and judicial is the dominant interest, for the Ulemas are both priests and lawyers, just as the corporate moneyed interest is dominant in Ohio, and in either country that interest claims exemption from the usual burdens and ordinary legislation of the State. The judgment of this court would establish the permanent existence of such an incubus upon the resources and growth of that country, if that interest should have taken their privileges in the form of a contract, and had such a constitution as ours. Yet the *first step [*371 for the regeneration of Turkey, according to the wisest statesmanship, is to abolish the vakuf.

Bentham, treating upon constitutional provisions in favor of contracts, says: "If all contracts were to be observed, all misdeeds would be to be committed, for there is no misdeed the committal of which may not be made the subject of a contract; and to establish in favor of themselves, or of any other person or persons, an absolute despotism, a set of legislators would have no more to do than to enter into any engagement—say with a foreign despot, say with a member of their own community—for this purpose." And were this to happen, should it be that a state of this Union had become the victim of vicious legislation, its property alienated, its powers of taxation renounced in favor of chartered associations, and the resources of the body politic cut off, what remedy have the people against the misgovernment? Under the

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doctrines of this court none is to be found in the government, and none exists in the inherent powers of the people, if the wrong has taken the form of a contract. The most deliberate and solemn acts of the people would not serve to redress the injustice, and the overreaching speculator upon the facility or corruption of their Legislature would be protected by the powers of this court in the profits of his bargain. Where would the people find a remedy? Let the case before us form an illustration. Congress cannot limit the term nor abolish the privileges of these corporations; they are corporations of Ohio, and beyond her limits they have no legal existence; they live in the contemplation of her laws and dwell in the place of their creation. 13 Pet. 512; 16 How. 314. Nor can Congress enlarge the subjects for state taxation, nor interfere in the support of the state government. They could not empower the State to collect taxes from these corporations. Were the resources of the State oppressed with the burden of a Turkish vakuf, Congress could not afford relief.

The faculties of the Judicial Department are even more fatal to the State than the impotence of Congress. The courts cannot look to the corruption, the blindness, nor mischievous effects of state legislation, to determine its binding operation. Fletcher v. Peck, 6 Cranch, 87. The court, therefore, becomes the patron of such legislation, by furnishing motives of incalculable power to the corporations to stimulate it, and affording stability and security to the successful effort. Where, then, is the remedy for the people? They have none in their state government nor in themselves, and the federal government is enlisted by their adversary. It may be that an amendment of the Constitution of the United States, by the proposal of two thirds of Congress and the ratification of the Legislatures of three fourths of 372*] the States, *might enable the people of Ohio to assess taxes for the support of their government, upon terms of equality among her citizens.

The first observation to be made upon this is, that these extraordinary pretensions of corporations are not unfamiliar to an inquirer into their nature and history. The steady aim of the most thoroughly organized and powerful of the corporate establishments of Europe has ever been to place themselves under the protection of an external authority, superior to the government and people where they dwell—an authority sufficiently powerful to shield them from responsibility and to secure their privileges from question. I do not refer to the claim of kings to passive obedience under a divine title. Ecclesiastical corporations, acknowledging the supremacy of the Pope, afford a case parallel to that before us. I find their principles compendiously declared in an allocution of a minister of Rome to the Court of Sardinia, in reference to taxes on church property there. I find that "religious corporations, forming a portion of the ecclesiastical family at large, are, by their very nature, under the guardianship and authority of the Church; and consequently, no measure or laws can be adopted with respect to them, except by the spiritual power, or through its agency, especially in what touches their existence or their conduct in the institutions to which they respectively belong, nor can any other rule be recognized, even in matters that concern their property. It is, in truth, beyond dispute, that the property possessed by ecclesiastical or religious foundations belong to the general category of property of the Church, and constitutes a true and proper portion of its patrimony. In consequence whereof, as the property of the Church is inviolable, so are the possessions of such foundations." Nor was the doctrine of inviolableness of the contracts foreign to these controversies. The sagacious and farsighted members of the ecclesiastical interests fortified themselves with concordats, and these concordats were affirmed to be "contracts," and, like these, "entail obligations;" and "if the bond of a bargain is to be respected in private life," so they declared "it is sacred and inviolable in the life of states." A slight change of expression will demonstrate that the principle of corporate policy, the dictate of corporate ambition, which has predominated in the contests in Europe, leading to desolating wars, is the same which this court is required to sanction in favor of corporations in the United States. The allocution of the Ohio banks to this court may be thus stated: "That the charters of incorporation granted by the state governments are in their essence and nature 'contracts,' which 'entail obligations;' that consequently, they are finally under the guardianship and protection of the judiciary establishment of the United States; and no Acts of the State *Legislature which conferred them, [*373 in whatever touches their existence, methods of proceeding, or corporate privilege, are binding on them; that, as the state Legislatures are agents of the people, whatever they have done in these respects is obligatory upon them, and irrevocable by them, in any form of their action, or in the exercise of any of their sovereign authority; and as the judiciary establishment of the Union is charged with the duty of holding the States and people to their limited orbits, and to afford redress for violated contracts, and to prevent serious resulting damage; and as these corporations cannot sue in the courts of the United States, it is the duty of the court to suffer the corporate wrongs to be redressed in the suit and at the solicitation of any of their stockholders who can appear there—for the state of opinion in the state courts will not allow the hope of redress from them.

The allowance of this plea interposes this court between these corporations and the government and people of Ohio, to which they owe their existence, and by whose laws they derive all their faculties. It will establish on the soil of every State a caste made up of combinations of men for the most part under the most favorable conditions in society, who will habitually look beyond the institutions and the authorities of the State to the central government for the strength and support necessary to maintain them in the enjoyment of their special privileges and exemptions. The consequence will be a new element of alienation and discord between the different classes of society, and the introduction of a fresh cause of disturbance in our distracted political and social system. In the end, the doctrine of this decision may lead to a violent overturn of the whole system of corporate combinations.

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Having thus examined the proportions of the doctrine contained in the judgment of the court, I oppose to it a deliberate and earnest dissent.

And first, as to the claim made for the court to be the final arbiter of these questions of political power, I can imagine no pretension more likely to be fatal to the constitution of the court itself. If this court is to have an office so transcendent as to decide finally the powers of the people over persons and things within the State, a much closer connection and a much more direct responsibility of its members to the people is a necessary condition for the safety of the popular rights. Justice Woodbury, in Luther v. Borden, 7 How. 52, has exposed this danger with great discrimination and force. He said: "Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges, would be, that in such an event all political privileges and rights would, in a dispute 374*] *among the people, depend on our decision finally. We would possess the power to decide against them, as well as for them; and, under a prejudiced or arbitrary judiciary, the public liberties or popular privileges might thus be much perverted, if not entirely prostrated. And if the people, in the distribution of powers under the Constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor amenable to them, nor at liberty to follow the various considerations that belong to political questions in their judgments, they will dethrone themselves, and lose one of their invaluable birthrights—building up in this way slowly, but surely, a new sovereign power in this Republic in most respects irresponsible, unchangeable for life, and one, in theory at least, more dangerous than the worst elective monarchy in the worst of times."

The inquiry recurs, have the people of Ohio deposited with this tribunal the authority to overrule their own judgment upon the extent of their own powers over institutions created by their own government and commorant within the State. The fundamental principle of American constitutions, it seems to me, is, that to the people of the several States belongs the resolution of all questions, whether of regulation, compact, or punitive justice, arising out of the action of their municipal government upon their citizens, or depending upon their constitutions and laws, and are judges of the validity of all acts done by their municipal authorities in the exercise of their sovereign rights, in either case without responsibility or control from any department of the federal government. This I understand to be the import of municipal sovereignty of the people within the State.

In 1802, the inhabitants of Ohio were released from their pupilage to the federal authority, placed in full possession of their rights to self-government, and were invited to adapt their institutions to the federal system, of which the State, when formed, was authorized to become a member.

The people of Ohio, by their state constitution, reserved to themselves "complete power" to "alter, reform and abolish their government;" "to petition for redress of grievances;" and to "recur, as often as might be necessary, to the first principles of government." It was by a constitution adopted according to established forms, and expressive of the sovereign will of the body politic, that the rule of taxation complained of in this suit was prescribed.

The inquiry arises, to what did the authority of the people extend. It was their right to ameliorate every vicious institution, and to do whatever an enlightened statesmanship might *prescribe for the advancement of their [*375 own happiness; and for this end, persons and things in the State were submitted to their authority. A material distinction has always been acknowledged to exist as to the degrees of the authority that a people could legitimately exert over persons and corporations. Individuals are not the creatures of the State, but constitute it. They come into society with rights which cannot be invaded without injustice. But corporations derive their existence from the society, are the offspring of transitory conditions of the State; and, with faculties for good in such conditions, combine durable dispositions for evil. They display a love of power, a preference for corporate interests to moral or political principles or public duties, and an antagonism to individual freedom, which have marked them as objects of jealousy in every epoch of their history. Therefore, the power has been exercised, in all civilized States, to limit their privileges, or to suppress their existence, under the exigences either of public policy or political necessity.

Sir James McIntosh says: "Property is, indeed, in some sense, created by acts of the public will, but it is by one of those fundamental acts which constitute society. Theory proves it to be essential to the social state. Experience proves that it has, in some degree, existed in every age and nation in the world. But those public acts, which form and endow corporations, are subsequent and subordinate. They are only ordinary expedients of legislation. The property of individuals is established on a general principle, which seems coeval with civil society itself. But bodies are instruments fabricated by the Legislature for a specific purpose, which ought to be preserved while they are beneficial, amended when they are impaired, and rejected when they become useless or injurious." Vind. Gal. 48, note.

Who, in the United States, is to determine when the public interests demand the suppression of bodies whose existence or modes of action are contrary to the well-being of the State?

If the powers of the people of a state are inadequate to this object, then their grave and solemn declarations of their rights and their authority over their governments, and of the ends for which their governments and the institutions of their governments were framed, and the responsibility of rulers and magistrates to themselves, are nothing but "great swelling words of vanity."

But not only is the jurisdiction of Ohio "complete" over the public institutions of her government, but the subject matter upon which their will was expressed in their constitution was independently of their control over the corporations, one over which their jurisdiction was plenary. They declared in what *man- [*376 ner property held within the State by these

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artificial bodies should contribute to the public support, in the form of regular and apportioned taxation. When the Constitution of the United States was before the people of the States for their ratification, they were told, that, with the exception of duties on exports and imports, the States retained "an independent and uncontrollable authority" "to raise their own revenue in the most absolute and unqualified sense;" and that any attempt, on the part of the federal government, to abridge them in the exercise of it, would be "a violent assumption of power unwarranted by any clause of the Constitution." Fed. 163, by Hamilton. And the opinions of this court are filled with disclaimers on the same subject. 4 Wheat. 429.

The true principle, therefore, would seem to be, that if there was any conflict in the tax laws of the State and a supposed contract of its legislative or executive agents with one of its citizens, it would be for the State to harmonize the two upon principles of general equity; but in no condition of facts for the Judiciary Department to interfere with state affairs by writs of replevin or injunction. The acknowledgment of such a power would be to establish the alarming doctrine that the empire of Ohio, and the remaining States of the Union, over their revenues, is not to be found in their people, but in the numerical majority of the judges of this court.

In the opinion I gave in the case of The Piqua Bank, I exhibited evidence that the care of the public domain, whether consisting of crown lands or of taxes on property, belonged to the sovereign power of the State, and that improvident alienations by the Crown were, from time to time, set aside by the Parliament of Great Britain under the dictates of a public policy. Twelve Acts of Parliament are cited by Sir William Davenant of this character, and having this object. Davenant, Grants and Res. 244.

A similar condition existed in France. The kings were bound, by their coronation oath "to maintain and preserve the public domain with all their power," and it was an inviolable maxim, that it could not be alienated except in specified cases determined in the fundamental laws of the monarchy. This legal result was declared by the National Assembly in 1790, to the effect that the public domain, with all its accretions, belonged to the nation; that this property is the most perfect that can be imagined, since there exists no superior power that can restrain or modify it; that the power to alienate—the essential attribute of property—exists in the nation; that every appropriation of the public domain is essentially revocable, if made without the consent of the nation; that it preserves over the property alienated 377*] *the same right and authority as if it had remained under its control; and that this principle was one which no lapse of time nor legal formality could evade. All grants, therefore, of the public rights, and especially those partaking of the nature of taxes, or subsidies, such as fines, confiscations, and stamps, were revoked, because the subject was not alienable. 8 Merlin Rep. tit. Dom. Pub.; 1 Proud. Dom. Pub. 62.

If the power to review the illegal or improvident acts of a monarch, by which "the domain and patrimony of the Crown (one of the principal sinews of the State, as they are termed in the ordinances) was dilapidated or impoverished in the nearly absolute monarchies of Europe, was reserved to the nation, it would seem to follow that in the American States, where so little has been conceded to the government, and whose "complete power" to amend or abrogate is so distinctly reserved that no inference nor implication can arise, that the same has been relinquished or abdicated. My conclusion is, that the constitution of Ohio, whether it is to be regarded as the expression of the sovereign will of the people, that the extraordinary exemptions granted to these corporations, by which they contribute unequally to the public support, is contrary to the genus of their institutions; or whether they are inconsistent with a just apportionment of the public burdens; or whether, as a declaration of the exigency of the State, requiring an additional contribution from them to its revenue; or a judgment of condemnation of the former government for an abuse of the powers it enjoyed; that it is above and beyond the supervision or control of the Judiciary Department of this government.

Nor does the opinion, that this department can exert such an empire over the people of Ohio, derive support, in my opinion, from the clause in the Constitution on the subject of the obligation of contracts, nor the decisions of this court upon that clause of the Constitution.

That the people of the States should have released their powers over the artificial bodies which originate under the legislation of their representatives, or over the improvident charges or concessions imposed by them upon its revenues, or over the acts of their own functionaries, it is not to be assumed. Such a surrender was not essential to any policy of the Union, nor required by any confederate obligation. Such an abandonment could have served no other interest than that of the corporations, or individuals who might profit by the legislative acts themselves. Combinations of classes in society, united by the bond of a corporate spirit, for the accumulation of power, influence or wealth, by the control of intercourse or trade, or the spiritual or moral concerns of society, unquestionably desire limitations upon the sovereignty *of the people, and the [*378 existence of an authority upon which they can repose in security and confidence. But the framers of the Constitution were imbued with no desire to call into existence such combinations, nor dread of the sovereignty of the people. They denied to Congress the power to create (3 Mad. Deb. 1576), and the most salutary jealousy was expressed in reference to them. The people of the States, during the existence of the confederation, suffered from the violation of private property by their governments. In reconstituting their political system, they abstained from delegating to the United States the powers to emit bills of credit; to make anything but gold and silver a tender in the payment of debts; to pass any bill of attainder or ex post facto law, or law to impair the obligation of contracts, except so far as necessary to a uniform law of bankruptcy; while they protected property from unreasona-

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ble searches and seizures, and the title from detriment, except in the due course of legal proceeding.

The state governments were prohibited from any corresponding legislation, either in the federal or state constitutions.

The power to interfere with private contracts is one of the most delicate and difficult, in its exercise, of any belonging to the social system, and one which there is constant temptation to abuse. That its exercise is sometimes necessary is proved by the history of every civilized state. Its judicious exercise constitutes the title of Solon and Sulla to fame, and has been vindicated by the most enlightened statesmen. But the people reserved to themselves to determine the exigences which should call it into existence. The prohibition is a limitation upon the ordinary government, and not upon the popular sovereignty. In Fletcher v. Peck, 6 Cranch, 87, the Chief Justice doubted whether the repeal of a grant, issued under a legislative act by the Executive of a state. was within the competence of the legislative authority; and notices the distinction between Acts of legislation and sovereignty, and treats the clause of the Constitution under consideration as an inhibition on legislation. In Dartmouth College v. Woodward, 4 Wheat. 518, 553, Mr. Webster presents the distinction with prominence in his argument. He says: "It is not too much to assert that the Legislature of New Hampshire would not have been competent to pass the Acts in question, and make them binding on the plaintiffs, without their assent, even if there had been in the Constitution of the United States, or of New Hampshire, no special restriction on their power, because these Acts are not the exercise of a power properly legislative. . . . The British Parliament could not have annulled or revoked this grant as an ordinary act of legislation. If it had done it at all, it could only have been in virtue of that sov-379*] ereign power *called omnipotent, which does not belong to any Legislature of the United States. The Legislature of New Hampshire has the same power over the charter which belonged to the King who granted it, and no more. By the law of England, the power to grant corporations is a part of the royal prerogative. By the Revolution this power may be considered as having devolved on the Legislature of the State, and it has been accordingly exercised by the Legislature. But the King cannot abolish a corporation, or new model it, or alter its powers without its assent." . . .

Chief Justice Marshall, in describing the jurisdiction of the court over such contracts, says it belongs to it "the duty of protecting from legislative violation those contracts which the Constitution of the country has placed beyond legislative control." And in defining the object and extent of the prohibition, he says: "Before the formation of the Constitution, a course of legislation had prevailed in many, if not in all the States, which weakened the confidence of man in man. and embarrassed all transactions between individuals by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the state Legislatures were forbidden to pass any law impairing the obligation of contracts; that is, of contracts respecting property under which some individual could claim a right to something beneficial to himself." These selections from opinions delivered in this court which have carried the prerogative jurisdiction of the court to its farthest limit, and portions of which are not easily reconciled with a long series of cases subsequently decided (Satterlee v. Matthewson, 2 Pet. 380; Charles River Bridge 11 Pet. 420; West River Bridge v. Dix, 6 How. 507; 8 How. 539; 10 How. 511), show with clearness that this court has not, till now, impugned the sovereignty of the people of a state over these artificial bodies called into existence by their own Legislatures.

I have thus given the reasons for the opinion that the constitution of Ohio and the acts of her government, done by its special authority and direction, are valid dispositions. It is no part of my jurisdiction to inquire whether these public acts of the people and the State were just or equitable. These questions belong entirely to themselves.

It may be that the people may abuse the powers with which they are invested, and even in correcting the abuses of their government, may not in every case act with wisdom and circumspection.

But, for my part, when I consider the justice, moderation, the restraints upon arbitrary power, the stability of social order, the security of personal rights, and general harmony which existed in the country before the sovereignty of governments was asserted, *and [*380 when the sovereignty of the people was a living and operative principle, and governments were administered subject to the limitations and with reference to the specific ends for which they were organized, and their members recognized their responsibility and dependence, I feel no anxiety nor apprehension in leaving to the people of Ohio a "complete power" over their government, and all the institutions and establishments it has called into existence. My conclusion is, that the decree of the Circuit Court of Ohio is erroneous, and that the judgment of this court should be to reverse that decree and dismiss the bill of the plaintiff.

Mr. Justice Daniel:

I concur in the preceding opinion of my brother Campbell.

Mr. Justice Catron:

I also dissent, and concur with the conclusions of the opinions just read.

Ex parte In the Matter of WILLIAM WELLS.

(See S. C. 18 How. 307-331.)

President can grant conditional pardon—can commute sentence of death to imprisonment for life—such pardon not absolute, on ground that condition is void.

The President can grant a conditional pardon under section two of second article of the Constitution giving him power to grant pardons.

NOTE.—Conditional pardons.

It seems agreed that the King may extend his mercy on what terms he pleases, and may annex any condition which he thinks fit, whether proceed-

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Such pardon is not absolute on the ground that the condition in it is void.

Legal meaning of the word "pardon," and kinds and incidents and extent and effects of, stated.

The condition, when accepted by the convict, is the substitution by himself of a lesser punishment than the law imposed, of which he cannot complain.

So held, where the President granted a pardon to one sentenced to be hung for murder, upon condition that he be imprisoned during life; commuting the sentence of death to imprisonment for life.

Argued Dec. 21, 1855. Decided Apr. 9, 1856.

ON PETITION for a writ of habeas corpus.

Motion for writ of habeas corpus, under the circumstances and fact set forth in the petition.

To the Honorable, the Justices of the Supreme Court of the United States.

"The petition of William Wells respectfully represents: That he was convicted of murder at the December Term, 1851, of the Criminal Court of the County of Washington, District of Columbia, and was sentenced by said court to be hanged on the 23d of April, 1852, on which said 23d of April, the President of the United States granted him a pardon.

For substance of pardon, see opinion of the court, "by virtue of which said pardon, the petitioner was removed from the place of execution by the Marshal of the District of Columbia, and was conveyed and received into the penitentiary of the District of Columbia where he still remains imprisoned; that petitioner had never prayed for nor desired a pardon with such conditions annexed, but that after he had been conveyed and imprisoned in the said penitentiary, and shut up for more than an hour in one of its cells; and while under restraint of duress of imprisonment, and duress per minas, the said pardon was presented to him by the warden of the penitentiary and the jailer of the said jail; and while under said duress, he did subscribe in their presence to the following acceptance of the said pardon and the conditions annexed." (See opinion of the court.)

The remainder of the petition recites the proceedings in the court below. A further statement of the case appears in the opinion of the court.

Mr. C. Lee Jones, for the petitioner:

It is an uncompromising principle of law, that the personal liberty of the individual cannot in any case be abridged without the explicit permission of the law,

1 Bl. Com. 135; 3 Bl. Com. 133.

The petitioner is now imprisoned, not by virtue of an judicial sentence inflicting this species of punishment for an ascertained offense, but by authority of the President, who, after exercising the pardoning power, has assumed powers not delegated, by legislating a new punishment into existence, and then sentencing the petitioner to undergo that punishment. The pardon is valid, but the condition being illegal, is void and of no effect. 2 Bl. Com. 157.

Under the Constitution (art. 2, sec. 21), the President has power to grant reprieves and pardons in certain cases. The Constitution defines and limits his powers, and we are not to be guided by what may or may not be done by the English Executive.

Mr. C. Cushing, Atty.-Gen., contra:

The language used in the Constitution conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption.

When the word "pardon" was used, it conveyed to the mind the authority as exercised by the English Crown or its representatives in the Colonies, and we should give the word the same meaning as prevailed here and in England at the time when it found a place in the Constitution.

See Cathcart v. Robinson, 5 Pet. 264, 280; Flavell's case, 8 Watts & Serg. 197.

Conditional pardons at common law, are coeval with the law itself.

Guilliam's case, cited from the rolls of 8 Hen. VI. by Coke; Co. Litt. 274, B; Clerk of Hangley's case, Y. B. 3, N. 6; Fol. 7, No. 5; Cole's case, Sir. F. Moore, 466.

Pardons may be "either absolute or on condition, exception or qualification."

Vin. Abr. Prerog. P. A. 3 Vol. XVII. p. 18,

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ent or subsequent, on the performance whereof the validity of the pardon will depend. Co. Lit. 274. b; 2 Hawk. P. C. ch. 37, sec. 45.

If the condition is not performed the prisoner remains in the same state in which he was at the time that pardon was granted. If sentence had been passed, and he is at large, he may be remanded under his former sentence. Patrick Madan's case, Leach, 220; People v. James, 2 Caines, 57; People v. Potter, 1 Park. Cr. 47; State v. Smith, 1 Bailey 283; State v. Addington, 2 Bailey, 516; or the court may proceed to pass sentence. State v. Fuller, 1 McCord, 178.

Under the Constitution, the President may grant a conditional pardon or commutation of sentence. U. S. v. Wilson, 7 Pet. 150.

The President may grant a conditional pardon provided the condition be compatible with the genius of our Constitution. 1 Op. Atty-Gen. 341, 432.

Where a condition is annexed to a pardon granted, the fact that the person pardoned is in prison, and must accept the condition before receiving the benefit of the pardon, does not constitute such duress as will make his acceptance of the condition of no effect. Greathouse's case, 2 Abb. U. S. 382.

One who claims the benefit of a pardon granted upon conditions, must make clear affirmative proof that the conditions have been completely performed. The requirement of an oath to be taken after issue of pardon is not complied with by showing that an oath of the same character was taken before its issue. Haym v. U. S. 7 Ct. of Cl. 443; Scott v. U. S. 8 Ct. of Cl. 457.

Immaterial variations in the oath do not affect the pardon. Hamilton v. U. S. 7 Ct. of Cl. 444.

A pardon "to begin and take effect" from the day an oath is taken, does not take effect till the oath is taken. Waring v. U. S. 7 Ct. of Cl. 501.

A pardon on condition that the person pardoned should not claim any of his property or the proceeds thereof that had been sold by the order, judgment or decree of a court under the confiscation laws of the U. S. is a bar to his claim. U. S. v. Six Lots of ground, 1 Woods, 234.

Where the power is conferred upon the Executive by the Constitution to grant pardons, it includes the granting conditional pardons. People v. Potter, 1 Park. Cr. R. 47; Hunt, ex parte, 5 Eng. 284.

Banishment from U. S. is a lawful condition. People v. Potter, 1 Park. Cr. R. 47; or that he shall leave the state. State v. Smith, 1 Bailey, 283.

In Virginia, a condition annexed to a pardon was held void and the pardon absolute. Commonwealth v. Fowler, 4 Call. 35.

In New York it was held that a clause that nothing contained therein is intended to relieve the prisoner from the legal disabilities arising upon his conviction and sentence, but solely from imprisonment, was incongruous and repugnant, and will be considered as surplusage. People v. Pease, 3 Johns. Cas. 333.

See, also, note to 14 L.R.A. 286. Power to impose conditions extending beyond term of sentence —see note, 5 L.R.A.N.S. 1002.

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Co. 3, Inst. 233; see, also, Patrick Madan's case, 1 Leach, Crown Law, 223; 4 Bl. Com. 401; 1 Chit. Cr. Law, 70, 73; Bac. Abr. Pardon, E.

This has been the construction put, all but universally, upon similar language in the constitutions of the several States.

People v. James, 2 Cai. 57; Flavell's case, 8 Watts & Serg. 196; The State v. Smith, 1 Bailey, 283; The State v. Addington, 2 Bailey, 516; The People v. Potter, 1 Park. Cr. 47.

This court has held that the President may annex conditions to a pardon.

U. S. v. Wilson, 7 Pet. 150.

By the local law applicable to the District of Columbia, special pardons are conditionally authorized.

1 Maryland Laws, 1799; 2 Stat. at L. 103, sec. 1.

Mr. Justice Wayne delivered the opinion of the court:

The petitioner was convicted of murder in the District of Columbia, and sentenced to be hung on the 23d of April, 1852. President Fillmore granted him a conditional pardon. The material part of it is as follows: "For divers good and sufficient reasons I have granted, and do hereby grant unto him, the said William Wells, a pardon of the offense of which he was convicted, upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington." On the same day the pardon was accepted in these words: "I hereby accept the above and within pardon, with condition annexed."

An application was made by the petitioner 309*] to the Circuit Court *of the District of Columbia for a writ of habeas corpus. It was rejected and is now before this court by way of appeal.

The 2d article of the Constitution of the United States, section 2, contains this provision: "The President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Under this power, the President has granted reprieves and pardons since the commencement of the present government. Sundry provisions have been enacted, regulating its exercise for the Army and Navy, in virtue of the constitutional power of Congress to make rules and regulations for the government of the Army and Navy. No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases the President has acted exclusively under the power as it is expressed in the Constitution.

This case raises the question, whether the President can constitutionally grant a conditional pardon to a convicted murderer, sentenced to be hung, offering to change that punishment to imprisonment for life; and if he does, and it be accepted by the convict, whether it is not binding upon him to justify a court to refuse him a writ of habeas corpus, applied for upon the ground that the pardon is absolute, and the condition of it void.

The counsel for the prisoner contends that the pardon is valid, to remit entirely the sentence of the court for his execution, and that the condition annexed to the pardon, and accepted by the prisoner, is illegal. It is also said that a President granting such a pardon, assumes a power not conferred by the Constitution—that he legislates a new punishment into existence, and sentences the convict to suffer it; in this way violating the legislative and judicial powers of the government, it being the province of the first to enact laws for the punishment of offenses against the United States; and that of the judiciary, to sentence convicts for violations of those laws, according to them. It is said to be the exercise of prerogative, such as the King of England has in such cases; and that, under our system, there can be no other foundation, empowering a President of the United States to show the same clemency.

We think this is a mistake, arising from the want of due consideration of the legal meaning of the word "pardon." It is supposed that it was meant to be used exclusively with reference to an absolute pardon, exempting a criminal from the punishment which the law inflicts for a crime he has committed.

But such is not the sense or meaning of the word, either in common parlance or in law. In the first it is forgiveness, release, remission. Forgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise. *Release from pe- [*310 cuniary obligation, as where it is said, I pardon you your debt. Or it is the remission of a penalty, to which one may have subjected himself by the non-performance of an undertaking or contract, or when a statutory penalty in money has been incurred, and it is remitted by a public functionary having power to remit it.

In the law it has different meanings, which were as well understood when the Constitution was made as any other legal word in the Constitution now is.

Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course. Sometimes, though, an express pardon for one is a pardon for another, such as in approver and appellee, principal and accessary in certain cases, or where many are indicted for felony in the same indictment, because the felony is several in all of them, and not joint, and the pardon for one of them is a pardon for all, though they may not be mentioned in it; or it discharges sureties for a fine, payable at a certain day, and the King pardons the principal; or sureties for the peace, if the principal is pardoned after forfeiture. We might mention other legal incidents of a pardon, but those mentioned are enough to illustrate the subject of pardon, and the extent or meaning of the President's power to grant reprieves and pardons. It meant that the power was to be used according to law; that is, as it had been used in England, and these States when they were colonies, not because it was a prerogative power, but as incidents of the power to pardon, particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to

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show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy. And it was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when this court instructed Chief Justice Marshall to say, in The United States v. Wilson, 7 Pet. 162: "As the power has been exercised from time immemorial by the Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their prin-311*] ciples respecting the operation *and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the King, as the Chief Executive. Prior to the Revolution, the Colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were of course to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the Crown. Hence, when the words to grant pardons were used in the Constitution, they convey to the mind the authority as exercised by the English Crown, or by its representatives in the Colonies. At that time both Englishmen and Americans attached the same meaning to the word "pardon." In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution. This is in conformity with the principles laid down by this court in Cathcart v. Robinson, 5 Pet. 264, 280; and in Flavell's case, 8 Watts & Serg. 197; Attorney-General's brief.

A pardon is said by Lord Coke to be a work of mercy, whereby the King, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty, temporal or ecclesiastical, 3 Inst. 233. And the King's coronation oath is, "that he will cause justice to be executed in mercy." It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend. Co. Litt. 274–276; 2 Hawkins Ch. 36, sec. 46; 4 Black. Com. 401. And if the felon does not perform the condition of the pardon, it will be altogether void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced. Cole's case, Moore, 466; Bac. Abr. Pardon, E. In the case of Packer and others—Canadian prisoners—5 Mees. & Welsby, 32, Lord Abinger decided for the court; if the condition upon which alone the pardon was granted be void, the pardons *must also [*312 be void. If the condition were lawful, but the prisoner did not assent to it nor submit to be transported, he cannot have the benefit of the pardon—or if, having assented to it, his assents be revocable, we must consider him to have retracted it by the application to be set at liberty, in which case, he is equally unable to avail himself of the pardon.

But to the power of pardoning there are limitations. The King cannot, by any previous license, make an offense dispunishable which is malum in se—i. e., unlawful in itself, as being against the law of nature, or so far against the public good as to be indictable at common law. A grant of this kind would be against reason and the common good, and therefore void, 2 Hawk. ch. 37, sec. 82. So he cannot release a recognizance to keep the peace with another by name, and generally with other lieges of the King, because it is for the benefit and safety of all his subjects, 3 Inst. 238. Nor, after suit has been brought in a popular action, can the King discharge the informer's part of the penalty, 3 Inst. 238; and if the action be given to the party grieved, the King cannot discharge the same, 3 Inst. 237. Nor can the King pardon for a common nuisance, because it would take away the means of compelling a redress of it, unless it be in a case where the fine is to the King, and not a forfeiture to the party grieved. 2 Hawk. ch. 37, sec. 33; 5 Chit. Burn. 2.

And this power to pardon has also been restrained by particular statutes. By the Act of settlement, 12 & 13 Will. III. ch. 2 Eng., no pardon under the great seal is pleadable to an impeachment by the Commons in Parliament, but after the articles of impeachment have been heard and determined, he may pardon. The provision in our Constitution, excepting cases of impeachment out of the power of the President to pardon, was evidently taken from that Statute, and is an improvement upon the same. Nor does the power to pardon in England extend to the Habeas Corpus Act, 31 Car. II. c. 2, which makes it a premunire to send a subject to any prison out of England, etc., or beyond the seas, and further provides that any person so offending shall be incapable of the King's pardon. There are also pardons grantable as of common right, without any exercise of the King's discretion; as where a statute creating an offense, or enacting penalties for its future punishment, holds out a promise of immunity to accomplices to aid in the conviction of their associates. When accomplices do so voluntarily, they have a right absolutely to a pardon, 1 Chit. C. L. 766. Also, when, by the King's proclamation, they are promised immunity on discovering their accomplices and are the means of convicting them. Rex v. Rudd, Cowp. 334; 1 Leach, 118. But except in these cases, accomplices, though admitted according to the usual phrase to be "King's *evidence," have no [*313

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absolute claim or legal right to a pardon. But they have an equitable claim to pardon, if upon the trial a full and fair disclosure of the joint guilt of one of them and his associates is made. He cannot plead it in bar of an indictment for such offense, but he may use it to put off the trial, in order to give him time to apply for a pardon. Rudd's case, Cowp. 331; 1 Leach, 115. So, conditional pardons by the King do not permit transportation or exile as a commutable punishment, unless the same has been provided for by legislation.

See 39 Eliz. ch. 4, and 5 Geo. IV. ch. 84, a consolidation of all the laws regulating the transportation of offenders from Great Britain.

Having shown, by the citation of many authorities, the King's power to grant conditional pardons, with the restraints upon the power, also when pardons for offenses and crimes are grantable of course, and when a party has an equitable right to apply for a pardon, we now proceed to show, by the decisions of some of the courts of the States of this Union, that they have expressed opinions coincident with what has been stated to be the law of England, and more particularly how the pardoning power may be exercised in them by the Governors of the States, whose constitutions have clauses giving to them the power to grant pardons, in terms identical with those used in the Constitution of the United States.

In the constitution of the State of Pennsylvania, of 1790, it is declared in the 2d article, section 9, that the Governor shall have power to remit fines and penalties, and grant reprieves and pardons, except in cases of impeachment.

Sargeant, Justice, said in Flavel's case, 8 Watts & Serg. 197, "several propositions were made in the convention which formed the Constitution of 1838, to limit and control the exercise the power of pardon by the Executive, but they were overruled and the provision left as it stood." "Now, no principle is better settled than that for the definition of legal terms and construction of legal powers mentioned in our Constitution and laws; we must resort to the common law when no Act of Assembly, or judicial interpretation, or settled usage, has altered their meaning."

Then proceeding to show the nature and application of conditions, the learned judge remarks: "And so may the King make a charter of pardon to a man, of his life, upon condition. A pardon, therefore, being an act of such a nature as that by the common law it may be upon any condition, it has the same nature and operation in Pennsylvania, and it follows that the Governor may annex to a pardon any condition, whether subsequent or precedent, not forbidden by law. And it lies 314*] upon the *grantee to perform the condition; or if the condition is not performed, the original sentence remains in full vigor and may be carried into effect."

To this case we add those of The State v. Smith, 1 Bailey's S. C. 283, 288; also South Carolina v. Addington, in the 2d volume of the same reporter, p. 516; also Hunt, ex parte, 10 Ark. 284; also that of The People v. Potter, 4 N. Y. Legal Observer, 177; S. C. 1 Parker, Cr. 47; and the case of the U. S. v. George Wilson, 7 Pet. 150.

But it was urged by the counsel who represents the petitioner, that the power to reprieve and pardon does not include the power to grant a conditional pardon, the latter not having been enumerated in the Constitution as a distinct power. And he cited the constitutions of several of the States, the legislation of others, and two decisions, to show that when the power to commute punishment had not been given in terms, that legislation had authorized it; and that when that had not been done, that the courts had decided against the commutation by the governors of the States. And it was said, so far from the President having such a power, that as the grant was not in the Constitution, Congress could not give it.

It not unfrequently happens in discussions upon the Constitution, that an involuntary change is made in the words of it, or in their order, from which, as they are used, there may be a logical conclusion, though it be different from what the Constitution is in fact. And even though the change may appear to be equivalent, it will be found upon reflection not to convey the full meaning of the words used in the Constitution. This is an example of it. The power as given is not to reprieve and pardon, but that the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. The difference between the real language and that used in the argument is material. The first conveys only the idea of an absolute power as to the purpose or object for which it is given. The real language of the Constitution is general; that is, common to the class of pardons, or extending the power to pardon, to all kinds of pardons known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them. A single remark from the power to grant reprieves will illustrate the point. That is not only to be used to delay a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases ex necessitate legis, as where a female after conviction is found to be enceinte, or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces *delay in the exe- [*315 cution of a sentence, the means to be used to determine either of the two just mentioned, are clearly within the President's power to direct; and reprieves in such cases are different in their legal character, and different as to the causes which may induce the exercise of the power to reprieve.

In this view of the Constitution, by giving to its words their proper meaning, the power to pardon conditionally is not one of inference at all, but one conferred in terms.

The mistake in the argument is, in considering an incident of the power to pardon the exercise of a new power, instead of its being a part of the power to pardon. We use the word "incident" as a legal term, meaning something appertaining to and necessarily depending upon another, which is termed the principal.

But admitting that to be so, it may be said, as the condition, when accepted, becomes a substitute for the sentence of the court, involving another punishment, the latter is substantially the exercise of a new power. But this is

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not so, for the power to offer a condition, without ability to enforce its acceptance, when accepted by the convict, is the substitution, by himself, of a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made.

As to the suggestion that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding upon them, because they are made whilst under dures per minas and duress of imprisonment, it is only necessary to remark, that neither applies to this case, as the petitioner was legally in prison. "If a man be legally imprisoned, and either to procure his discharge, or on any other fair account, seal a bond or deed, this is not duress or imprisonment, and he is not at liberty to avoid it. And a man condemned to be hung cannot be permitted to escape the punishment altogether, by pleading that he had accepted his life by duress per minas." And if it be further urged, as it was in the argument of this case, that no man can make himself a slave for life by convention, the answer is, that the petitioner had forfeited his life for crime, and had no liberty to part with.

We believe we have now noticed every point made in the argument by counsel on both sides, except that which deduces the President's power to grant a conditional pardon, from the local law of Maryland, of force in the District of Columbia. We do not think it necessary to discuss it, as we have shown that the President's power to do so exists under the Constitution of the United States.

We are of opinion that the Circuit Court of the District of Columbia rightfully refused the petitioner's application, and this court affirms it.

316*] *Mr. Justice **McLean**, dissenting:

William Wells was convicted of murder, in the District of Columbia, and sentenced to be hung on the 23d of April, 1852; on which day President Fillmore granted him a conditional pardon, for his acceptance, as follows: "The sentence of death is hereby commuted to imprisonment for life, in the penitentiary at Washington." On the same day this pardon was accepted, as follows: "I hereby accept the above and within pardon, with condition annexed." This acceptance was signed by Wells, and witnessed by the jailer and warden. Wells now claims that the pardon is absolute and the condition null and void, and that consequently he is entitled to a discharge from imprisonment.

Application was made in this case to the Circuit Court of the District of Columbia by petition for a writ of habeas corpus, and on the petition the following entry was made on the records of that court: "William Wells, who was convicted in the Circuit Court of this District of murder, and sentenced to be hung on the 23d of April, 1853, which sentence was on that day commuted by the President of the United States, to that of imprisonment for life in the penitentiary of the District, having been brought before that court on a writ of habeas corpus, the court after hearing the arguments of counsel, and mature deliberation being thereupon had, do order that the said William Wells be remanded to the penitentiary, the court being of opinion that the President of the United States has the power to commute the sentence of death to that of imprisonment for life, in the penitentiary."

A petition for a habeas corpus to this court has been presented, and the case has been argued on its merits, and it is now before us for consideration.

This case is brought here, not as an original application, but in the nature of an appeal from the decision of the Circuit Court. It is not an appeal in form, but in effect, as it brings the same subject before us, with the decisions of the Circuit Court on the habeas corpus, that the principles laid down by it may be considered.

In Ex parte Watkins, 7 Pet. 568, the court say: "Upon this state of the facts several questions have arisen and been argued at the bar; and one, which is preliminary in its nature, at the suggestion of the court. This is, whether, under the circumstances of the case, the court possess jurisdiction to award the writ; and upon full consideration, we are of opinion that *the court do possess jurisdiction. The [*317 question turns upon this, whether it is an exercise of original or appellate jurisdiction. If it be the former, then, as the present is not one of the cases in which the Constitution allows this court to exercise original jurisdiction, the writ must be denied. Marbury v. Madison, 1 Cranch, 137; 1 Pet. Cond. 267. If the latter, then it may be awarded, since the Judiciary Act of 1789, sec. 14, has clearly authorized the court to issue it.

"This was decided in the case of U. S. v. Hamilton, 3 Dall. 17; Ex parte Bollman & Swartwout, 4 Cranch, 75; and Ex parte Kearney, 7 Wheat. 38. The doubt was, whether, in the actual case before the court, the jurisdiction sought to be exercised was not original, since it brought into question, not the validity of the original process of capias ad satisfaciendum, but the present right of detainer of the prisoner under it. Upon further reflection, however, the doubt has been removed."

In that case, this court "considered Watkins in custody under process awarded by the Circuit Court, and that whether he was rightfully so was the very question before the court; and if the court should remand the prisoner, it would clearly be the exercise of an appellate jurisdiction." The same remark applies with equal force and effect to the case before us.

In this case the question is, whether Wells is rightfully detained, under the order of the Circuit Court, in virtue of the commutation of the original sentence by the President, and which the Circuit Court has held to be a legal detention.

It is not perceived that there is any difference, in principle, between this case and the case of Watkins. The court has no power to revise, in this form, the judgment of the Circuit Court under the law in a criminal case; but, as in the case of Watkins, we may decide whether the individual is held by a legal custody.

It is said the convict is now in prison under the original sentence of the court. So far as that sentence goes, the man is presumed to have been hung in April, 1852. But it is insisted the President had power to reprieve from the sentence of death. This is admitted; but no reprieve has been granted. On the contrary, an

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act has been done, entirely inconsistent with a reprieve, as that only suspends the punishment for a fixed period. The punishment of death has been commuted, for confinement to hard labor in the penitentiary during life. It is a perversion of the facts to say that Wells has been reprieved by the President; nor can it be said that he is now in confinement under a sentence of death. The sentence of death has been commuted for confinement. Since April, 1852, that sentence has been abrogated in effect; for if the President had power to commute the crime, the sentence is at an end. The culprit 318*] is detained in *prison under this commutation of the President, which the Circuit Court held he had the power to do, and remanded the prisoner on that ground; and whether this be legal, is the inquiry on the habeas corpus. It does not reach the original sentence of the court. That sentence is considered only as the ground of the commutation; and if the President had no power to make it, the detention of Wells is illegal. Is not this a legitimate subject of inquiry on a habeas corpus? It has been held to be a legal detention by the Circuit Court, and this opinion of the Circuit Court is brought before us on the habeas corpus, as the only cause of detention.

The 2d section of the 2d article of the Constitution of the United States declares, that "the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachments."

The meaning of the word "pardon," as used in the Constitution, has never come before this court for decision. It has often been decided in the States, that the Governor may grant conditional pardons by commuting the punishment. But in these cases the Governor acted generally, if not uniformly, under special provisions in the Constitution or laws of the State, or on the principles of the common law adopted by the State. This is the case in New York, Maryland, Ohio, and many other states.

It is argued by the Attorney-General, that the word "pardon" was used, in the Constitution, in reference to the construction given to it in England, from whence was derived our system of laws and practice; and that the powers exercised by the British Sovereign under the term "pardon" is a construction necessarily adopted with the term. If this view be a sound one, it has the merit of novelty. The executive office in England and that of this country is so widely different, that doubts may be entertained whether it would be safe for a republican Chief Magistrate, who is the creature of the laws, to be influenced by the exercise of any leading power of the British Sovereign. Their respective powers are as different in their origin as in their exercise. A safer rule of construction will be found in the nature and principles of our own government. Whilst the prerogatives of the Crown are great, and occasionally, in English history, have been more than a match for the Parliament, the President has no powers which are not given him by the Constitution and laws of the country; and all his acts beyond these limits are null and void.

There is another consideration of paramount importance in regard to this question. We have under the federal government no common law offenses, nor common law powers to punish in our courts; and the same may be said of our Chief *Magistrate. It would be strange [*319 indeed if our highest criminal courts should disclaim all common law powers in the punishment of offenses, whilst our President should claim and exercise such powers in pardoning convicts.

The power of commutation overrides the law and the judgments of the courts. It substitutes a new, and, it may be, an undefined punishment for that which the law prescribes a specific penalty. It is, in fact, a suspension of the law, and substituting some other punishment which, to the Executive, may seem to be more reasonable and proper. It is true the substituted punishment must be assented to by the convict; but the exercise of his judgment, under the circumstances, may be a very inadequate protection for his rights.

If the law controlled the exercise of this power, by authorizing solitary confinement for life, as a substitute for the punishment of death, and so of other offenses, the power would be unobjectionable; the line of action would be certain, and abuses would be prevented. But where this power rests in the discretion of the Executive, not only as to its exercise, but as to the degree and kind of punishment substituted, it does not seem to be a power fit to be exercised over a people subject only to the laws.

To speak of a contract by a convict, to suffer a punishment not known to the law, nor authorized by it, is a strange language in a government of laws. Where the law sanctions such an arrangement, there can be no objection; but when the obligation to suffer arises only from the force of a contract, it is a singular instrument of executive power.

Who can foresee the excitements and convulsions which may arise in our future history? The struggle may be between a usurping Executive and an incensed people. In such a struggle, this right, claimed by the Executive, of substituting one punishment for another, under the pardoning power, may become dangerous to popular rights. It must be recollected that this power may be exercised, not only in capital cases, but also in misdemeanors, embracing all offenses punished by the laws of Congress. Banishment, or other modes of punishment, may be substituted and inflicted, at the discretion of the national Executive. I cannot consent to the enlargement of executive power, acting upon the rights of individuals, which is not restrained and guided by positive law.

I have no doubt the President, under the power to pardon, may remit the penalty in part, but this consists in shortening the time of imprisonment, or reducing the amount of the fine, or in releasing entirely from the one or the other. This acts directly upon the sentence of the court, under the law, and is strictly an *exercise of the pardoning power in [*320 lessening the degree of punishment, called for by mistaken facts on the trial, or new ones which have since become known.

The case of The U. S. v. Wilson, 7 Pet. 150, has been referred to by the Attorney-General as sanctioning conditional pardons. But the remarks of the court in that case arose on the pleadings, and not on the power of the President. He had pardoned Wilson, but that pardon had not been pleaded, or brought before the court by motion or otherwise, and the court

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held that the pardon could not be considered unless it was brought judicially before it. In that case the Chief Justice said: "The Constitution gives to the President, in general terms, the power to grant reprieves and pardons for offenses against the United States."

And he says, "as this power has been exercised from time immemorial by the Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles, respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." And he goes on to show that a pardon, like any other defense, must be pleaded, to enable the court to act upon it. There is nothing in the case which countenances the power of the President, as in this case is contended, to commute the punishment of death for confinement during life in the penitentiary. The Chief Justice said, "a pardon may be conditional," in reference to grants of pardon in England, and by Governors of states.

There can be no doubt, where one punishment is substituted, under the laws of England, for another—as banishment for death—if the convict shall return he may be arrested on the original offense; and if he shall be found by a jury to be the identical person originally convicted, the penalty of death incurred by him may be inflicted. And the same thing may be done in regard to all offenses where, in this country, the law authorizes the pardoning power to modify the punishment and give effect to the commutation.

In 4 Call. 35, in Virginia, a case is reported where the prisoner was indicted for felony. On motion of the Attorney-General for an award of execution, the Governor's pardon was pleaded, and urged as absolute, because the Governor had no authority to annex the condition. The general court held that the condition was illegal, and therefore the pardon was absolute. Another case in North Carolina, reported in 4 Hawks, 193, the defendant was convicted of forgery, sentenced to the pillory, three years' imprisonment, thirty-nine lashes, and a fine of 321*] *$1,000; execution issued for fine and costs; conditional pardon by the Governor. The judge said "the Governor cannot add or commute a punishment—it was consistent with his power to remit."

We are told that when a term is used in our Constitution or statutes which is known at the common law, we look to that system for its meaning. Pardon is a word familiar in common law proceedings, but it is not a term peculiar to such proceedings. It applies to the ordinary intercourse of men, and it means remission, forgiveness. It is said, in a monarchy, the offense is against the monarch, and that consequently he is the only proper person to forgive.

Bacon says the power of pardoning is irreparably incident to the Crown, and is a high prerogative of the King. And Comyns, in his Digest, says: "The King, by his prerogative, may grant his pardon to all offenders attainted or convicted of a crime; and that statutes do not restrain the King's prerogative, but they are a caution for using it well."

The power to pardon is a prerogative power of the monarch, which cannot, it seems, be restrained by statute. Is this the usage or the common law meaning of the word "pardon," to which we are to refer as a guide in the present case? If the President can exercise the pardoning power, as free from restraints as the Queen of England, his prerogative is much greater than has been supposed. Instead of looking into the nature of our government, for the true meaning of terms vesting powers in the Executive, are we to be instructed by studying the regalia of the Crown of England; not to ascertain the definition of the word "pardon," but to be assured what powers are exercised under it by the monarch of England. This is a new rule of construction of the constitutional powers of the President. I had thought he was the mere instrument of the law, and that the flowers of the Crown of England did not ornament his brow.

In his commentary on the Constitution, Judge Story says, 346: "The whole structure of our government is so entirely different, and the elements of which it is composed are so dissimilar from that of England, that no argument can be drawn from the practice of the latter, to assist us in a just arrangement of the executive authority."

It is not the meaning of the word "pardon" that is objected to; but it is the prerogative powers of the Crown which are exercised under that designation. The President is the executive power in this country, as the Queen holds the executive authority in England. Are we to be instructed as to the extent of the executive power in this country, by looking into the exercise of the same power in England?

*In the Act for the Better Government [*322 of the Navy of the United States, passed the 23d April, 1800 (2 Stat. at L. p. 51, art. 42), it is declared: "The President of the United States, or, when the trial takes place out of the United States, the commander of the fleet or squadron, shall possess full power to pardon any offense committed against these articles, after conviction, or to mitigate the punishment decreed by a court-martial." If, in the opinion of Congress, the power to pardon included the power to commute the punishment, this provision would seem to be unnecessary.

But admit that the power of the President to pardon, is as great as are the prerogatives of the Crown in England, still the Act before us is unsustainable. The Queen of England cannot do what the President has done in this instance. She has no power, except under statutes, to commute a punishment, to which the prisoner has been judicially sentenced, for any other punishment at her discretion.

By the Act of George III. ch. 140, it is provided, "that if His Majesty shall be graciously pleased to extend his mercy to any offender liable to the punishment of death by the sentence of a naval court-martial, upon condition of transportation, or of transporting himself beyond seas, or upon condition of being imprisoned within any jail in Great Britain, or on condition of being kept to hard labor in any jail or house of correction, or penitentiary house, etc., it shall and may be lawful for any justice of the King's Bench, etc., upon such intention of mercy as aforesaid being notified in writing, to allow to such offender the benefit of such conditional pardon as shall be ex-

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pressed in such notification. And the judge is required to make an order in regard to the punishment, which is declared to be as effectual as if such punishment had been inflicted by the sentence of the court; and the sentence of death was made to apply to such offender should he escape."

And again; by the Act of George IV. 21st June, 1824, it is provided, "when His Majesty shall be pleased to extend his mercy, upon condition of transportation beyond seas, etc., one of His Majesty's principal secretaries shall signify the same to the proper court, before which the offender has been convicted; such court shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender. And the Act declares that any person found at large, who had been thus transported, should suffer death," etc.

Statute 28, 7 & 8 of George IV. sec. 13, declares that, "when the King's Majesty shall be pleased to extend his royal mercy to any offender, his royal sign-manual, countersigned 323*] by one of his *principal secretaries of state, shall grant to such offender a free or a conditional pardon," etc.

In 54 Geo. III. ch. 146, where there was a conviction for high treason, the King was authorized to change the punishment—that said person shall not be hanged by the neck—but that instead thereof such person should be beheaded, etc.

It is laid down in Coke's 3d Institute, Vol. VI. p. 52: "Neither can the King by any warrant under the great seal alter the execution, otherwise than the judgment of the law doth direct." In that same book, p. 211, he says, "it is a maxim of law, that execution must be according to the judgment."

The Sovereign of England, with all the prerogatives of the Crown, in granting a conditional pardon, cannot substitute a punishment which the law does not authorize. The law authorizes the Sovereign to transport, or inflict other punishments, for certain offenses, and this being signified to some one or more of the judges, effect is given to the condition through his or their instrumentality. So that the punishment inflicted is matter of record. And should the offender return into England, after banishment, the law subjects him to punishment under the original conviction. Here is certainty in limiting on the one hand the discretion of the pardoning power, and on the other the rights of the culprit.

With very few, if any, exceptions, conditional pardons have not been granted by the Governors of states, except where express authority has been given in the Constitution or laws of the states. So early as the 12th of March, 1794, a law of New York provided "that it shall and may be lawful for the person administering the government of the State, for the time being, in all cases in which he is authorized by the Constitution to grant pardons, to grant the same upon such conditions, and with such restrictions, and under such limitations, as he may think proper."

The distinguished Attorney-General, Mr. Wirt, being called on for his opinion in a case differing from the present, but involving, to some extent, the same principles, in his letter of 4th January, 1820, to the Secretary of the Navy, says: "Your letter of the 30th ultimo, submits, for my opinion, the power of the President to change the sentence of death, which has been passed by a general court-martial on William Bonsman, a private in the marine corps, into a sentence of service and restraint for the space of one year, after which to cause him to be drummed from the marine corps as a disgrace to it."

He refers to the 42d article of the Rules and Regulations of the Navy, which embrace the marine corps, and which declares that "the President of the United States shall possess full power to *pardon any offense [*324 against these articles after conviction, or to mitigate the punishment decreed by a court-martial." And he says, "the power of pardoning the offense does not, in my opinion, include the power of changing the punishment; but the 'power to mitigate the punishment,' decreed by a court-martial, cannot, I think, be fairly understood in any other sense than as meaning a power to substitute a milder punishment in the place of that decreed by the court martial, in which sense it would justify the sentence which the President proposes to substitute, in the case under consideration."

The power of mitigation, he says, "in general terms, leaves the manner of performing this act of mercy to himself, and if it can be performed in no other way than by changing its species, the President has, in my opinion, the power of adopting this form of mitigation;" and he observes, "to deny him the power of changing the punishment in this instance, is to deny him the power of mitigating the severest of all punishments. Congress foresaw that there were cases in which the exercise of the power of entire pardon might be proper; they therefore, in the first branch of the article, gave him the power to pardon. But they foresaw, also, that there would be cases in which it would be improper to pardon the offense entirely, in which there ought to be some punishment, but in which, nevertheless, it might be proper to inflict a milder punishment than that decreed by the court-martial; and hence, in another and distinct member of the article they give him, in general terms, the separate and distinct power of mitigation."

It will be seen that Mr. Wirt places the power of mitigation expressly under the article cited.

In a letter to the President on the power to pardon, dated 30th March, 1820, Mr. Wirt says: "The power of pardon, as given by the Constitution, is the power of absolute and entire pardon. On the principle, however, that the greater power includes the less, I am of opinion that the power of pardoning absolutely includes the power of pardoning conditionally. There is, however," he says, "great danger lest a conditional pardon should operate as an absolute one, from the difficulty of enforcing the condition, or, in case of a breach of it, resorting to the original sentence of condemnation; which difficulty arises from the limited powers of the national government.

"But suppose," he remarks, "a pardon granted on a condition, to be executed by officers of the federal government—as, for example, to work on a public fortification—and suppose this condition violated by running away, where is the power of arrest, in these

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circumstances, given by any law of the United States? And suppose the arrest could be made, 325*] where is the *clause in any of our judiciary acts that authorizes a court to proceed in such a state of things? And without some positive legislative regulation on the subject, I know that some of our federal judges would not feel themselves at liberty to proceed, de novo, on the original case. It is true the King of England grants such conditional pardons by the common law; but the same common law has provided the mode of proceeding for a breach of the condition on the part of the culprit. We have no common law here, however, and hence arises the difficulty." And he says: "If a condition can be devised whose execution would be certain, I have no doubt that the President may pardon on such condition. All conditions precedent would be of this character; e. g., pardon to a military officer under sentence of death, on the previous condition of resigning his commission."

In his letter to the President, dated 18th September, 1845, Mr. Attorney-General Mason says: "I cannot doubt the power of the President to mitigate a sentence of dismission from the service, by commuting it into a suspension for a term of years without pay. A dismission is a perpetual suspension without pay; and the limited suspension without pay is the inferior degree of the same punishment. The minor is contained in the major." And he says: "The sentence of death for murder could be mitigated by substituting any punishment which the law would authorize the court to inflict for manslaughter. This is the inferior degree of the offense."

And again, in his letter to the Secretary of the Navy, dated 16th of October, 1845, Mr. Mason says: "Did this power to mitigate the sentence include the power to commute or substitute another and a milder punishment for that decreed by the court (referring to a court-martial), the mitigation," he says, "must be of the punishment adjudged, by reducing and modifying its severity, except as in sentences of death, where there is no degree." He says: "At the War Department it has always been considered that the Executive has not the power by way of mitigation, to substitute a different punishment for that inflicted by sentence of a court martial—the general rule being that the mitigated sentence must be a part of the punishment decreed." He further remarks, "that in 1820, Mr. Wirt gave an opinion recognizing this rule, but made a substitution of a different punishment for the sentence of death an exception; and he places it in the ground that capital punishment can only be mitigated by a change of punishment." Mr. Attorney-General should have said, that the power given in the article to mitigate was referred to by Mr. Wirt as authorizing the mitigation, and not the general power to pardon.

No higher authority than Mr. Wirt can be 326*] found, as coming *from the law officer of the government. It gives to the procedure now before us no countenance or support, but throws the weight of his great name against the exercise of the power assumed.

But it is said that the power of commutation may be exercised by the President under the laws of Maryland, adopted by Congress on the cession of the territory which now constitutes the District of Columbia.

The constitution of Maryland provides, that the Governor "alone may exercise all other the executive powers of government, where the concurrence of council is not required according to the laws of the State, and grant reprieves or pardons for any crime, except in cases where the law shall otherwise direct." This, I suppose, no one will contend, can be applied to the President of the United States. The constitutional provision is made subject to the action of the Legislature.

A Statute of Maryland was passed in 1847 (ch. 17), to make conditional pardons effectual. This law can only tend to show that there was no prior law by which such pardons could be made effectual.

The first law of Maryland on the subject of pardon was enacted in 1787. The 1st section provided, "that the Governor may, in his discretion, grant to any offender capitally convicted a pardon, on condition contained therein, and is and shall be effectual as a condition according to the intent thereof."

The 2d section provides, if the convict be a slave, he may be transported out of the State, and sold for the benefit of the State.

The 4th sec. declares, if a party who has been pardoned on condition of leaving the State shall return contrary thereto, he shall be arrested, and on being found by a jury to be the same person, the court shall pass such judgment as the law requires for the crime committed.

The second law on the same subject, was enacted in 1795.

The 1st sec. requires the Governor to issue a warrant to the sheriff, to carry the sentence of the court into effect. The 2d sec. that, in his discretion, the Governor may commute or change any sentence or judgment of death into other punishment of such criminal of this State, upon such terms and conditions as he shall think expedient. And if a slave, he may be transported and sold for the benefit of the State.

By an Act of Congress of the 27th of February, 1801, it was declared, "that the laws of Maryland, as they now exist, shall be and continue in force in that part of the said district which was ceded by that State to the United States, and by them accepted." This provision covers what is now the District of Columbia.

*That the general law of Maryland for[*327 the punishment of offenses, the practice of the courts, forms of action, contracts, etc., come under the laws of Maryland, is undoubted. But the question is, whether the above laws which regulate pardons by the Governor, apply to the President of the United States, in the exercise of the same power. After much reflection, I have come to the conclusion that they can neither justify nor control the exercise of the constitutional power of the President to grant a pardon, for the following reasons:

1. Their language is inappropriate, and some of their provisions are inconsistent with the duties of the President. The Governor is required to issue a warrant to execute the sentence of the court, and also to sell convicted slaves for the benefit of the State. Can the President do this?

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2. For more than half a century these acts have not been applied to the President, although he has often granted pardons, until in the case now before us. Nor have either of the laws been referred to by any one of the attorneys-general who have been consulted on the subject, and who have given elaborate opinions, and particularly Mr. Wirt, who dwells upon the difficulty, if not impracticability, of carrying out the condition on which the pardon was granted, without specific legislation. No reference was made to these laws by the late Attorney-General, on whose advice the punishment of death was commuted, in favor of Wells, to imprisonment for life.

Any regulation respecting the high prerogative power to pardon or commute the punishment of a convict, must be general, and extend as far as the federal jurisdiction extends, and cannot be restricted by any Act of Congress to any particular state or territory. The power is given in the Constitution, and it may be exercised commensurate with that fundamental law; and any modification of the power, to be exercised at the discretion of the President, must be co-extensive with the constitutional power.

The 8th section of the 1st article of the Constitution declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

4. The above Acts of Maryland can only operate in this case as Acts of Congress, and in that view they have been enacted more than fifty years, without being referred to or acted on during that period, although the subject of conditional pardon has been often discussed, and the want of provisions which they contain deeply felt and expressed. Under such circum-
328*] stances, *is it possible to consider those Acts, or either of them, as in force in this district since 1801? If this be so, it is the most extraordinary event that has occurred in the legal history of any country.

The laws adopted from Maryland were not specified by name; of course, those only which were local in their character, and were necessary in their nature to regulate local transactions, and the courts which settle controversies, were adopted. The laws which regulate the duty and powers of the Governor, in regard to pardons granted to offenders, no more apply to the President than duties prescribed for the action of the Governor in any other matter. This shows the reason why the above laws have been dormant, as if unknown, for more than fifty years. It is too late now to resuscitate them, however strongly the present exigency may call for them.

I am not opposed to commutation of punishment, where it may be called for by any great principle of justice or humanity; but the exercise of such power should be regulated by law, and not left to the discretion of the Executive. As the law now stands, the punishment substituted, as well as the exercise of the power, rests upon discretion; and there is no legal mode of giving effect to the commutation; and this is an unanswerable objection to it. No court would execute the convict on the original sentence under such circumstances.

If the condition on which a pardon shall be granted be void, the pardon becomes absolute. This, I think, is a clear principle, although there may be found some opinions against it. The President has the power to pardon, and if he make the grant on an impossible condition —for a void condition may be considered of that character—the grant is valid.

The condition being void, I think Wells is illegally detained, and should be discharged.

Mr. Justice Curtis, dissenting:

In Ex parte Kaine, 14 How. 117, I examined, with care, the jurisdiction of this court to issue writs of habeas corpus to inquire into causes of commitment. I then came to the conclusion that the mere fact that a circuit court had examined the cause of commitment and refused to discharge the prisoner, did not enable this court, by a writ of habeas corpus, to re-examine the same cause of commitment. Though subsequent reflection has confirmed the opinion then formed, I should have acquiesced in the jurisdiction assumed in this case, if a majority of the court, in Kaine's case has decided contrary to my opinion. But the question was then left undecided; and in this case, for the first time, in my judgment, has jurisdiction been assumed, on the *ground, not that [*329 the cause of commitment was originally examinable here—for that would be an exercise of original jurisdiction—but that though not thus originally examinable, yet, as the Circuit Court had the prisoner before it, and has remanded him, this court, by a writ of habeas corpus, may examine that decision and see whether it be erroneous or not.

That this is the only ground on which the jurisdiction over this case can be rested, or that it cannot be considered to be an examination of the original cause of commitment, will clearly appear, if we attend to what that cause of commitment was. The petititoner was convicted capitally. His sentence is not brought before us in form, but we must infer that it ordered him to be imprisoned until the day which was by the court, or should be by the Executive, fixed for his execution. He received a conditional pardon. Regularly, I consider that he should have been brought before the Circuit Court upon a writ of habeas corpus, and have there pleaded his pardon, in bar of so much of his sentence as directed him to be hung; or, in bar of the entire sentence if the condition requiring him to continue in imprisonment for life, was inoperative. United States v. Wilson 7 Pet. 150. If this had been done, the Circuit Court would have pronounced its judgment upon the validity of such a plea; and in conformity with the decision which that court has made in this case, it must have entered a judgment vacating its former sentence, and sentencing the petitioner to imprisonment during life in the penitentiary of this District.

Over such a sentence this court could have exercised no control, either by writ of error or of habeas corpus. Not by writ of error, for none is allowed in criminal cases. Not by habeas corpus, for, as was held in Ex parte Watkins, 3 Pet. 193, a writ of habeas corpus cannot issue from this court to examine a criminal sen-

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tence of the Circuit Court, even where the objection to the sentence is, that it appears on the face of the record, in the opinion of this court, that the Circuit Court had not jurisdiction, and its proceeding was merely void; because the circuit courts are the final judges of their own jurisdiction; and of all their proceedings in criminal cases. This court has no power to reverse one of their criminal judgments for any cause, and consequently no power to form any judicial opinion upon the correctness thereof.

In the case before us, so far as appears, the petitioner did not formally plead his pardon, nor did the Circuit Court, by an entry on its records, formally vacate the capital sentence, and sentence the prisoner anew. But that court, using its own final judgment as to the proper mode of proceeding in this criminal case, proceeded in such manner and form as it 330*] deemed to be according *to law. It remanded the prisoner, in execution of the original sentence, so far as that directed his imprisonment. After this had been done, the imprisonment may be viewed in one of two aspects. It may be considered as continued under the original sentence; the execution of that part of the sentence which commanded him to be hung being postponed by the pardon, so long as there shall be no breach of the condition; or the original sentence may be treated as modified by the proceedings under the habeas corpus in the Circuit Court, and that part of the sentence which commanded him to be hung, as annulled, the residue remaining in force.

As I view this case, therefore, it stands thus: the petitioner is imprisoned under a criminal sentence of the Circuit Court, either as originally pronounced, or as modified by the order of the Circuit Court made under the writ of habeas corpus. That original or modified criminal sentence is the cause of his commitment. Thought this court has no jurisdiction by writ of error to revise such a sentence, and has deliberately decided, in Ex parte Watkins, that a writ of habeas corpus cannot be made a writ of error for such a purpose, yet by a writ of habeas corpus we do revise such a sentence in this case.

It seems to me that the refusal of a writ of error in criminal cases is not only idle, but mischievous, if a writ of habeas corpus, which is certainly a very clumsy proceeding for the purpose, may be resorted to, to bring the record of every criminal case, of whatever kind, before this court.

With deference for the opinions of my brethren, in my judgment, it goes very little way towards avoiding the difficulty to hold that, before one under a criminal sentence of a circuit court can thus attack his sentence collaterally, in a court which cannot review it by any direct proceeding, he must first apply to the Circuit Court for a writ of habeas corpus; and if the writ, or his discharge under it, be refused, he may then bring into action the appellate power of this court, and by a writ of habeas corpus out of this court stop the execution of a sentence, which we have no power to reverse. Few questions come before this court which may affect the general course of justice more deeply than questions of jurisdiction. This great remedial writ of habeas corpus, so efficacious and prompt in its action, and so justly valued in our country, may become an instrument to unsettle the nicely adjusted lines of jurisdiction, and produce conflict and disorder. If the true sphere of its action, and the precise limits of the power to issue it, should become in any degree confused or indistinct, serious consequences may follow—consequences not only affecting the efficient administration of the criminal laws of the United States, but the harmonious action of the *divided [*331 sovereignties by which our country is governed. For these reasons, though sensible of the bias, which I suppose everyone has in favor of this process, I have heretofore felt, and now feel constrained to examine with care the question of our jurisdiction to issue it; and being of opinion that this court has not power to inquire into the validity of the cause of commitment stated in this petition, I think it should be dismissed for that reason.

In this opinion Mr. Justice Campbell concurs.

MARY ANN CONNOR, alias Mary Ann Van Ness, Tenant, etc., Plff. in Er.,

v.

SAMUEL A. PEUGH'S LESSEE.

(See S. C. 18 How. 394, 395.)

One, not party below, cannot bring error—matters in discretion of court below, not subject of appeal or writ of error.

In ejectment, the tenant in possession having neglected to appear and have herself made defendant in the court below, cannot have a writ of error to the judgment against the casual ejector.

To the action of the court below, on a motion to set aside the judgment, and for leave to intervene, it being a matter of discretion, no appeal lies, nor is it the subject of a bill of exceptions or writ of error.

Argued Apr. 4, 1856. Decided Apr. 10, 1856.

IN ERROR to the Circuit Court of the United States for the District of Columbia.

Messrs. Bradley, Carlisle, and Lawrence, for defendant in error:

At the October Term, 1854, judgment by default was rendered in an action of ejectment brought by Peugh's Lessee, and a writ of possession was ordered, which was issued March 24, 1855, returnable the fourth Monday of March, instant, and was returned with the indorsement, "came to hand too late for service." On the 23d of May, 1855, an alias writ was issued, returnable on the third Monday of October, thereafter.

Before the return of this writ, to wit: on the 5th June, 1855, a motion was made and a petition filed by the defendant below (Connor) to set aside the judgment and to quash the writ of possession, on the ground that the declaration was not duly served upon her, in proper time.

At the October Term, 1855, this motion was overruled and the petition was dismissed. Thereupon the defendant below prayed an appeal from the judgment aforesaid, so as aforesaid rendered, to this court, which was granted, and the proceedings were brought to this court by writ of error.

NOTE.—Who may appeal to, or sue out writ of error from, Federal Supreme Court—see note, 66 L.R.A. 854.

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The defendant in error moves to dismiss the writ of error, on the ground that the writ of error is taken to the judgment of the court, overruling the motion and dismissing the petition, which was a matter in the sound discretion of the court below, and not the subject of a writ of error.

Mr. Brent for appellant.

Mr. Justice Grier delivered the opinion of the court:

Defendant in error moves to dismiss the writ of error in this case. It is an action of ejectment brought in the Circuit Court of this district in usual form, by serving a declaration on the tenant in possession with notice. The declaration and notice were served by the marshal, more than ten days before March Term, 1854. The tenant did not appear and have herself made defendant in place of the casual ejector, according to the exigency of the notice; and at October Term a judgment was entered against the casual ejector, in the usual and proper form. On the 5th of June, 1855, the tenant in possession came into court for the first time, and moved to set aside the judgment and execution issued thereon, and to be allowed to defend the suit, for reasons set forth in her affidavit. The court refused to grant this motion, "whereupon the said Mary Ann Connor prayed an appeal," etc.

The tenant in possession having neglected to appear and have himself made defendant, and confess lease, entry and ouster, the judgment was properly entered against the casual ejector. No one but a party to the suit can bring a writ of error. The tenant having neglected to have herself made such, cannot have a writ of error to the judgment against the casual ejector.

The motion afterwards made to have the judgment set aside, and for leave to intervene, was an application to the sound discretion of the court. To the action of the court on such a motion no appeal lies, nor is it the subject of a bill of exceptions or writ of error.

396*] *DANIEL SOUTH, John W. Stouffer, Daniel Middlekauff, Sr., and John A. K. Brewer, Piffs. in Error,

v.

THE STATE OF MARYLAND, Use of JONATHAN W. POTTLE.

(See S. C. 18 How. 396–403.)

Sheriff's bond—construction of—for what default, action may be brought on—sureties not liable for his breach of public duty, only when he acts ministerially, etc.—sureties not liable for his neglect to preserve the public peace by which plaintiff suffered injury.

Where the specific enumeration of duties in a sheriff's bond includes none but those classed as ministerial, the general expressions should be construed to include only such other duties of the same kind as are not enumerated.

To entitle a citizen to sue on the bond for his own use, he must show such a default as would entitle him to recover against the sheriff in an action on the case.

When the sheriff is punishable by indictment as for a misdemeanor, his sureties are not bound to suffer in his place, or to indemnify individuals for the consequences of such a criminal neglect.

For a breach of public duty, an officer is punishable by indictment; but where he acts ministerially, and is bound to render certain services to individuals, for a compensation in fees or salary, he is liable, for acts of misfeasance or nonfeasance, to the party who is injured by them.

The duty of conservator of the peace exercised by the sheriff is a public duty, for neglect of which he is amenable to the public, and punishable by indictment only.

An action on a sheriff's bond for a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the unlawful violence of a mob, is not maintainable.

The declaration alleges no special individual right, privilege or franchise in the plaintiff from the enjoyment of which he has been restrained or hindered by the malicious act of the sheriff; nor does it charge him with any misfeasance or nonfeasance in his ministerial capacity in the execution of any process in which the plaintiff was concerned, and therefore sets forth no sufficient cause of action.

Argued Apr. 2, 1856. Decided Apr. 21, 1856.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This is an action of debt upon the official bond of Daniel South, one of the plaintiffs in error, as Sheriff of Washington County, Maryland; the other plaintiffs in error being his sureties thereon. The evidence shows that Pottle, cestui que trust of the defendant in error, a resident of Massachusetts, had a judgment against one Robinson, Washington County, Maryland. A writ of fieri facias having issued, he went with the deputy-sheriff and his counsel, to have the same levied upon Robinson's property. While proceeding to make the levy, they were surrounded by workmen, armed with stones, etc., and threatened with violence, if the levy should be proceeded with. They went to a house near by for protection. The rioters maintained a constant armed guard about the house in which Pottle and his counsel were imprisoned, preventing escape. He appealed to the deputy-sheriff for protection, and protested against his leaving him, as he did, to consult with the defendant below, the High Sheriff.

Subsequently the deputy, in company with South, the High Sheriff, returned. Pottle demanded of South that he should protect them. South, however, failed to do so. Pottle did not escape until after he had paid a large sum of money to the rioters, for his enlargement, being an amount alleged to be due to them, as wages, by Robinson.

This cause having been argued by counsel at a former term of this court, upon consideration a new argument was ordered, and the following questions suggested to be argued by counsel, which were argued at this term of the court:

1. Whether or not the declaration contains a cause of action, entitling the plaintiff (Pottle) to recover against the sheriff and his sureties, within the condition of the official bond, according to the laws of the State of Maryland.

2. Whether or not the sheriff as conservator of the public peace, is liable to a civil action for an injury to the person or property of an individual from a riotous assembly or mob, according to any law of the State of Maryland, if it should appear said sheriff unreasonably omitted or neglected to exert his authority to suppress it.

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3. Whether or not the sheriff, as conservator of the public peace, is liable to the plaintiff in an execution, attending personally upon the levy or sale under it for an injury to his person or property from a riotous assembly or mob, according to any law of the State of Maryland, if it should appear that said sheriff unreasonably omitted or neglected to exert his authority to suppress it.

4. Whether or not, on the case last stated, the sheriff would be liable to the plaintiff in the execution, if he desisted in good faith from the execution of his authority at the instance and request of said plaintiff, while in the hands of the mob, from apprehension of great bodily injury, if an effort should be made to suppress it.

A further statement of the case appears in the opinion of the court.

Mr. **John Nelson**, for plaintiff in error:

1. The declaration contains no cause of action entitling the plaintiff to recover against the sheriff and his sureties, under the laws of the State of Maryland.

2. The sheriff, as conservator of the public peace, is not liable to a civil action for an injury to the person or property of an individual from a riotous assembly or mob, according to any law of the State of Maryland, even if it should appear that he unreasonably omitted to exert his authority to suppress it.

1 Thomas Coke, 81, 82; Com. Dig. Tit. Viscount—Authority of a Sheriff, C. 1; Watson, sheriff, 2, 3; 1 Perry & Davidson, 297; Pitcher v. King, 9 Ad. & E. 288; Holroyd v. Breare, 2 B. & A. 473; Tensley v. Nassau, 7 St. Tr. 42; Barnardiston v. Soames, Fran. K. B. 380.

3. The following authorities are cited under the 4th question submitted: Cook v. Palmer, 6 Barn. & C. 739; 8 Barn. & C. 598; 70 Mo. 536; 13 Mo. 437.

Messrs. **Reverdy Johnson** and **George W. Dobbin**, for defendant in error:

1. The sheriff was, virtute officii, conservator of the peace of the State.

Dalton on Sheriff, 26; Com. Dig. Sheriff, C. A. C. 1 C, 2; 2 Hawk. P. C. ch. 8, sec. 4; Cro. Car. 27; 3 Bac. Abr. 689, Title Sheriff, L.

2. As sheriff, he was responsible for acts and omissions of his deputies; and whether so or not, having been present during two days of the riot, he became responsible for all official omissions of his duty after such presence.

Dalton, 176; 8 Bac. Abr. 675; 2 McLean, 193; 6 Shep. 277, 2 App. 93.

3. The sheriff's official bond is liable for every failure on his part to faithfully execute said office of sheriff. His failure to protect and relieve Pottle was a breach of the condition of the bond upon which a right of action accrued to Pottle against the sheriff and his sureties.

1 Pet. 46; 12 Pick. 303; 6 Wend. 454.

In support of the affirmative of the first proposition suggested by the court, the counsel for the defendant in error submitted the following authorities:

Late Constitution of Maryland, secs. 42, 10; Acts of Assembly of Maryland, 1799, ch. 54; 1801, ch. 63; 1816, ch. 98, sec. 3; 1742, ch. 10; 1826, ch. 268; 1831, ch. 58, sec. 8; 1815, ch. 342; Stat. 17th Richard II. ch. 8; State v. Wayman, 2 Gill & J. 254; Respublica v. Montgomery, 1 Yeates, 419.

In support of the affirmative of the second point:

1 T. R. 493; Ashby v. White, 2 Ld. Raym. 938; Smith v. Hall, 2 Mod. 31; Clark v. Moore, Rep. Const. Ct. S. C. 151; Riddle v. Prop. Locks and Canals, 7 Mass. 169; Lincoln v. Hapsgood, 11 Mass. 350.

In support of the affirmative of the third point:

Watson on Sheriffs, 197.

Upon the fourth point, they cited Bac. Abr. Tit. Duress.

Mr. Justice **Grier** delivered the opinion of the court:

In this case a verdict was rendered for the plaintiff in the court below, and the defendant moved, in arrest of judgment, "that the matters set out in the declaration of the plaintiff are not sufficient, in law, to support the action." If it be found that the court erred in overruling this motion and in entering the judgment on the verdict, a consideration of the other points raised on the trial will be unnecessary.

The action is brought on the official bond of South, as sheriff of Washington County. The declaration sets forth the condition of the bond at length. The breach alleged is, in substance, "that while Pottle was engaged about his lawful business, certain evil-disposed persons came about him, hindered and prevented him, threatened his life, with force of arms demanded of him a large sum of money, and imprisoned and detained him for the space of four days; and until he paid them the sum of $2,500 for his enlargement."

That South, the sheriff, being present, the plaintiff, Pottle, applied to him for protection, and requested him to keep the peace of the State of Maryland; he, the said sheriff, having power and authority so to do. That the sheriff neglected and refused to protect and defend the plaintiff, and to keep the peace, wherefore it is charged, "the sheriff did not well and truly execute and perform the duties required of him by the laws of said State;" and thereby the said writing obligatory became forfeited, and action accrued to the plaintiff.

This declaration does not charge the sheriff with a breach of his duty in the execution of any writ or process in which Pottle, the real plaintiff in this case, was personally interested, but a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the unlawful violence of a mob. It assumes as a postulate that every breach or neglect of a public duty subjects the officer to a civil suit by any individual who, in consequence thereof, has suffered loss or injury; and consequently, that the sheriff and his sureties are liable to this suit on his bond, because he has not "executed and performed all the duties required of and imposed on him by the laws of the State."

The powers and duties of the sheriff are usually arranged under four distinct classes:

1. In his judicial capacity, he formerly held the sheriff's tourn, or county courts, and performed other functions which need not be enumerated.

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402*] *2. As king's bailiff, he seized to the king's use all escheats, forfeitures, waifs, wrecks, estrays, etc.

3. As conservator of the peace in his county or bailiwick, he is the representative of the King, or sovereign power of the State for that purpose. He has the care of the county, and though forbidden by Magna Charta to act as a justice of the peace in trial of criminal cases, he exercises all the authority of that office where the public peace was concerned. He may upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it, he may award process of the peace, and bind anyone in recognizance to keep it. He is bound, ex officio, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody. For these purposes he may command the posse comitatus or power of the county; and this summons, everyone over the age of fifteen years is bound to obey, under pain of fine and imprisonment.

4. In his ministerial capacity he is bound to execute all processes issuing from the courts of justice. He is keeper of the county jail, and answerable for the safe keeping of prisoners. He summons and returns juries, arrests, imprisons, and executes the sentence of the court, etc., etc.

1 Black. Com. 343; 2 Hawk. P. C. 8, sec. 4, etc., etc.

Originally the office of sheriff could be held by none but men of large estate, who were able to support the retinue of follows which the dignity of his office required, and to answer in damages to those who were injured by his neglect of duty in the performance of his ministerial functions. In more modern times, a bond with sureties supplies the place of personal wealth. The object of these bonds is security, not the imposition of liabilities upon the sheriff, to which he was not subject at common law. The specific enumeration of duties in the bond in this case includes none but those that are classed as ministerial. The general expression, in conclusion, should be construed to include only such other duties of the same kind as were not specially enumerated. To entitle a citizen to sue on this bond to his own use, he must show such a default as would entitle him to recover against the sheriff in an action on the case. When the sheriff is punishable by indictment as for a misdemeanor, in cases of a breach of some public duty, his sureties are not bound to suffer in his place, or to indemnify individuals for the consequences of such a criminal neglect.

It is an undisputed principle of the common law, that for a breach of a public duty, an officer is punishable by indictment; but where he acts ministerially, and is bound to render certain services to individuals, for a compensa-
403*] tion in fees or salary, he *is liable for acts of misfeasance or non-feasance to the party who is injured by them.

The powers and duties of conservator of the peace exercised by the sheriff are not strictly judicial; but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace. It is a public duty, for neglect of which he is amenable to the public, and punishable by indictment only.

The history of the law for centuries proves this to be the case. Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections.

In the case of Entick v. Carrington, State Trials, Vol. XIX. p. 1062, Lord Camden remarks: "No man ever heard of an action against a conservator of the peace as such."

The case of Ashby v. White, 2 Lord Raym. 938, has been often quoted to show that a sheriff may be liable to a civil action where he has acted in a judicial, rather than a ministerial capacity. This was an action brought by a citizen entitled to vote for member of Parliament, against the sheriff for refusing his vote at an election. Gould, Justice, thought the action would not lie, because the sheriff acted as a judge. Powis, because, though not strictly a judge, he acted quasi judicially. But Holt, Ch. J., decided that the action would lie: 1st. "Because the plaintiff had a right or privilege. 2d. That, by the act of the officer, he was hindered from the enjoyment of it." 3d. By the finding of the jury the act was done maliciously. The later cases all concur in the doctrine, that where the officer is held liable to a civil action for acts not simply ministerial, the plaintiff must allege and prove each of these propositions. See Cullen v. Morris, 2 Starkie, N. P. C. 577; Harman v. Tiffenden, 1 East, 555, etc., etc.

The declaration in the case before us is clearly not within the principles of these decisions. It alleges no special individual right, privilege, or franchise in the plaintiff, from the enjoyment of which he has been restrained or hindered by the malicious act of the sheriff; nor does it charge him with any misfeasance or non-feasance in his ministerial capacity, in the execution of any process in which the plaintiff was concerned. Consequently, we are of opinion that the declaration sets forth no sufficient cause of action.

The judgment of the Circuit Court is, therefore, reversed.

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*THE STATE OF PENNSYLVANIA, [*421
Complainant,

v.

THE WHEELING AND BELMONT BRIDGE COMPANY et al.

(See S. C. 18 How. 421-459.)

Act of Congress may supersede decree of court founded on public right—compact between Virginia and Kentucky—Act of Congress not in conflict with Constitution.

NOTE.—Power of Congress to regulate commerce, State licenses. Power of state to tax commerce—see note to Gibbons v. Ogden, 6 L. ed. U. S. 23, and note to Brown v. Maryland, 6 L. ed. U. S. 678.

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An Act of Congress, that a certain bridge across the Ohio River is "declared to be a lawful structure, and shall be so held and taken to be, anything in the laws of the United States to the contrary notwithstanding," supersedes the effect and operation of the decree of the court previously rendered, declaring it an obstruction to navigation and directing its removal.

Congress cannot annul a judgment of the court upon the private rights of parties, but can one founded on the unlawful interference with the enjoyment of a public right which is under the regulation of Congress.

The decree for costs is not affected by the Act of Congress.

The compact between the States of Virginia and Kentucky at the time of the admission of the latter into the Union, cannot operate as a restriction upon the power of Congress under the Constitution to regulate commerce among the several States.

The Act of Congress above referred to, is not in conflict with the clause of the Constitution that no preference shall be given to the ports of one State over those of another.

Motion for attachment for contempt for disobedience of an injunction against reconstruction of the bridge, denied for same reasons.

Argued Dec. 15, 1856. Decided Apr. 21, 1856.

THE original bill in this case was filed in this court, under its original jurisdiction, by the State of Pennsylvania, for the removal of an alleged obstruction to the navigation of the Ohio River, caused by the erection of the bridges at Wheeling. For the full history of the case, and all of the facts involved, consult the reports of the proceedings heretofore had in this court.

9 How. 647; 11 How. 528; 13 How. 518.

In May, 1852, this court rendered a decree, which declared the bridge in question to be an obstruction of the free navigation of the Ohio River, and directed that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement.

On August 31st, 1852, before the execution of the said decree, by an Act of Congress, the bridges constructed by the Company at Wheeling were declared to be lawful structures in their then condition, and were also declared to be post roads for the passage of the mail of the United States.

Subsequently, the main bridge was blown down in a gale of wind, and the Company was making preparations to rebuild it, when the plaintiff filed a bill praying for an injunction.

No opposition was made on the part of the Company, and the injunction was granted, as a matter of course, by Mr. Justice Grier, in vacation. The Company disregarded the injunction, and the present hearing arises on motions by the plaintiff for attachment and sequestration of the property of the Company for contempt, and a motion by the Company to dissolve the injunction.

A further statement appears in the opinion of the court.

Messrs. Stanton, Darragh, Walker and Campbell, for complainants.

Messrs. Johnson, Fitzhugh, Stuart, Cadwalader and Russell, for respondents.

Mr. Justice Nelson delivered the opinion of the court:

The motion in this case is founded upon a bill filed to carry into execution a decree of the court, rendered against the defendants at the adjourned term in May, 1852, which decree declared the bridge erected by them across the Ohio River, between Wheeling and Zane's Island, to be an obstruction of the free navigation of the said river, and thereby occasioned a special damage to the plaintiff, for which there was not an adequate remedy at law, and directed that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement.

Since the rendition of this decree, and on the 31st August, 1852, an Act of Congress has been passed as follows: "That the bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures in their present positions and elevations, and shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding."

And further, "That the said bridges be declared to be and are established post roads for the passage of the mails of the United States, and that the Wheeling and Belmont Bridge Company are authorized to have and maintain their bridges at their present site and elevation, and the officers and crews of all vessels and boats navigating said river are required to regulate the use of their said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of said bridges."

The defendants rely upon this Act of Congress as furnishing authority for the continuance of the bridge as constructed, and as superseding the effect and operation of the decree of the court previously rendered, declaring it an obstruction to the navigation.

On the part of the plaintiff, it is insisted that the Act is unconstitutional and void, which raises the principal question in the case.

In order to a proper understanding of this question, it is material *to recur to the [*430 ground and principles upon which the majority of the court proceeded in rendering the decree now sought to be enforced.

The bridge had been constructed under an Act of Legislature of the State of Virginia; and it was admitted that Act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce. It was claimed, however, that Congress had acted upon the subject and had regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the Acts of Congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the Act of the Legislature of Virginia afforded no authority or justification It was in conflict with the Acts of Congress, which were the paramount law.

This being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion, that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the Constitution and laws of Congress, nor in applying the appropriate remedy in behalf of the plaintiff. The ground and principles upon which the court proceeded

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will be found reported in 13 How. 518; 19 Curtis, 621.

Since, however, the rendition of this decree, the Acts of Congress, already referred to, have been passed, by which the bridge is made a post road for the passage of the mails of the United States, and the defendants are authorized to have and maintain it at its present site and elevation, and requiring all persons navigating the river to regulate such navigation so as not to interfere with it.

So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous Acts of Congress, they are to be regarded and modified in this subsequent legislation; and although it still may be an obstruction in fact, is not so in the contemplation of law. We have already said, and the principle is undoubted, that the Act of the Legislature of Virginia conferred full authority to erect and maintain a bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and federal, which, if not sufficient, certainly none can be found in our system of government.

431*] *We do not enter upon the question, whether or not Congress possess the power, under the authority in the Constitution, "to establish postoffices and post roads," to legalize this bridge; for, conceding that no such powers can be derived from this clause, it must be admitted that it is, at least, necessarily included in the power conferred to regulate commerce among the several States. The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction of navigation; and that power, as we have seen, has been exercised consistent with the continuance of the bridge.

But it is urged that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially, as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.

The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by Acts of Congress.

But, although this right of navigation be a public right common to all, yet a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which, as we have seen, is under the regulation of Congress. Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the meantime, *since the decree, this right has been [*432 modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree. Suppose the decree had been executed, and after that, the passage of the law in question, can it be doubted that the defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?

A class of cases that have frequently occurred in the state courts contain principles analogous to these involved in the present case. The purely internal streams of a state which are navigable belong to the riparian owners to the thread of the stream, and, as such, they have a right to use the waters and bed beneath, for their own private emolument, subject only to the public right of navigation. They may construct wharves or dams or canals, for the purpose of subjecting the stream to the various uses to which it may be applied, subject to this public easement. But, if these structures materially interfere with the public right, the obstruction may be removed or abated as a public nuisance.

In respect to these purely internal streams of a state, the public right of navigation is exclusively under the control and regulation of the state Legislature; and in case where these erections or obstructions to the navigation are constructed under a law of the state or sanctioned by legislative authority, they are neither a public nuisance subject to abatement, nor is the individual who may have sustained special damage from their interference with the public use entitled to any remedy for his loss. So far as the public use of the stream is concerned, the Legislature having the power to control and regulate it, the Statute authorizing the structure, though it may be a real impediment to the navigation, makes it lawful.

5 Wend. 448, 449; 15 Wend. 113; 17 T. R. 195; 20 T. R. 90, 101; 5 Cow. 165.

It is also urged that this Act of Congress is

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void, for the reason that it is inconsistent with the compact between the States of Virginia and Kentucky, at the time of the admission of the latter into the Union, by which it was agreed, "that the use and navigation of the River Ohio, so far as the territory of the proposed, or the territory that shall remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States," and which compact was assented to by Congress at the time of the admission of the State.

This court held, in the case of Green et al. v. Biddle, 8 Wheat. 1; 5 Curtis, 345; 433*] *that an act of the Legislature of Kentucky in contravention of the compact, was null and void, within the provision of the Constitution forbidding a state to pass any law impairing the obligation of contracts. But that is not the question here. The question here is, whether or not the compact can operate as a restriction upon the power of Congress under the Constitution to regulate commerce among the several States. Clearly not. Otherwise Congress and two states would possess the power to modify and alter the Constitution itself.

This is so plain that it is unnecessary to pursue the argument further. But we may refer to the case of Wilson v. Mason, 1 Cranch, 88, 92; 1 Curtis, 346; where it was held that this compact, which stipulated that rights acquired under the Commonwealth of Virginia shall be decided according to the then existing laws, could not deprive Congress of the power to regulate the appellate jurisdiction of this court, and prevent a review where none was given in the state law existing at the time of the compact. Again, it is insisted that the Act of Congress is void, as being inconsistent with the clause in the 9th section of article 1st of the Constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

It is urged that the interruption of the navigation of the steamboats engaged in commerce and conveyance of passengers upon the Ohio River at Wheeling from the erection of the brdige, and the delay and expense arising therefrom, virtually operate to give a preference to this port over that of Pittsburg; that the vessels to and from Pittsburg navigating the Ohio and Mississippi rivers are not only subjected to this delay and expense in the course of the voyage, but that the obstruction will necessarily have the effect to stop the trade and business at Wheeling, or divert the same in some other direction or channel of commerce. Conceding all this to be true, a majority of the court are of opinion that the Act of Congress is not inconsistent with the clause of the Constitution referred to—in other words, that is not giving a preference to the ports of one state over those of another, within the true meaning of that provision. There are many Acts of Congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one state and which very advantage may incidentally operate to the prejudice of the ports in a neighboring state, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce, may be referred to as examples. It will not do to say that the exercise of an *admitted [*434 power of Congress conferred by the Constitution is to be withheld, if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation, the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. These consequences and incidents are very proper considerations to be urged upon Congress for the purpose of dissuading that body from its exercise, but afford no ground for denying the power itself, or the right to exercise it.

The court are also of opinion, that, according to the true exposition of this prohibition upon the power of Congress, the law in question cannot be regarded as in conflict with it.

The propositions originally introduced into the convention, from which this clause in the Constitution was derived, declared that Congress shall not have power to compel vessels belonging to citizens or foreigners to enter or pay duties or imposts in any other state than that to which they were bound, nor to clear from any other than that in which their cargoes were laden. Nor shall any privilege or immunity be granted to any vessels on entering or clearing out, or paying duties or imposts, in one state in preference to another. Also, that Congress shall not have power to fix or establish the particular ports for collecting the duties or imposts in any state, unless the state should neglect to fix them upon notice. I give merely the substance of the several propositions.

Luther Martin, in his letter to the Legislature of Maryland, says that these propositions were introduced into the convention by the Maryland delegation; and that without them, he observes, it would have been in the power of Congress to compel ships sailing in or out of the Chesapeake to clear or enter at Norfolk, or some port in Virginia—a regulation that would be injurious to the commerce of Maryland. It appears also, from the reports of the convention, that several of the delegates from that State expressed apprehensions that under the power to regulate commerce Congress might favor ports of particular states, by requiring vessels destined to other states to enter and clear at the ports of the favored ones, as a vessel bound for Baltimore to enter and clear at Norfolk.

These several propositions finally took the form of the clause in question, namely: "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter or clear or pay duties in another."

1 Elliot's Deb. 266, 270, 279, 280, 311, 375; 5 Ib. 478, 483, 502, 545.

The power to establish their ports of entry and clearance by *the states was given [*435 up, and left to Congress. But the rights of the States were secured, by the exemption of vessels from the necessity of entering or pay-

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ing duties in the ports of any state other than that to which they were bound, or to obtain a clearance from any port other than at the home port, or that from which they sailed. And also by the provision that no preference should be given, by any regulation of commerce or revenue, to the ports of one state over those of another. So far as the regulation of revenue is concerned, the prohibition in the clause does not seem to have been very important, as, in a previous section (8), it was declared that "all duties, imposts, and excises, shall be uniform throughout the United States;" and as to a preference by a regulation of commerce, the history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one state over those of another. That these privileges and immunities, whatever they may be in the judgment of Congress, shall be common and equal in all the ports of the several States. Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular state over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by Congress to this effect, and not against any incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce, and confessedly within its power.

Besides, it is a mistake to assume that Congress is forbidden to give a preference to a port in one state over a port in another. Such preference is given in every instance where it makes a port in one state a port of entry, and refuses to make another port in another state a port of entry. No greater preference, in one sense, can be more directly given than in this way; and yet the power of Congress to give such preference has never been questioned. Nor can it be without asserting that the moment Congress makes a port in one state a port of entry, it is bound, at the same time, to make all other ports in all other states ports of entry. The truth seems to be, that what is forbidden is, not discrimination between individual ports within the same or different states, but discrimination between states; and if so, in order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.

Upon the whole, without pursuing the examination further, our conclusion is, that, so far as respects that portion of the decree which directs the alteration or abatement of 436*] the bridge, it *cannot be carried into execution since the Act of Congress which regulates the navigation of the Ohio River, consistent with the existence and continuance of the bridge; and that this part of the motion, in behalf of the plaintiff, must be denied. But that, so far as respects that portion of the decree which directs the costs to be paid by the defendants, the motion must be granted.

A motion has also been made, on behalf of the plaintiff, for attachments against the President of the Bridge Company and others, for disobedience of an injunction issued by Mr. Justice Grier, in vacation, on the 27th June, 1854.

It appears that since the rendition of the decree of this court and the passage of the Act of Congress, and before any proceedings taken to enforce the execution of the decree, notwithstanding this Act, the bridge was broken down, in a gale of wind, leaving only some of the cables suspended from the towers across the river. Upon the happening of this event, a bill was filed by the plaintiff, and an application for the injunction above mentioned was made, which was granted, enjoining the defendants, their officers and agents, against a reconstruction of the bridge, unless in conformity with the requirements of the previous decree in the case. The object of the injunction was to suspend the work, together with the great expenses attending it, until the determination of the question by this court as to the force and effect of the Act of Congress, in respect to the execution of the decree. The defendants did not appear upon the notice given of the motion for the injunction, and it was consequently granted without opposition.

After the writ was served, it was disobeyed, the defendants proceeding in the reconstruction of the bridge, which they had already begun before the issuing or service of the process.

A motion is now made for attachments against the persons mentioned for this disobedience and contempt.

A majority of the court are of opinion, inasmuch as we have arrived at the conclusion that the Act of Congress afforded full authority to the defendants to reconstruct the bridge, and the decree directing its alteration or abatement could not, therefore, be carried into execution after the enactment of this law, and inasmuch as the granting of an attachment for the disobedience is a question resting in the discretion of the court, that, under all the circumstances of the case, the motion should be denied.

Some of the judges also entertain doubts as to the regularity of the proceedings in pursuance of which the injunction was issued.

Messrs. Justices Wayne, Grier and Curtis, are of opinion that, upon the case presented, the attachment for contempt should issue, and in which opinion I concur.

*The motion for the attachment is denied, and the injunction dissolved. [*437

Mr. Justice McLean, dissenting:

A motion was made, at the last term, for process of contempt against the Bridge Company, for not complying with the decree of this court to elevate or abate the suspension bridge, or open a draw in the bridge over the western branch of the Ohio, so as to afford a safe channel for steamboats when the water is too high for them to pass under the suspension bridge; and also for not obeying the injunction granted, etc.

In opposition to this motion the Act of Congress of the 31st of August, 1852, is set up, which purports to legalize both bridges.

The 6th section of the above Act provides, "that the bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport in the State of Ohio, abutting on

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Zane's Island, in said river, are hereby declared to be lawful structures, in their present position and elevation, and shall be so held and taken to be, anything in any law or laws of the United States to the contrary, notwithstanding."

7th section. "And be it further enacted, that the said bridges are declared to be and are established post roads for the passage of the mails of the United States, and that the Wheeling and Belmont Bridge Company are authorized to have and maintain their said bridges at their present site and elevation; and the officers and crews of all vessels and boats navigating said river are required to regulate the use of their said vessels and boats, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of said bridges."

This court, in the exercise of its judicial functions, with the approbation of seven of its members, which included all the judges present, with but one exception, took jurisdiction of a complaint made by the State of Pennsylvania against the Wheeling Bridge Company, which was charged with having constructed its bridge so low as to cause a material obstruction to the commerce of the Ohio River; and which was especially injurious to the State of Pennsylvania, which had expended several millions of dollars in the construction of lines of improvement from Philadelphia to Pittsburg—such as turnpike roads, railroads, canals and slackwater navigation—over which more than fifty millions' worth of property were transported annually, in connection with the Ohio River; and that any material obstruction to the navigation of the river by the bridge would be injurious to that State, by lessening the transportation of passengers and freight on the above lines.

After a very tedious and minute investiga-
438*] tion of the facts of *the case, which embraced the reports of practical engineers, depositions from the most experienced river men, statements of the stages of water in the river throughout the year, and also after a full consideration of the legal principles applicable to the matter in controversy, six of the members of this tribunal, two only dissenting, were brought to the conclusion that the bridge was a material obstruction to the navigation of the river, at seasons of the year and under circumstances which rendered its navigation most important to the public and to the complainant, and that there was no adequate remedy for it by an action at common law.

From the facts developed in the course of the investigation, it appeared that the seven passenger packets, which plied between Cincinnati and Pittsburg, whose progress was obstructed by the bridge, conveyed about one half the goods, in value, which were transported on the river, and three fourths of the passengers between the above cities. That each packet transported annually thirty thousand nine hundred and sixty tons of freight, and twelve thousand passengers.

It appeared that a steamboat drawing five feet of water, and whose chimneys were seventy-nine feet six inches high, could never pass under the apex of the bridge, at any stage of the water, without lowering its chimneys. And the court found by lowering the chimneys, including the expense of machinery, and delay of time, without an estimate as to the dangers incurred by the operation, that a tax was imposed upon the seven packets, annually, of $5,598, which sum was exacted from the owners for the accommodation of the crossing public and the bridge proprietors.

The court also found that the cost of each packet, per running hour, was $8.33; and, as was estimated, if the chimney should be made shorter, so as to pass under the bridge at an ordinary stage of water, it would cause the average loss of four hours in each trip between Cincinnati and Pittsburg, which would amount to the sum of $33.32, which, being multiplied by sixty, the average number of trips each season, would amount to the sum of $1,999.20; and this, being multiplied by seven, would make the sum of $13,994.40, which would be an annual loss by the owners of these packets.

The court also found, that from the great weight of the chimneys of the packets, and other boats of that class, they could not be lowered by hinges at the tops; that they could only be let down at the hurricane deck by means of a derrick. The average weight of the chimneys, which must be lowered upon each of the large boats, was about four tons; and if this enormous weight *hanging over the [*439
cabin, or rather over the berths of the passengers, in the process of lowering, should come down by the run, their weight would crush the hurricane deck, break through the berths of the cabin, and be arrested, probably, only by the cargo or the lower flooring of the vessel.

For these reasons, and others contained in the opinion of the court, they came to the decision that the bridge obstructed the navigation of the Ohio, and to the irremediable injury at law of the public works of Pennsylvania. But, to avoid any greater hardship on the bridge owners than would be required by the maintenance of the commercial right, this court decreed that if the defendant would open a draw in the western channel which would admit the passage of boats, when, from the high water, they could not pass under the suspension bridge, that it would remove all reasonable ground of complaint by the plaintiffs. But this it refused to do, and invoked the legislation of Congress successfully, in procuring the passage of the Act above cited.

That Congress have a constitutional power to regulate commerce among the States, as with foreign nations, must be admitted. And where the Constitution imposes no restriction on this power, it is exercised at discretion; and the correction of impolicy or abuse is only through the ballot box. During the existence of the embargo, in 1808, it was contended that, under the commercial power, an embargo could not be imposed, as it destroyed commerce. But it was held otherwise; so that the constitutionality of a regulation of commerce by Congress does not depend upon the policy and justice of such an Act, but generally upon its discretion.

An embargo is a temporary regulation, and is designed for the protection of commerce, though for a time it may suspend it. There are, however, limitations on the exercise of commercial power by Congress. As stated in the opinion of the court, Congress had regulat-

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ed the commerce of the Ohio River. But all such regulations, before the passage of the above Act, were of a general character, and tended to the security of transportation, whether of freight or passengers.

The decree in the Wheeling Bridge case was the result of a judicial investigation, founded upon facts ascertained in the course of hearing. It was strictly a judicial question. The complaint was an obstruction of commerce, by the bridge, to the injury of the complainant, and the court found the fact to be as alleged in the bill. It was said by Chief Justice Marshall, many years ago, that Congress could do many things, but that it could not alter a fact. This it has attempted to do in the above Act. An obstruction to the navigation of the river was, technically, a nuisance, and in their decree this court so pronounced.

440*] *The compact between Virginia and Kentucky, which "declared, that the use and navigation of the River Ohio should be free and common to the citizens of the United States," was incorporated into the Kentucky Constitution of 1791, and received the sanction of Congress in the admission of that State into the Union. This compact bound both parties; and this court held, that a violation of it by a law of Kentucky, called the Occupying Claimant Law, was void, as it impaired the obligation of the compact. Virginia, no more than Kentucky, could violate any of its provisions, although they extended to citizens of the Union.

The effect that the Act of Congress shall have upon the decree of the court, I will now consider. This subject can be treated only with the profoundest respect for the legislative action of the nation, and with a sincere desire to give to it all the effect which such an expression should have.

The Congress and the court constitute coordinate branches of the government; their duties are distinct and of a different character. The judicial power cannot legislate, nor can the legislative power act judicially. The Constitution has declared that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties, etc. All legislative powers are vested in Congress. While these functionaries are limited to their appropriate duties as vested, there can be little or no conflict of jurisdiction.

From the organization of the legislative power, it is unfitted for the discharge of judicial duties; and the same may be said of this court in regard to legislation. It may therefore happen, that, when either trenches upon the appropriate powers of the other, their acts are inoperative and void.

The judicial power is exercised in the decision of cases; the legislative, in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case. From this view, it is at once seen that Congress could not undertake to hear the complaint of Pennsylvania in this case, take testimony or cause it to be taken, examine the surveys and reports of engineers, decide the questions of law which arise on the admission of the testimony, and give the proper and legal effect to the evidence in the final decree. To do this is the appropriate duty of the judicial power. And this is what was done by this court, before the above Act of Congress was passed. The court held, that the bridge obstructed the navigation of the Ohio River, and that, consequently, it was a nuisance. The Act declared the bridge to be a legal structure, and consequently, that it was not a nuisance. Now, is this a legislative or a judicial act? Whether *it be a nuisance or not, de- [*441 pends upon the fact of obstruction; and this would seem to be strictly a judicial question, to be decided on evidence produced by the parties in a case.

We do not speak of a public commercial right, but of an obstruction to it, by which an individual wrong is done, that at law is irremediable. A regulation of the public right belongs exclusively to Congress. It is a question of policy, which seldom, if ever, comes within the range of judicial action. All such questions belong to the legislative power.

The words of the 7th section of the Act are, "that the said bridges are declared to be and are established post roads for the passage of the mails of the United States; and that the Wheeling and Belmont Bridge Company are authorized to have and maintain their said bridges, at their present site and elevation; and the officers and crews of all vessels and boats navigating the river are required to regulate the use of their said vessels and boats, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of said bridges."

The provisions of this section are: 1. The bridges are declared to be post roads; and 2. The pipes and chimneys of the boats are required to be cut down, so as not to interfere with said bridges.

And first, as to the effect of making the bridges post roads:

By the Act of the 7th July, 1838, all railroads are declared to be post roads; and for more than twenty years, all navigable waters on which steamboats regularly ply are established as post roads.

The policy of extending the lines of post roads on all railroads and navigable waters was to require, under a penalty, all boats and railroad cars to deposit in post offices all letters which they may carry, so that the postage may be charged. It gives to the government no rights on these lines of communication, except where the mail may be carried under a contract, which, if obstructed, subjects the offender to prosecution. It gives to the government no other interest in or control over the road.

The railroad may be changed at the will of the proprietors, and the mail will not be carried in the cars, except by contract, for which a compensation is paid. The same principle applies to a turnpike road on which the mail is carried. Even an ordinary road, though a post road, may be altered or vacated at the will of the local authority.

It is difficult to perceive what benefit can result to the public from these bridges being declared a post road. It cannot use the bridges without paying toll the same as for the use of a turnpike road or railroad. It does not prevent the Bridge Company *from pulling [*442

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down the bridge or altering it in any respect. They are under no obligation by reason of this use to keep up the bridge or repair it. They may abandon it, and if it should be again prostrated by the winds, they are not obliged to rebuild it.

The idea that making the bridge a post road would exempt it from the consequence of being a nuisance, is wholly unsustainable. Should the contractor to carry the mail refuse or neglect to pay the customary tolls, he would be liable to a suit for the amount. If one of the Pittsburg packets carry the mail under a contract with the Postoffice Department, and the bridge should obstruct the boat, such an obstruction would make the Bridge Company liable, unless the above Act, which gives a preference to the crossing mail, applies a different rule to the mail boat; and it would seem that no such preference can arise under the law declaring the bridge to be a post road.

But is there a power in Congress to legalize a bridge over a navigable water within the jurisdiction of any state or states? It has the power to regulate commerce among the several States, requiring two or more States to authorize the regulation. But this does not necessarily include the power to construct bridges which may obstruct commerce, but can never increase its facilities on a navigable water. Any power which Congress may have in regard to such a structure is indirect, and results from a commercial regulation. It may, under this power, declare that no bridge shall be built which shall be an obstruction to the use of a navigable water. And this, it would seem, is as far as the commercial power by Congress can be exercised.

The same power that would enable Congress to build a bridge over a navigable stream would authorize it to construct a railroad or turnpike road through the States of the Union, as it might deem expedient. This power may have been asserted in regard to post roads, but the settled opinion now seems to be, that to establish post roads, within the meaning of the Constitution, is to designate them. In this sense Congress may establish post roads extending over bridges, but it can neither build them nor exercise any control over them, except the mere use for the conveyance of the mail on paying toll.

It has often been held, that in throwing a bridge across a navigable river or arm of a lake, or the sea, the sovereign power of the State in some form may authorize it, under such restrictions and conditions as may be considered best for the public. But this power must always be so exercised as not materially to obstruct navigation. Over this public right Congress exercises exclusive legislation, except where the Constitution restricts it; and the judicial power can never interpose, except in 443*] regard to *private injuries. It would be otherwise if Congress should authorize an indictment for obstructing the public right of navigation on the Ohio, or generally. If, under the commercial power, Congress may make bridges over navigable waters, it would be difficult to find any limitation of such a power. Turnpike roads, railroads and canals might on the same principle be built by Congress. And if this be a constitutional power, it cannot be restricted or interfered with by any state regulation. So extravagant and absorbing a federal power as this has rarely, if ever, been claimed by anyone. It would, in a great degree, supersede the state governments by the tremendous authority and patronage it would exercise. But if the power be found in the Constitution, no principle is perceived by which it can be practically restricted. This dilemma leads us to the conclusion that it is not a constitutional power. Having arrived at this point, it only remains to say, that the Act of Congress declaring the bridge to be a legal structure, being the exercise of a judicial and an appellate power, is unconstitutional, and consequently inoperative. It is what it purports to be, a reversal of the decree of this court, in effect, if not in terms.

Under the commercial power, Congress may declare what shall constitute an obstruction of commerce, on a navigable water; and so far as the public right is concerned, there is no limitation to the exercise of this power, unless it be found in the Constitution.

It must be admitted that the provision in the 7th section in regard to the length of the pipes and chimneys of the boats which ply on the Ohio from and to Pittsburg, is a commercial regulation. Congress have required the boilers of steamboats to be inspected, and that an iron chain should be used as a tiller-rope on all steamboats, and this has been required with a view to the safety of the boat, its passengers and cargo. In the event of fire, the rope is generally burnt and the boat becomes unmanageable. This is as far as Congress has legislated in regard to the tackle of the boat. No attempt has before been made to regulate the height of the chimneys.

From facts above stated, it appears the speed of the seven packets, by cutting down the chimney, would be reduced four hours, on an average, each, on a trip between Pittsburg and Cincinnati. This, as the statement shows, would increase the expense of the owners of the seven packets, in addition to the loss of time, $13,994.40 per annum. Such a regulation would seem to be the more objectionable, as the loss arises from the preference given to the bridge, which the public accommodation does not require.

But there is another objection, of a more serious nature. In *the 9th section of [*444 the 2d article of the Constitution, it is declared "that no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This can have no relation to "duties and imposts," as in the 8th section it is declared, "they shall be uniform throughout the United States." The clause must refer to some other regulation, and it applies, of course, to all regulations affecting commerce.

It was said in the late argument of this cause, that the Pittsburg packets had done a larger business in transportation the last year, than within the same time at any former period. If this be so, the injury by cutting down the chimneys of all the boats to and from Pittsburg must amount to a larger sum than above stated. Nothing could more forcibly illustrate the propriety of the above provision in the Constitution, that no port in one state shall have a preference over those of another.

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Practical knowledge in regard to steamboat and railroad transportation of freight is better than theory. Notwithstanding the lines of railroad from Pittsburg to Cincinnati, and to St. Louis, by the way of Chicago, for the past year, have been in operation, the business on the steamboat lines has greatly increased in freight; and from published prices it would seem that the water transportation is three times cheaper than the railroad, and, on account of the frequent detention of freight cars, is much more expeditious.

But is is said many regulations of commerce, from local circumstances, cannot operate equally on all ports. As, for instance, a breakwater may be more beneficial to one port than another; and the same inequality may exist from the establishment of light-houses and the improvement of harbors. But these are incidental and not direct consequences, resulting from the exercise of the legislative power, and no prudence can, effectually, guard against them. As near as may be, equal facilities should be given to ports of equal importance; this, however, is a matter for the decision of Congress, and does not belong to the judiciary. But where a prohibition is imposed on Congress in the exercise of the commercial power, and it is not regarded, it is a judicial question, and this is the only check to be relied on against such unconstitutional legislation.

It is objected that the court cannot determine what degree of preference shall be given to one port over another, to make the regulation come within the prohibition. If this be so, then is the constitutional prohibition a dead letter; but this is not the practical view which this court have uniformly taken of the Constitution. The restrictions on state powers stand upon the same footing, and no insuperable difficulty has been found in giving effect to them. 445*] *No State shall coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." To determine the unconstitutionality of a law under some of these prohibitions, would be attended with as much, if not more, difficulty than to say whether a commercial regulation gives a preference to one port over another.

In the case of McCulloch v. The State of Maryland, 4 Wheat. 431, the court say, "that the power to tax 'the Bank of the United States' involves the power to destroy," and on this ground the tax on the bank by the Legislature of Maryland was declared to be unconstitutional and void. If this rule be applied to the point under consideration, no doubt could exist. Congress are prohibited from giving a preference to one port over another in different states, and consequently, if any such preference be given, the regulation is void. Not an incidental preference, but a regulation which necessarily acts injuriously and oppressively on one to the exclusion of the other ports.

Suppose Congress had declared by law that all steamboats plying to and from Pittsburg should not use chimneys more than forty feet high, which would essentially retard their progress, and consequently injure their business, would any court hesitate to pronounce such a regulation unconstitutional, as giving a preference to all other ports on the river over that of Pittsburg? This Congress has in effect done, and the only justificaton for it must be found, if any exist, in the regulated height of the bridge. But the bridge, at a very small expense comparatively, could have been elevated as our decree required, and as the charter under which it was built also required. Less than this: if a draw had been made in the bridge over the western channel so as to enable boats to pass up and down the river when they could not pass under the suspension bridge, nothing more was required. The expense of the draw, it is believed, would not exceed $25,000—a sum less, as it would seem, than the annual injury inflicted on the commerce of Pittsburg by the bridge.

If the regulation of the chimneys of steamboats, as in the law to protect the bridge, would be unconstitutional without the bridge, it is not perceived how the bridge could make it constitutional. The right to cross the river by a bridge, and to navigate it, is admitted; but these public rights are not incompatible. They can both be enjoyed without any material interference of the one with the other. This being the case, Congress, it would seem, cannot restrict the right to navigate the river for the benefit of the bridge. It cannot violate the constitutional inhibition *in giving [*446 a preference to other ports over that of Pittsburg, by declaring the Wheeling bridge formed no obstruction to navigation. The Constitution declares Congress shall not give a preference to one port over another; the act, if done, is not constitutional, though done under the power to regulate commerce.

The equality which such a regulation was intended to secure is a matter intimately connected with the commercial prosperity of the country. For a wrong thus done by Congress there is no remedy, except through the exercise of the judicial power. This court is sworn to support the Constitution, and in every infraction of that instrument by Congress or state Legislatures, where individual injury is inflicted, redress may be obtained by action in court. Congress is prohibited from laying a duty on exports, except for port charges. Can a duty be imposed on exports beyond this under the commercial power? The commercial power is limited in this and in other cases, and if the limit be exceeded the Act is void. The federal government in all its forms exercises enumerated and limited powers. But if the limitation depends upon the discretion of Congress, there is neither limitation nor protection. This is neither the theory nor the practical operation of the government. Congress has power to regulate commerce, but it has no power in such regulation to give a preference to one port in a state over another port in a different state. If it may do this to an extent materially injurious, it may equally disregard every other restriction in the Constitution. The regulation of the height of the chimneys of steamboats which ply to and from Pittsburg, by the present elevation of the bridge, is the same in effect and in principle as if the Act had required such steamers to cut down their chimneys without reference to the bridge. The bridge affords no justification or excuse for an unconstitutional regulation.

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But it is said there is great difficulty in ascertaining the fact, that a regulation gives a preference to one or more ports in a state over those of another, and it is intimated that a jury should be called to ascertain the fact. This argument was used in regard to the fact of obstruction, complained of by Pennsylvania; but this court very properly determined that a court of chancery, having jurisdiction, could inquire whether the bridge constituted such an obstruction to commerce as materially to injure the public works of Pennsylvania, and on such a finding by this court the late decree was entered for the removal of the obstruction.

What fact beyond this is necessary to determine the fact of preference of one port over another? The chimneys of the steamboats which ply to and from Pittsburg are required to be 447*] *cut down, so as to pass under the bridge. By this the rights of the port of Pittsburg are measured by the Wheeling bridge, and that bridge, this court have held, is so material an obstruction to commerce as to be a nuisance to the State of Pennsylvania.

This obstruction or nuisance consists in the necessity, when a boat passes under the bridge, of lowering its chimneys or cutting them down so as to pass under it; and if this be a material injury to the commerce of the State of Pennsylvania, on its lines of improvement, how much greater the injury to the port of Pittsburg, from and to which one hundred millions' worth of property is transported annually? Can anyone fail to see that the proof of preference to the port of Wheeling, and those below it, is given by the regulation complained of, over the port of Pittsburg and others above the bridge? The proof of this important fact, as found by the decision of the court already pronounced, is more conclusive to show the preference than to establish the claim of Pennsylvania.

Can it be urged that this preference is limited to a mere entry of the port? Had the Wheeling bridge been constructed over the Ohio River, a short distance below Pittsburg, it would have been far less injurious to that port than it now is; the boats with their propelling power undiminished, could have approached near to that port, where their cargoes are discharged and received.

It is contended that the commerce across the river required the consideration of Congress equally with that which floated upon its surface. There is no ground for such an argument. Some twenty-five or thirty thousand dollars, under the decree, would open a passage in the western channel so as to remove the obstruction. The annual injury to the commerce of the port of Pittsburg by the bridge is believed to exceed that sum.

Had the Act of Congress required all steamboats which ply upon the Ohio River to cut down their chimneys, so as to pass under the Wheeling bridge, the regulation, being general, however injurious, would not have given a preference to one port over another. It would have been the exercise of the commercial power, within the Constitution.

The principle involved in this case is of the deepest interest to the commerce of the West. The Mississippi River and its tributaries, water a country unsurpassed, if equalled, in the world, in extent and fertility. But if the obstruction of the Wheeling bridge may be repeated wherever the crossing public shall think proper to build a bridge, one third of the internal commerce of the Union will be materially obstructed. The injury of such a regulation would be very limited in the Atlantic *States, as there the rivers are short, [*448 and navigation is generally limited to the ebb and flow of the tide. If the Wheeling bridge be a legal structure, hundreds of bridges on the same principle may be thrown over the Mississippi and its navigable tributaries, to the great and remediless injury of western commerce.

That commerce is rapidly increasing, and at this time it probably amounts to four hundred millions of dollars annually; and if the Father of Waters and his tributaries shall have the same regulation extended to them as is now applied to the Wheeling bridge, it will impose a tax upon western commerce of several hundred thousand dollars annually; and this will be, not for the advancement of commerce over those waters, as it will greatly obstruct it, but to save a few thousand dollars in the structure of each bridge.

In regard to the motion for process of contempt against the Bridge Company, we must, I think, be governed by matters which appear upon the record. Shortly after the first decree was entered, the defendants made application to Congress for relief. The object of the Bridge Company in making this application was to counteract and annul the decision of this court. It is not supposed, however, that such was the intention of Congress in passing the law. The two sections referred to were moved as an amendment to an Act making appropriations for the service of the Postoffice Department, on the 31st of August, 1852, at the close of that session. But little time was afforded for investigation of the important questions involved in the Act. This fact is not stated to impair the force and effect of the Act, but I think it is fit to be considered on this motion, in regard to the conduct of the Bridge Company.

The court may properly consider, if they are not bound to do so, that the defendants, in making application to Congress, and procuring the passage of the Act, as having acted in good faith. And although the law, if it has been passed in violation of the Constitution, cannot be held valid, yet it may save the defendants from the contempt charged. On its face it gave to the Bridge Company all that it could desire or ask against the decree of this court. It legalized what the court held to be illegal; and it required all steamboats, running to and from Pittsburg, from any point below Wheeling, to regulate their chimneys so as to pass under the bridge. It was the exercise of a judicial powe without an examination of the principles law applicable, and without a knowledge of th facts on which the decree was founded. N imputation is cast upon that honorable bod but the fact must be known to everyone th the Senate and House of Representatives, ho ever distinguished for their high ability and gal learning, could not discharge, to the pu advantage, the duties of an appellate court.

*I have no doubt that the learned [*4 judge had power to grant the injunction. The 5th section of the Act of the 2d of March, 17

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1 Stat. at L. 334, declares "that writs of ne exeat and of injunction may be granted by any judge of the Supreme Court, in cases where they might be granted by the supreme or circuit court." The 14th section of the Judiciary Act of 1789 declares that "the courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

Six of my brethren now hold that the Act of Congress arrested the progress of the court in carrying their decree into effect, and gave the defendants a right to rebuild their bridge. The injunction prohibited them from reconstructing it; can the defendants be punished for contempt, for doing that which the law authorized? This view shows that the injunction ought not to have been granted, as it was against law. And is not this a sufficient excuse for the contempt charged? My view is, that the law was unconstitutional and void. and yet I consider it as excusing the defendants' contempt. I cannot punish defendants, by fine or imprisonment, for doing that which the law authorized them to do.

There was no opposition made when the injunction was applied for; and it was granted, as a matter of course, on the face of the bill. Had the Act of Congress been set up against the allowance of the injunction, the motion, in all probability, would have been referred to the Supreme Court by the judge.

Having come to the conclusion, for the reasons above stated, that the Act of Congress is inoperative and void, although it may excuse the contempt, it can afford no excuse for a further refusal to perform the decree. I would therefore order that the final decree, heretofore made, be carried into effect according to its true intent, by the first day of October next, and that the defendants pay the costs.

Mr. Justice Grier:

I concur with the majority of this court, that in cases where this court has original jurisdiction, and interlocutory or preliminary injunction may be awarded in vacation, by any judge of the court. I differ with the majority in declining to punish a wanton contempt of the process of the court.

I concur with my brother McLean, that Congress cannot annul or vacate any decree of this court; that the assumption of such a power is without precedent, and as a precedent for the future, it is of dangerous example.

450*] *Mr. Justice Wayne:

I concur with Messrs. Justices Nelson, Grier, and Curtis, in thinking that the attachment for contempt should have been granted by this court.

I concur with the majority of the court in the view taken by them of the liability of the defendants for the costs of this suit.

I dissent with the majority of the court in the opinion given, that the 6th and 7th sections of the Act of the 31st August, 1852, 10 Stat. at L. 112, relieve the defendants from the operation of the judgment of this court in behalf of the plaintiff. That judgment was for the abatement of a nuisance of which the plaintiff complained. This court decided it was a nuisance, causing injury and great pecuniary loss, inasmuch as it prevented the State of Pennsylvania from navigating the Ohio River at all stages of its waters, to the uninterrupted navigation of which they had a right under the Constitution of the United States. I know of no power in Congress to interfere with such a judgment, under the pretense of a power to legalize the structure of bridges over the public navigable rivers of the United States, either within the States, or dividing states from each other, or under the commercial power of Congress, to regulate commerce among the States. Nor does the power of Congress to establish postoffices or post roads give any power to Congress to do more between the States, or within the States, than to declare the routes for carrying the mails upon roads already existing, and to designate the localities upon those roads where postoffices shall be kept for the delivery and transmission of letters, and other things or parcels which Congress may declare to be mailable. Whatever Congress may have intended by the Act of August, 1852, I do not think it admits of the interpretation given to it by the majority of the court; and if it does, then my opinion is that the Act would be unconstitutional.

I concur with many of the views taken by Mr. Justice McLean in his dissenting opinion, but I shall take another opportunity to express my opinion fully upon the action of this court and of Congress in this case.

Mr. Justice Daniel:

In the decision of the court dissolving the injunction and refusing the coercive measures asked for in this case, I entirely concur. But as in the argument by which the court have proceeded to their conclusions, important questions of constitutional law appear to me to have been, some of them, passed over without consideration, and others inaccurately expounded, convictions of duty impel me to express my own interpretation of those questions. The correctness or incorrectness of that interpretation *is left to the judgment of those [*451 whom curiosity or interest may incline to its examination; but whether examined or approved, or condemned, or otherwise, it has been given because commanded by a sense of obligation, from obedience to which I hold that no one is or can be absolved.

When the controversy now revived before us, was, in January, 1850, for the first time brought to our attention, there suggested themselves to my mind serious difficulties with respect both to the authority and the mode by which it was attempted to place that controversy within the cognizance of this tribunal.

I was unable to perceive by what warrant a judge of a circuit court circumscribed in his jurisdiction both as to parties and to subject matters of litigation within specified limits, could claim cognizance as to parties and subject matters confessedly beyond the prescribed bounds of his jurisdiction. Still less could I comprehend by what warrant a circuit judge could, by an interlocutory order at chambers, relative to rights of person and property beyond the bounds of his jurisdiction, transfer a

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controversy affecting subjects thus situated to the Supreme Court of the United States.

An attempt to avoid these difficulties (for they were not directly met) was essayed, by the assumption that the application to the Circuit Court might be adopted here as the commencement of an original suit by the State of Pennsylvania; that State possessing the right to institute an action in the Supreme Court, under the provision in the Constitution which defines the original jurisdiction of the court. Accordingly, this case was received and treated as one authorized by the Constitution, in virtue of the original jurisdiction vested exclusively in the Supreme Court—a jurisdiction which an inferior court, or a judge of an inferior court, could have no power to exert.

However irregular and unauthorized the first proceeding in this case appeared to me, the granting of the second injunction, and the measures directed for enforcing it, I am constrained to regard as still more irregular—a much wider departure from precedent or legitimate authority.

This second proceeding brings to our notice the following state of facts: An application to a circuit judge at chambers, to control by compulsory process persons and property, both of them situated beyond and without the bounds of his legitimate power. This application is granted at chambers, and not by a proceeding in court at all; and the order of the judge so made, and the mandate directed by him singly for the execution of his order, are entitled as a proceeding in and before the Supreme Court, and as an act of the Supreme Court; and the peculiar and appropriate officer of this tribunal is ordered to carry that mandate into effect.

452*] *According to my interpretation of the Constitution of the United States, the Supreme Court is a distinct, aggregate, collective body—one which can act collectively, and in term or in united session only. It cannot delegate its functions, nor can it impose its duties upon any number of the body less than a quorum, constituted of a majority of its members; much less can a single judge be clothed with its joint powers, to be wielded by him at any time or in any place, or to any extent to which his individual discretion may point. Yet, in the case before us, we have a proceeding begun, prosecuted and consummated in the name of the Supreme Court—nay, denominated their proper act, when eight of the nine judges constituting this tribunal had no participation in that proceeding; perhaps never even suspected its existence. It may very well be inquired, whether a majority of the judges, either acting individually or collectively in court, would, on principles of power or of justice have sanctioned the course pursued in this cause. For one, I can answer, that by him it would have been unhesitatingly rejected.

Yet this course it is now attempted to justify and sustain, under the 5th section of the Act of Congress of the 2d of March 1793, 1 Stat. at L. 334, which provides, that "writs of ne exeat and injunction may be granted by any judge of the Supreme Court, in cases where they might be granted by the Supreme Court or a circuit court."

The inference sought to be drawn from the provision just cited, I propose cursorily to examine, with the view of showing its incorrectness as a deduction from the language or the purposes of that provision, and especially with the view of exposing the total inapplicability of the attempted conclusion of the facts developed by the record before us.

The subjects embraced within the proposed inquiry, viz.: the distribution and exercise of power in the different divisions of the federal judiciary—the definition and establishment of the distinctive boundaries within which those several divisions should revolve, are matters of an importance much too grave to be incidentally or lightly disposed of. They are matters inseparable alike from the order and harmony and stability of public authority, and from the safety and enjoyment of private right.

By the Act of Congress establishing the judicial courts of the United States, 1 Stat. at L. Vol. I, p. 81, no power was conferred upon the judges of the courts of the United States to grant writs of injunction; nor was the power to grant an injunction eo nomine conferred upon any of the courts. This authority was, however, as to the courts, given by implication in the 14th section of the Statute, which authorized the courts thereinbefore enumerated, to grant writs of scire facias, habeas corpus, and *all other writs not specially provided [*453 for by statute, which may be necessary for the exercise of their respective jurisdictions.

The feature of this provision, proper for consideration here is this: that the power was conferred upon the courts, and not upon the judges, and was given in case only in which it was necessary for the exercise of the jurisdiction of those courts. What was the jurisdiction of the circuit courts, as to persons or property, or both? With respect to proceedings in rem, as the process of the court could not run beyond the prescribed limits of its appropriate district, the jurisdiction or power of the court could be co-extensive only with those limits, and was consequently impotent and null as to any direct control of the subject matter when situated beyond them. And with respect to the jurisdiction over persons or parties, we find it declared by the 11th section of the Judiciary Act, that "no civil suit shall be brought before either of the said courts, against an inhabitant of the United States, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ;" and so careful have been the authors of this restriction to insure its effectual observance, that in the same section of the Statute they have prohibited every transfer of the interests or rights of parties made with the view of evading its operation. An interpretation of the 11th section of the Judicial Act—one conclusive upon the jurisdiction of the circuit courts—has been declared in repeated decisions by this court, as may be seen amongst other instances which might be adduced, in the cases of McKim v. Webb, 9 Pet. 36; or Toland v. Sprague, 12 Pet. p. 300; and of Keary v. The Farmers and Mechanics' Bank of Memphis, 16 Pet. p. 89. In the second of the cases just cited, the effect of the Statute in defining the jurisdiction of the circuit courts is examined with much minuteness and particularity.

It follows, then, by necessary induction,

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both from the language of the Judiciary Act and from the interpretation thereof by this court, that the jurisdiction—as auxiliary to which, and as a means of enforcing its exercise, the power to grant injunctions was conferred upon the circuit courts—is that jurisdiction restricted to persons and property found within the prescribed local bounds assigned to those courts.

But it has been argued, that whilst the restrictions above mentioned may be imposed upon the courts as such, in the most solemn and deliberate exercise of their functions, the judges individually, out of court, and distinguished as they are by the language of the law from the courts, have been released from the same or similar restraints, and have been clothed with power separately to exert this extraordinary jurisdiction over persons 454*] *and property residing or situated anywhere and everywhere within the United States. Nothing more is required, according to this argument, to overstep the fixed and designated boundary of the courts' authority than the sic jubeo of the individual judge.

In considering the interpretation now placed upon the 5th section of the Act of March 2d, 1793, the mind is impressed with the irregularity and inconsistency which this interpretation implies; and with the inutility and inefficiency for any beneficial object of the power it is said to have created. It is certainly a novelty, and an anomaly in jurisprudence, to allege in a judicial officer acting out of court, and as it were in pais, the existence of a jurisdiction over persons and property with respect to which he has no power to adjudicate in court, and his acts in relation to which he possesses no authority to reverse or modify or even to revise. Yet this is precisely the attitude which the circuit courts and the judges of those courts are made to occupy in relation to each other, by the interpretation now attempted.

In the next place, so far as usefulness or efficiency may be supposed to have been the objects of the Statute, much of these are taken away by denying to the courts the power claimed for the judges out of court to act upon persons or property beyond the bounds of the respective circuits. The same necessity which would dictate a resort to one, requiring equally a resort to both or either.

Some obscurity and difficulty is perceived and felt as arising from the portion, of sec. 5 of the Act of March 2d, 1793, which permits the judges of the circuit courts to grant injunction in cases wherein they might be granted by the Supreme Court; but this language it is thought, when correctly understood, operates no change or extension, or enlargement of the powers and jurisdiction of the circuit courts, or of the judges of those courts. If indeed it should be contended that this section of the Statute was designed to confer, or by its terms purported to confer, upon the circuit courts, or upon the judges thereof, the jurisdiction and functions of the Supreme Court, then must that section, so far, as least, be rejected as absolutely void, being in violation of the Constitution.

The Supreme Court of the United States is the creature of the Constitution. By this instrument its powers and jurisdiction, original and appellate, are conferred and defined; these are peculiar, are exclusive; and by no legislation can they, be enlarged or diminished, much less can they either in whole or in part, be delegated to other tribunals or officers of any grade or description.

I am clearly of the opinion, therefore, that by the 5th section *of the Act of 1793, [*455 no power to exercise authority or jurisdiction appertaining to the Supreme Court was, or could have been, conferred either upon the circuit courts or upon the judges thereof; but that this section must be understood as simply conferring upon the judges a power previously confined to the courts alone—viz.: the power to grant injunctions, and this subject to every limitation by which the circuit courts were controlled.

But the interpretation of the Act of 1793 now contended for, broad as it is, still is not wide enough to cover the proceeding which it is now used to shield and protect. To accomplish this end, it must be stretched still more; and until it can be made to comprise an identification of a single judge of the Supreme Court with the entire court itself, and the transformation of an act by an individual judge—an act performed without the accustomed formalities of a regular court—into a proceeding by the Supreme Court in the exercise of its constitutional and only legitimate functions.

The order granting the second injunction in this case, were it obnoxious to no other objection, appears to me to be unwarranted and void, for the reason that it assumes to contravene and overrule in effect, if not in terms, an existing decree of this court between these same parties and upon the same subject matter.

The decree of this court, first pronounced in February, 1852, decided that the suspension bridge at Wheeling was an obstruction to the passage of steamboats on the Ohio River, and that unless it should be elevated to the height of one hundred and eleven feet above low water mark, before the 1st day of February next following this decree, it should be abated. Upon a subsequent day of the same term, the decree was so modified as to substitute for the requirement of increased elevation, or of the alternative of an abatement, permission to the proprietors of the suspension bridge to construct in the permanent wooden bridge, which spans the western channel of the river, a draw of a capacity sufficient for the passage of steamboats of the largest class; the additional distance or the short delay (of a few minutes only) incident to this arrangement constituting, as expressed in the language of this court, "no appreciable injury to commerce." Liberty was reserved by this decree to either party to "move the court in relation to this matter, on the 1st Monday of February ensuing." Vide 13 How. 625.

In obedience to a notice from the complainant, under the liberty reserved in the decree, the defendants appeared on the regular return day by counsel in court; but the complainant failing to prosecute this motion, it was permitted to be discontinued. To a second notice to the defendants they again appeared, but *the complainant again making default, [*456 was formally called, and the motion was dismissed.

From this failure or refusal on the part of

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those who were authorized to move in the case, this court, for aught that could be judicially known to them, might have been justified in the conclusion, that everything they had ordered had been complied with, or had been arranged to the mutual satisfaction of the parties. Certainly, up to this period, there was no fact regularly and formally before them, on which to found or justify process for contempt. Under this state of things, the suspension bridge at Wheeling remained, and was authorized to remain.

This court had prescribed the conditions, according to which it was to stand or to be abated, and had designated the parties by whom, the modes by which, and the extent to which, the decree might be carried into effect.

In this attitude of the case, a mandate is issued from a judge at chambers, superseding the mode pointed out by this court for the execution of its decree, and wholly irrespective of any condition according to which that decree had been, by its own terms, modified, as above mentioned.

The above mandate assumes to order, in the name of this court, that no bridge of an elevation less than that prescribed by this order, shall be thrown across the Ohio from Zane's Island to Wheeling, regardless altogether of any facility, however complete, which might be provided for the passage of steamboats by the western channel of the river.

This mandate, therefore, was itself a palpable violation of the decree of this court, and of rights reserved to the defendants by that decree—rights which they twice evinced their readiness to vindicate before this court, in opposition to the reiterated, but subsequently abandoned, attempts by the complainant to assail them.

Can contempt, then, be affirmed or imputed with reference to a readiness to yield obedience to the regular authority of the court, or with reference to an unwillingness to comply with a proceeding not merely void in itself, but one also in manifest violation of the Constitution and the law?

To which, it may be asked, were the defendants bound to conform, to the authority of this court, deliberately announced upon a question regularly before them as a court, or to an order from a single judge, obviously in contravention of the former, assuming to exercise an authority belonging to the court as an aggregate body, and by which assumption this court is placed in an attitude adversary to its own decree?

There is still another view of this case, which, to my mind, is conclusive against the proceedings on the part of the circuit 457*] *judge, and equally so against every motion now urged before us as founded thereon, or on either the principal or modified decree heretofore pronounced in this cause.

Previously to the application for the second injunction, the Congress of the United States, by a formal statutory enactment, declared the bridges which had been erected over the Ohio at Wheeling in Virginia, and at Bridgeport in the State of Ohio, abutting on Zane's Island, to be lawful structures in their present position and elevation, "anything in any law or laws of the United States to the contrary notwithstanding." And they further enacted, "that the officers and crews of all vessels and boats navigating the said river, are required to regulate the use of their said vessels and boats, and any pipes, or chimney, or chimneys belonging thereto, so as not to interfere with the elevation and structure of the said bridges."

Vide Stat. at Large, Vol. X. p. 112.

Against the effect of these very explicit enactments, it has been contended that they are void, because, as it is said, they reverse a decision of this court, which Congress has no power to do. In answer to this argument, it may be conceded that the position assumed by it might be true with reference to the adjustment or security of private rights vested under previously existing laws of adjudications; but such a position is wholly inapplicable to measures of public policy falling appropriately within the legislative competency, and much less can it have any influence to warrant in any other department of the government the exercise of powers vested exclusively in the national Legislature.

It is impossible to read either the original or the modified decree, by the majority of the court in this cause, without perceiving that both these decrees, as well as the entire argument in support of them, were based upon the single assumption that the erection of the suspension bridge at Wheeling was an interference with the right to regulate commerce vested in Congress by the Constitution. It is equally manifest from the arguments and opinions of the minority of the court, that the right in Congress to regulate commerce is not only conceded by the minority, but the exclusiveness of that power in Congress is insisted upon. These later opinions maintain the doctrine that Congress alone are competent to exercise this right of power, and can neither be controlled nor anticipated with respect to it by the Judicial Department, upon any fancied necessity, nor upon any supposed neglect, or omission, or incompetency, which the latter may impute to Congress. and may imagine the Judicial Department called upon to remedy.

In these views are seen essentially, nay, explicitly, the diversity *existing in the [*458 opinions of the majority and minority of the judges, as declared in this case.

Congress have, by statute already referred to, undertaken to regulate the commerce upon the Ohio River, so far as the matters involved in this controversy are concerned. And who shall question their power to do this? Does it belong to this court, under any article or clause of the Constitution, or of any statute, to assume such superiority? Congress have ordained that the vehicles of commerce on the Ohio, the steamboats, shall so graduate the height of their chimneys as not to interfere with the bridges at Wheeling, as existing at the date of the Statute. By this they have at least declared that these bridges are deemed by them no invasion, either of the power or the policy of Congress with reference to the commerce of the Ohio River. They have regulated this matter upon a scale by them conceived to be just and impartial, with reference to that commerce which pursues the course of the river, and to

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that which traverses its channel, and is broadly diffused through the country.

They have, at the same time, by what they have done, secured to the government, and to the public at large, the essential advantage of a safe and certain transit over the Ohio—an advantage which, previously to the erection of the Wheeling bridge, was greatly desired but never attained.

In what has been done by Congress, I can have no doubt that they have acted wisely, justly, and strictly within their constitutional competency. By their action they have completely overthrown every foundation upon which the decrees of this court, the orders of the circuit judge, and every motion purporting to be based upon these or either of them, could rest. I am, therefore, of the opinion that each and every motion submitted by the complainant under color of the decrees heretofore pronounced in this cause, or of the injunction awarded by the Judge of the Circuit Court, should be overruled; that the injunction awarded as aforesaid should be dissolved, and the bill praying for that injunction should be dismissed; and that in each instance the defendants should be decreed their costs.

FORMER ORDER.

This court, at a prior term, to wit: on 27th May, 1852, having declared that the bridge of the respondents was an obstruction to the navigation of the Ohio River, and that it did a special damage to the complainant, and having decreed that the same should be altered as thereby directed, or removed by the respondents—and the complainant having subsequently moved this court for writs of assistance, of sequestration and of attachment against the said respondents, and also for a taxation of 459*] *costs decreed by this court, and for the process of this court to enforce the payment thereof by the said respondents—and the Congress of the United States having by an Act passed on the 31st of August, 1852, entitled "An Act making appropriations for the service of the Postoffice Department, during the fiscal year ending the 30th of June, 1853, and for other purposes," provided for the navigation of the Ohio River, and so regulated the navigation of the said river as to be consistent with the maintenance of the said bridge. And the respective parties having been fully heard by counsel, and after mature deliberation thereupon had by this court, it is now here considered and decreed by this court, that the said motion for writs of assistance, sequestration and attachment be, and the same is hereby overruled; and that the said writs be, and they are hereby denied. And it is further considered and decreed by the court, that the said complainant do have and recover from the said respondents the costs of the said complainant as decreed by this court on the aforesaid 27th day of May, A. D. 1852, to be taxed by the clerk, and that the said respondents do pay the same to the complainant within ninety days from this date; and that, in default of such payment, that execution do issue therefor, to be directed to the Marshal of the United States for the District of Columbia to enforce the same. Per Justice Nelson.

ORDER IN THIS CASE.

This cause came on to be heard upon the bill of complaint, an order by the Honorable R. C. Grier, an associate justice of this court, on the 26th day of June, 1854, granting an injunction as prayed for in the said bill and upon the motion by the complainant for writs of assistance, of sequestration and of attachment against the said respondent, and upon a motion by the respondent to dissolve the said injunction, and was fully argued by counsel on both sides: upon consideration whereof, and after mature deliberation thereupon had, it is now here ordered and decreed by this court, that the said motion by the said complainant for writs of assistance, of sequestration and of attachment be, and the same is hereby overruled; and that the said injunction so as aforesaid granted be, and the same is hereby dissolved.

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*THE STATE OF PENNSYLVANIA, [*460
Complainant,
v.
THE WHEELING AND BELMONT BRIDGE COMPANY et al.

(See S. C. 18 How. 460–463.)

This court can award costs—costs will not b opened, after waiver of exceptions to taxa tion.

The decree rendered for costs in this case was unaffected by the Act of August 31, 1852.

Congress has repeatedly recognized the right of the prevailing party to costs in this and the circuit courts.

There is conferred by the Constitution on this court original jurisdiction over cases in equity between a state and citizens of another state.

Original jurisdiction in equity, in a particular class of cases, conferred by the Constitution on this court, has been interpreted to impose the duty to adjudicate according to such rules and principles as governed the Court of Chancery in England down to the time of our Constitution.

When the Constitution conferred that jurisdiction on this court, it cannot be construed to exclude the power possessed and exercised by every court of equity, to award or refuse costs, in its discretion, as its judgment of the right of each case might require.

This court has power to award costs.

After a written waiver of exceptions to the taxation, this court will not open the question of costs for re-examination.

Argued May 8, 1856. Decided May 12, 1856

THIS is a branch of the preceding case, to which the reader is referred for the history of the case, and a general statement of the facts involved.

Messrs. Stanton, Darragh, Walker and Campbell, for complainants.

Messrs. Johnson, Fitzhugh, Stuart, Cadwalader and Russell, for respondents.

Mr. Justice Nelson delivered the opinion of the court:

This is an application made, on the part of the defendants, for leave to file a bill of review, so far as respects the orders and decrees for costs heretofore rendered in the above case against them.

The court have already determined that the decree rendered for costs against the defendants was unaffected by the Act of Congress

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passed August 31, 1852, and with which determination it is entirely satisfied.

It is suggested, however, on the part of the applicant, that there is no Act of Congress expressly conferring power upon this court in the case of original jurisdiction to award costs against other parties. This may be true, but it is equally true in respect to the circuit courts of the United States, and yet no one has doubted the power in those courts since their first 461*] organization *(1 Blatchf. 652); and the grounds upon which that power rests apply with equal force to the Supreme Court in the cases mentioned. In the distribution of original jurisdiction between the supreme and circuit courts, there is nothing peculiar in the nature or character of that conferred upon the former, to distinguish it specially from the latter. Indeed, a large portion of this jurisdiction is concurrent with that of the circuit courts. It is exclusive only in a few cases having regard to the sovereign character of the party to the suit, or in cases where the interests of our foreign relations may be concerned, and principles of international law involved.

In the nature of the jurisdiction, therefore, or in the character of the suits in this court of original jurisdiction, we perceived nothing that should lead us to distinguish, on the question of costs, between this court and the circuit courts. And, as we have already said, the grounds for the exercise of the power—namely: the repeated recognition by Acts of Congress of the right of the prevailing party to costs—is as applicable to the one court as the other.

It would be an endless task to refer to the various Acts of Congress passed from time to time recognizing the right of the party to costs in proceedings in the courts of the United States, and, of course, including this court. It will be sufficient to say, that they will be found in the laws of Congress, running through its entire legislation on the subject of judicial proceedings, and regulation of the power and authority of the federal courts and its officers. Among the first Acts is that of May 9, 1792, "An Act for regulating processes in the courts of the United States, and providing compensations for the officers of the said courts and for jurors and witnesses." 1 Stat. at L. 275. The compensation here provided for, on behalf of officers and persons concerned in the administration of justice, not payable out of the Treasury of the United States, was recoverable as costs of the suit. Sec. 6, p. 278.

The Act of July 22, 1813, "An Act concerning suits and costs in courts of the United States," provided (sec. 1), that where several actions against persons who might be joined in one action touching a demand in any court of the United States, if judgment be given for the plaintiff, such party shall not recover the costs of more than one action, etc. And the 3d section provided, that where causes of like nature, etc., shall be pending before a court of the United States, it is made the duty of the court to make rules or orders to avoid unnecessary costs, and consolidate the causes. It is also provided that if any attorney or person admitted to conduct causes in a court of the United States shall appear to have multiplied pro- 462*] ceedings *in any cause, so as to increase costs vexatiously, such person may be required to satisfy any excess of costs so incurred. But we shall not pursue this inquiry. We could multiply instances of similar recognition of the right of the party to costs, and power of the court to award them, to almost any extent. The instances we have referred to are but samples, and, we think, sufficient for the purpose designed.

But independent of this, the Constitution provides that the judicial power of the United States shall extend to all cases in equity between a state and the citizens of another state; and that, in cases in which a state shall be a party, this court shall have original jurisdiction. There is thus conferred by the Constitution on this court original jurisdiction over "cases in equity" between a state and a citizen of another state; and this is the jurisdiction we have exercised in the matter now before us.

Original jurisdiction in equity, in a particular class of cases, conferred by the Constitution on this court, has been interpreted to impose the duty to adjudicate according to such rules and principles as governed the action of the Court of Chancery in England, which administered equity at the time of the emigration of our ancestors, and down to the period when our Constitution was formed. And when the Constitution of the United States conferred that jurisdiction on this court, it cannot be construed to exclude the power possessed and constantly exercised by every court of equity then known, to use its discretion to award or refuse costs, as its judgment of the right of the case, in that particular, might require. The court entertains no doubt of its power to award costs, and deny the application to file a bill of review.

Then as to the bill of costs taxed by the clerk. It is sufficient to say that the bill, as we understand it, consists entirely of the expenses attending the taking of testimony in the case, and of the surveys, examinations, and reports of the engineer, preparatory to the final hearing of the case, and which services were performed under the special order and direction of the court, together with the fees for the services of the officers of the court. And further, that the bill of costs has been referred to the clerk of the court, with directions to examine witnesses, and resort to such other proofs for the purpose of ascertaining the proper compensation to be allowed the commissioners, and to the engineers and clerks employed by him, and also to ascertain the whole amount of expenses incurred by said commissioner, and the amount advanced by the respective parties, and report on the same; and that either party have leave to except to the report, in writing, as to any of the items or sums of money allowed by the clerk.

*This report was duly made in con- [*463 formity with the order, and the counsel for the respective parties filed at the time a written declaration waiving all exceptions to any part of said account or vouchers, and stating that they do not mean to except to said report, nor desire any further time to examine or except to it; whereupon the report was confirmed by this court.

It can hardly be expected, after this deliberate proceeding by the court to ascertain the

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costs and expenses attending the trial and hearing of the case, and the opportunity of the counsel for the respective parties at the time, to scrutinize the several items of the account, their attendance before the master, and after the proper scrutiny, entering into and filing an express written waiver of exceptions to the taxation and solemn recognition of its justice and propriety, that the court will open the question for a re-examination, or can desire any further inquiry into or review of the matter thus disposed of. There must be an end of litigation. We are not only satisfied that the party applicant for a review of the question has already had full opportunity to present his objections to the bill of costs, and, indeed, has already availed himself of the benefit of it, but are also satisfied with the order, and judgment of the court heretofore given in the premises.

The motion for bill of review, and also for retaxation of costs, is denied.

404*] *THE LAFAYETTE INSURANCE COMPANY, Plff. in Er.,
v.
MAYNARD FRENCH, Edward K. Strong, and Thomas B. Fine.

(See S. C. 18 How. 404–409.)

Jurisdiction — averment of residence — Ohio judgment against Indiana corporation, entitled to faith and credit in Indiana, when service was on resident authorized agent—mistake in defendant's name, not pleaded in abatement—judgment binds him.

The averment in the declaration that a company, defendant, is a citizen of a state, in the district in which the suit is brought, is not sufficient to show jurisdiction.

The averment that the defendants are a Corporation created under the laws of the State, having its principal place of business in that state, is sufficient.

A judgment recovered in Ohio against an Indiana Corporation, upon a contract made by that Corporation in Ohio, to insure property there, allowed by the laws of Ohio to transact business there, and to receive service of process on its resident agent, is a judgment entitled to the same faith and credit in Indiana as in Ohio, under the Constitution and laws of the United States.

The process was served in Ohio upon an agent of the Corporation there, qualified, by law of Ohio, to represent the Corporation there in respect to such service, and notice to him was notice to the Corporation.

Such a judgment, recovered after such notice, is as valid as if the Corporation had had its habitat within Ohio; that is, entitled to the same faith and credit in Indiana as in Ohio.

If a mistake be made in the name of a defendant, and he fails to plead it in abatement, the judgment binds him though called by a wrong name.

Argued Apr. 4, 1856. Decided Apr. 25, 1856.

IN ERROR to the Circuit Court of the United States for the District Court of Indiana.

This was an action of debt brought in the Circuit Court of the United States for the District of Indiana, by the appellees, on a judgment rendered in one of the state courts of Ohio.

The plaintiff offered in evidence a judgment record from the Commercial Court of Cincinnati in the State of Ohio; to the introduction of which judgment record as evidence in this cause, the said defendant, by counsel, then and there objected.

The court overruled the objections so made by the defendant to the introduction of said record in evidence, to which ruling the defendant, by counsel, excepted.

The case was submitted to the court by the parties, waiving a jury, and the court found for the plaintiffs the amount of the judgment, with interests and costs, and rendered judgment accordingly. The defendants brought the case here on a writ of error.

The case is further stated by the court.

Mr. R. H. Gillett, for the plaintiffs in error:

The question whether the Commercial Court of Cincinnati had jurisdiction to render the judgment offered in evidence, can be inquired into when thus offered.

1 Pet. 340; Thompson v. Tolmie, 2 Pet. 157; Rose v. Himely, 4 Cranch, 241; Hickey v. Stewart, 3 How. 750; Shriver v. Lynn, 2 How. 60.

A judgment against parties not within the jurisdiction of a court, and who were not served with process, and who did not appear to the action, is null and void, and will not support an action.

Ewer v. Coffin, 1 Cush. 24; Woodruff v. Taylor, 20 Vt. 65; Lincoln v. Tower, 2 McLean, 473; Shaefer v. Gates, 2 B. Mon. 453; Day v. Newark India-rubber Co. 1 Blatchf. 628.

The variance in the name of the defendant below was fatal.

Burnham v. Bank, 5 N. H. 446; Bank v. Smalley, 2 Cow. 770.

The record could not be changed by parol evidence.

Lincoln v. Tower, 2 McLean, 473; Green v. Ovington, 16 Johns. 55; Hunt v. Rousmanier, 8 Wheat. 174; Bradley v. Washington, etc. Co. 13 Pet. 89.

Mr. O. H. Smith, for the defendants in error:

The Commercial Court of Cincinnati had jurisdiction to render the judgment offered in evidence.

There was service of process under the laws of the State of Ohio, and the record is conclusive between the parties.

5 McLean, 461.

The Circuit Court had jurisdiction of this cause. I should feel disposed to review the old authorities cited by counsel for appellants against this proposition, did I not consider the question res adjudicata in this court.

Louisville R. R. Co. v. Letson, 2 How. 497; 16 How. 314; 5 McLean, 461.

Mr. Justice Curtis delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Indiana, in an action of debt on a judgment recovered in the Commercial Court of Cincinnati, in the State of Ohio. In the declaration, the plaintiffs are averred to be citizens of Ohio; and they "complain of the Lafayette Insurance Company, a citizen of the State of Indiana."

NOTE.—Citizenship of corporation and its stockholders. Voluntary association. Holders of bonds of corporation secured by mortgage. General answer waives objections to residence—see note to Hope Ins. Co. v. Boardman, 3 L. ed. U. S. 36.

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This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a Corporation; or, if it be such, by the law of what state it was created. The averment, that the Company is a citizen of the State of Indiana, can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the Constitution. And therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed. But the plaintiff's replication alleges that the defendants are a Corporation, created under the laws of the State of Indiana, having its principal place of business in that State. These allegations are confessed by the demurrer; and they bring the case within the decision of this court in Marshall v. The Baltimore and Ohio Railroad Company, 16 How., 314, and the previous decisions therein referred to.

Upon the merits it was objected that the judgment declared on was rendered by the Commercial Court of Cincinnati, without jurisdiction over the person sued; and the argument was, that as this Corporation was created by a law of the State of Indiana, it could have no existence out of that State, and consequently could not be sued in Ohio.

406*] *The precise facts upon which this objection depends, are that this Corporation was created by a law of the State of Indiana, and had its principal office for business within that State. It had also an agent authorized to contract for insurance, who resided in the State of Ohio. The contract on which the judgment in question was recovered was made in Ohio, and was to be there performed; because it was a contract with the citizens of Ohio to insure property within that State. A statute of Ohio makes special provision for suits against foreign corporations, founded on contracts of insurance there made by them with citizens of that State; and one of its provisions is, that service of process on such resident agent of the foreign corporation shall be "as effectual as though the same were served on the principal."

The question is, whether a judgment recovered in Ohio against the Indiana Corporation, upon a contract made by that Corporation in Ohio with citizens of that State to insure property there, after the law above mentioned was enacted—service of process having been made on such resident agent—is a judgment entitled to the same faith and credit in the State of Indiana as in the State of Ohio, under the Constitution and laws of the United States.

No question has been made that this judgment would be held binding in the State of Ohio, and would there be satisfied out of any property of the defendants existing in that State.

The Act of May 26, 1790 (1 Stat. at L. 122), gives to a judgment rendered in any state such faith and credit as it had in the courts of the state where it was recovered. But this provision, though general in its terms, does not extend to judgments rendered against persons not amendable to the jurisdiction rendering the judgments. D'Arcy v. Ketchum, 11 How. 165. And consequently, notwithstanding the Act of Congress, whenever an action is brought in on one state on a judgment recovered in another, it is not enough to show it to be valid in the state where it was rendered; it must also appear that the defendant was either personally within the jurisdiction of the State, or had legal notice of the suit, and was in some way subject to its laws, so as to be bound to appear and contest the suit, or suffer a judgment by default. In more general terms, the doctrine of this court, as well as of the courts of many of the States, is. that this Act of Congress was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result; nor those rules of public law which protect persons and property within one state from the exercise of jurisdiction over them by another.

*This Corporation, existing only by [*407 virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that State. Bank of Augusta v. Earle, 13 Pet. 519. But it does not necessarily follow that a valid judgment could be recovered against it only in that State. A corporation may sue in a foreign state, by its attorney there; and if it fails in the suit, be subject to a judgment for costs. And so if a corporation, though in Indiana, should appoint an attorney to appear, in an action brought in Ohio, and the attorney should appear, the court would have jurisdiction to render a judgment, in all respects as obligatory as if the defendant were within the State. The inquiry is not whether the defendant is personally within the State, but whether he, or some one authorized to act for him in reference to the suit, had notice and appeared; or, if he did not appear, whether he was bound to appear, or suffer a judgment by default.

And the true question in this case is, whether this Corporation had such notice of the suit. and was so far subject to the jurisdiction and laws of Ohio, that it was bound to appear, or take the consequences of non-appearance.

A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State (13 Pet. 519). This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the Constitution or laws of the United States. or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.

In this instance, one of the conditions imposed by Ohio was, in effect. that the agent who should reside in Ohio and enter into contracts of insurance there in behalf of the foreign Corporation, should also be deemed its agent to receive service of process in suits founded on such contracts. We find nothing in this provision either reasonable in itself, or in conflict with any principle of public law. It cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State, and fully sub-

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ject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the State, for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed.

408*] *Nor do we think the means adopted to effect this object are open to the objection that is an attempt improperly to extend the jurisdiction of the State beyond its own limits to a person in another state. Process can be served on a corporation only by making service thereof on some one or more of its agents. The law may, and ordinarily does, designate the agent, or officer, on whom process is to be served. For the purpose of receiving such service, and being bound by it, the Corporation is identified with such agent or officer. The corporate power to receive and act on such service, so far as to make it known to the Corporation, is thus vested in such officer or agent. Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the Corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the Corporation to receive service of process in suits on such contracts, and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the Corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the president and directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the Corporation there in respect to such service; and notice to him was notice to the Corporation which he there represented, and for whom he was empowered to take notice.

We consider this foreign Corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that State, in suits founded on such contracts, whereof notice should be given by due process of law, served on the agent of the Corporation resident in Ohio, and qualified by the law of Ohio and the presumed assent of the Corporation to receive and act on such notice; that this obligation is well founded in policy and morals, and not inconsistent with any principle of public law; and that when so sued on such contracts in Ohio, the Corporation was personally amenable to that jurisdiction; and we hold such a judgment, recovered after such notice, to be as valid as if the Corporation had had its habitat within the State; that is, entitled to the same faith and credit in Indiana as in Ohio, under the Constitution and laws of the United States.

We limit our decision to the case of a Corporation acting in a state foreign to its creation, under a law of that state which recognized its existence, for the purposes of making contracts there and being sued on them, through 409*] notice to its contracting *agents. The case of natural persons, and of other foreign corporations, is attended with other considerations, which might or might not distinguish it; upon this we give no opinion.

This decision renders it unnecessary to consider the questions arising under the counts on the policy.

It was objected that the judgment recovered in the Commercial Court was against "the President, Directors and Company of the Lafayette Insurance Company," while this action is against the "Lafayette Insurance Company;" but the declaration describes the judgment correctly, and then avers that the judgment was recovered against the defendants by that other name. We must assume that this fact was proved; and the only question open here is, whether, if a mistake be made in the name of a defendant, and he fails to plead it in abatement, the judgment binds him, though called by a wrong name. Of this, we have no doubt. Evidence that it was an erroneous name of the same person must, therefore, be admissible; otherwise, a mistake in the defendant's name, instead of being available only by a plea in abatement, would render a judgment wholly inoperative.

In the case of The Medway Cotton Manufactory v. Adams, 10 Mass. 360, the plaintiffs, a Corporation, declared on a promissory note made to Richardson, Metcalf & Co., and averred that the maker promised the Corporation by that name. The defendant demurred to the declaration, and assigned, in argument, the same cause which has been relied on at the bar in this case—that it was not competent to prove by parol evidence that the promisee of the note was the Corporation, the name not being the same. The court held otherwise, and overruled the demurrer.

A similar decision was made in an action of debt on bond by the Supreme Court of New York, in the case of N. Y. African Society v. Varick et al. 13 Johns. 38. See, also, Inhabitants, etc., v. String, 5 Halst. 323; and the authorities cited in the cases in New York and Massachusetts.

The decision of the Circuit Court is affirmed.

Mr. Justice Campbell dissented, and stated the grounds of his dissent.

JOSHUA STANFORD, Plff. in Error,

v.

CLAY TAYLOR.

(See S. C. 18 How. 409–413.)

Parol evidence to contradict survey.

Where a grant of land with indefinite boundaries was confirmed and ordered to be surveyed, conformably to the possession, parol proof is inadmissible to show that the official survey was improperly made of a wrong tract.

The official survey of confirmation under which the plaintiff claims does not include the premises sued for; therefore the verdict was properly for defendant.

Argued Apr. 18, 1856. Decided Apr. 25, 1856.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The case is stated by the court.

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Messrs. **Lawrence, Evans and Johnson,** for the plaintiffs in error:

The title in this case was a perfect, equitable title from Spain. The tract was specific. The possession and cultivation were in accordance. This equitable title was protected by the Treaty. It was confirmed by the Act of 1807, and the decision of the commissioners.

Glenn v. U. S. 13 How. 250; U. S. v. Davenport, 15 How. 1; Menard v. Massey, 8 How. 309; West v. Cochran, 17 How. 413.

The cases of Stoddard v. Chambers, 2 How. 284, and Bissell v. Penrose, 8 How. 317, were cases in which the grant was undefined, and they remained unlocated except by private surveys long after the grant.

But it is contended that there was a survey in 1834, which places this claim elsewhere, and that we are concluded by that.

This survey was erroneous and void in every respect that could affect the plaintiff's right under the confirmation. A survey, if necessary at all, is not final or unalterable. If wrong, it may be corrected by the courts.

Kittridge v. Landry, 2 Rob. La. 72; Latiolais v. Richard, 6 Martin, N. S. 213; Fay v. Chambers, 4 La. Ann. 481.

A survey is prima facie evidence of its conformity to the confirmation. The land surveyed should be the same as that originally possessed. This case differs from that of West v. Cochran, 17 How. 403; in which Brazeau had never been in possession of the ground claimed by him. Neither he nor any representative of his ever had proper registry of the claim; nor did anyone come before the Board of Commissioners as a claimant, under the Act of 1807.

The plaintiff made out a good prima facie case in ejectment. The defendant showed no title in himself, and the plaintiff should have been allowed to show the erroneous character of the surveys produced by the defendant.

9 Pet. 171; 10 Pet. 326, 340; 15 Pet. 172; 16 Pet. 146. 228; 8 How. 295; 10 How. 541; 11 How. 115; U. S. v. Levy, 13 Pet. 33.

Mr. **Williams** for defendant in error.

Mr. Justice **Catron** delivered the opinion of the court:

The plaintiff, Stanford, sued Taylor in ejectment, claiming title to the land in dispute under a concession from "Don Francisco Cruzat, Lieutenant Governor," dated in 1785, who decreed as follows:

"In view of what is set forth in the present memorial presented by Angela Chovin, widow of the deceased Miguel Bolica, of this Town of St. Louis, under date of the sixth of May of the current year, I have granted to her, in proprietary title, for her heirs, and others who may represent her right, forty arpents front of land upon forty in depth, along the river called De los Padres (Des Pères), from the north to the south, which is bounded on the one side by lands of Louis Robert, and on the other by the domain of the King," etc.

This claim was confirmed in general terms to Jean F. Perry, as assignee, by the Board of Commissioners sitting at St. Louis, in 1811. for 1,600 arpents, "situate in the district of St. Louis, on the River Des Pères," and ordered to be surveyed "conformably to the possession, by virtue of a concession, or order of survey, from Francis Cruzat, Lieutenant-General."

The plaintiff derives title under Perry.

The survey directed to be made by the Board of Commissioners *was not executed till [*412 1834, when the Surveyor-General ordered the land to be located west of Louis Robert's tract, and on both sides of the River Des Pères. But the plaintiff insists that the land granted and confirmed, adjoins Robert's tract on the east, and that the location is so plainly apparent on the face of the concession as not to require a survey; and furthermore, he offered to show by proof that the possession of Perry, the confirmee, was part of a tract of land east of the tract of Louis Robert, of seven by forty arpents, and adjoining it; and, if located there. would include the premises in controversy. The court rejected the evidence offered, and permitted the defendant to give in evidence the official survey of the tract of 1,600 arpents, to overcome the effect of which, the plaintiff offered to prove that the official survey was improperly made west of Robert's tract, and not adjoining it; whereas it should have been made east of the same. This evidence was also rejected, when the court instructed the jury as follows: "The parties agreeing that the official survey of confirmation, under which the plaintiff claims the land in dispute, does not include the premises sued for, the jury ought to find for the defendant."

To the rejection of the parol evidence, and to the charge of the court, the plaintiff excepted.

The law is settled, that where there is a specific tract of land confirmed, according to ascertained boundaries, the confirmee takes a title on which he may sue in ejectment. The case of Bissell v. Penrose, 8 How. 317, lays down the true rule.

But where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed, and severed from the public domain and the lands of others, then it is not open to controversy that the title attaches to no land: nor has a court of justice any authority in law to ascertain and establish its boundaries, this being reserved to the Executive Department. The case of West v. Cochran, 17 How. 403, need only be referred to as settling this point. And the question here is, whether the concession to Perry is indefinite and vague, and subject to be located at different places.

It is to be forty by forty arpents in extent; it is to lie along the River Des Pères, from the north to the south; and to be bounded on the one side by the lands of Louis Robert, and on the other by the domain of the King. On which side of Robert's land it is to lie, we are not informed, further than that it is to lie along the river from north to south. The record shows, that if surveyed west of Robert's tract, the forty by forty arpents includes the River Des Pères; but, if surveyed east of Robert's land, it will not include the river. The uncertainty of out-boundary *in this instance is too [*413 manifest, in our opinion, to require discussion to show that a public survey is required to attach the concession to any land.

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JAMES C. CONVERSE, Adm'r of Philip Greely, Deceased, Plaintiff in Error,

v.

BENJAMIN BURGESS, Nathan B. Gibbs and Benjamin F. Burgess, Copartners under the firm of Benjamin Burgess & Son.

(See S. C. 18 How. 413–418.)

Money paid for duties illegally assessed, may be recovered back—return of appraisers not conclusive—what sufficient protest to admit evidence that appraisers did not examine goods.

An importer who has paid money under a valid protest to a collector of customs for duties illegally assessed, may maintain an action for its return.

The importer is not precluded by the return of the merchant appraisers from disputing the sufficiency or accuracy of their statement.

But to enable the importer to do this, he must, before paying the duties, enter a protest in writing, signed by him, setting forth "distinctly and specifically the grounds of objection" to the payment of the duties.

A ground of objection stated in the protest, "that the goods were not fairly and faithfully examined by the appraisers," is sufficient to admit evidence that the appraisers did not examine or see any of the original packages, and only saw samples which had been taken several weeks before, and which would not afford a fair criterion by which to judge of the importation.

Submitted Feb. 25, 1856. Decided Apr. 25, 1856.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This suit was brought in the Circuit Court of the United States for the District of Massachusetts, by the defendants in error, to recover back certain duties upon sugars and honey imported from Remedois, in Cuba, which they claimed were illegally exacted.

The duties in question were levied under and appraisement made by the public appraisers, advancing the invoiced price from $8.968.41 to $9,794.30. From the decision of said appraisers the plaintiffs had appealed, and two merchants, appointed at their request, confirmed the action of public appraisers, but substituted the word "the principal markets of Cuba" for "the place of exportation."

Duties were levied according to this appraisement, and also an additional duty of twenty per cent, under sec. 8 of the Act of July 30, 1846. The additional duties, amounting to $1,643.48, were paid under protest.

On the trial below, the jury found for the plaintiffs and assessed their damages at $2,127.68, upon which judgment was entered. Whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. C. Cushing, Attorney-General, for plaintiff in error:

The appraisal by the merchant appraisers is final and conclusive, except when impeached for fraud.

Act of 1842, 5 Stat. at L. 563, 564, secs. 16, 17; 8th sec. of Tariff Act of 1846, 9 Stat. at L. p. 431; see, also, Burchell v. Marsh, 17 How. 344.

Mr. Milton Andros, for defendants in error:

The acts of the appraisers complained of by the defendants, are of a ministerial character, and they are not conclusive upon the reporter; but inquiry may be entertained in what manner they have been done, or whether they have been done at all.

The report of the appraisers is in the nature of an award. It can be impeached for other causes than fraud.

Torrence v. Amsden, 3 McLean, 512; Cald. Arb. 182; Kyd. on Awards, 236; McCalmont v. Whittaker, 3 Rawle, 90; Corneforth v. Geer, 2 Vern. 705; The State v. Williams, 9 Gill. 172; Kent v. Elstob, 3 East, 18.

The evidence offered by the defendants in error was properly admitted, because it tended to show that said examination and appraisement was irregularly and illegally made. The Statute is imperative upon the appraisers, to make an examination of at least every tenth package. The examination in this manner is a ministerial act, the performance of which is not left to their discretion.

The protest was sufficient. The objection in the protest which is relied upon, is "that the goods were not fairly and faithfully examined." This is substantially the language of the Statute, "which is diligently and faithfully to examine." "If the protest makes known what was protested against, it satisfies the Statute in this particular."

Swanston v. Morton, 1 Curt. 295.

Mr. Justice Campbell delivered the opinion of the court:

The intestate of the plaintiff is charged in this judgment for an excess of duties collected by him in his capacity of Collector of Customs at the port of Boston, under color of a law of the United States.

The defendants in April, 1850, imported into Boston an invoice of sugars from the Island of Cuba, and made entry as in case of goods purchased, by the production of the invoice and an oath that it exhibited a just and faithful account of the actual cost and all charges thereon, etc. The public appraisers advanced the valuation of the merchandise contained in the invoice ten per cent. above the invoice price, and made their return to the Collector accordingly, the 14th May, 1850. From this valuation the defendants appealed, and merchant appraisers were appointed to make a new appraisement. These returned their report the 4th June, to the effect that the sugars could not have been purchased at the time of exportation for less than the sum assessed by the appraisers, at the principal markets of Cuba.

Duties were levied according to this appraisement, and also an additional duty of 20 per cent, under the 8th section of the Act of 30th July, 1846. These duties were paid 4th June, 1850, under a protest, by the defendants, with the declared "intention of reclaiming [*415 the same or any part thereof as may be found to have been illegally paid by them;" and affirm as the ground of their protest the "fair valuation in the invoice, and that the goods were not fairly and faithfully examined by the appraisers."

Upon the trial of the cause the importers (defendants) offered to prove that the merchant appraisers did not examine nor see any of the original packages of the merchandise in question, but only saw samples which had been

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taken on the 26th April, 1850, from one in ten of the packages described in the invoice; and that such samples so drawn and exposed to the air would not afford a true criterion by which to judge of the importation; and claimed the right to go behind the return of the said merchant appraisers, on the ground that they had not examined the sugars as required by law, and to put that as a question of fact to the jury, without alleging fraud.

The Collector (plaintiff's intestate) objected to this evidence, and claimed that the decision of the appraisers was in the nature of an award and final under the Statute, and not open under this protest, in the absence of fraud, to review.

The Circuit Court admitted this evidence, and decided that the importers (defendants) might go to the jury on the facts, whether the examination made by the merchant appraisers was in substance and effect equivalent to an examination of one package in ten of the importation, and if it was not, that the appraisement was void.

A verdict and judgment were rendered in favor of the importers, and these decisions of the Circuit Court have been assigned for error in this court.

The right of an importer, who has paid money, under a valid protest, to a Collector of the Customs, for duties illegally assessed, to maintain an action for its return has been acknowledged by Congress and in this court. 5 Stat. at Large, 727, ch. 22; Greely v. Thompson, 10 How. 225. The only inquiries in such an action are, whether the duties have been legally charged, and does the protest conform to the Act of Congress above cited. The ascertainment of the value of imports, upon which the assessment of duties is made, is confided in the first instance to officers of the government, and in the case of dissatisfaction of the importer with their assessment, to discreet and experienced merchants, familiar with the character and value of the goods in question, whose decision is final, provided it is made in pursuance of law.

They are required by all reasonable ways or means in their power to ascertain, estimate, and appraise "the true and actual market value and wholesale price of the import," at the time and place or places specified in the stat- 416*] utes, "any invoice or *affidavit thereto to the contrary notwithstanding;" they are authorized "to call before them and examine upon oath or affirmation any owner, importer, consignee, or other person, touching any matter or thing they may deem material in ascertaining the true market value or wholesale price of any merchandise imported, and to require the production, on oath or affirmation, of any letters, accounts, or invoices in his possession relating to the same." It is the duty of the Collector to designate on the invoice at least one package of every invoice, and one package at least of every ten packages of goods, wares and merchandise, and a greater number, should he, or either of the appraisers, deem it necessary, to be opened, examined and appraised, and shall order the package or packages so designated to the public stores for examination. 5 Stat. at Large, 563–565, secs. 16, 17, 21. The appraisers take an oath diligently and faithfully to examine and inspect such goods, wares and merchandise as the Collector may direct, and truly to report, to the best of their knowledge and belief, the true value thereof. 3 Stat. at Large, 735, sec. 16.

These Acts of Congress provide for the appointment, regulate the duties, and impose the limitations on the authority of the appraisers, and determine the conditions on which the validity of their assessment depends. All their powers are derived from these Acts, and it is their duty to observe the restrictions, and to obey the directions they contain. In the present instance, there was a neglect of the positive mandate to open, examine and appraise one package of every invoice, and one package, at least, of every ten packages of goods, wares and merchandise;" and the jury have found that the inquiry they made was not, in substance, nor in effect, an equivalent for such an examination.

We are, therefore, of the opinion that the importer was not precluded by their return from disputing the sufficiency or accuracy of their assessment. But to enable the importer to do this, he must, before making payment of the duties, enter "a protest," in writing, signed by him, setting forth, "distinctly and specifically, the grounds of objection" to the payment of the duties. In the present instance there was a protest, to which there is no objection, except that its statement was not sufficiently distinct and specific. The ground of objection stated in the protest is, "that the goods were not fairly and faithfully examined by the appraisers."

And the proof offered was, that the appraisers did not examine nor see any of the original packages of the merchandise, and only saw samples which had been taken several weeks before, and which would not afford a true criterion by which to judge of the importation.

This Statute was designed for practical use by men engaged *in active commercial [*417 pursuits, and was intended to superinduce a prompt and amicable settlement of differences between the government and the importer. The officers of the government on the one part, and the importer or his agent on the other, are brought into communciation and intercourse by the act of entry of the import, and opportunities for explanation easily occur for every difference that may arise. We are not, therefore, disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this Statute. It is sufficient if the importer indicates distinctly and definitely the sources of his complaint, and his design to make it the foundation for a claim against the government.

In the present instance, he asserts that the goods were not fairly and faithfully examined by the appraisers. This, we think, was sufficient, without disclosing the grounds upon which he contended that the appraisement was unfair or unfaithful.

In Jones v. Bird, 5 B. & A. 847, which arose under a local Act of Parliament relating to the Commissioners of Sewers for Westminster, which provides that no plaintiff should recover in any action for anything done under certain Acts of Parliament, unless notice was given to the defendants, specifying the cause of action, Chief Justice Abbott said: "I think

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the notice sufficient, and that it ought not to be construed with great strictness, its object being merely to inform the defendant substantially of the ground of the complaint, but not of the mode or manner in which the injury has been sustained." And Justice Bayley said: "A notice of this sort does not require the same precision as a declaration. It is quite sufficient if it calls the attention of the defendants to the general nature of the injury, so that they may go to the premises and see what the ground of complaint is."

Under the Act of 24 George II., ch. 44, which required a notice to justices of the peace which should contain, "clearly and explicitly, the course of action which the party hath, or claimeth to have," the Court of Exchequer held a notice sufficient, although it was in the form of a declaration, and comprised not only the specific complaint, but all the redundancy and general averments which the experience of pleaders has led them to introduce into that description of pleadings, "for it could not have misled nor imposed any difficulty on the defendants, as to the tender of the amends they might have thought fit to make, and is, therefore, sufficient." Gembert v. Coyney, McClelland & Y. 469.

These authorities disclose a sound principle of interpretation in regard to such notices, and support the principle we have announced in respect to that under consideration.

Upon the whole case, we think there is no error in the record, and judgment is affirmed.

Dissenting, Mr. Chief Justice **Taney**, Mr. Justice **Daniel** and Mr. Justice **Nelson**.

AMARON LEDOUX, Alphonse Miltenberger, and George O. Hall, Plffs. in Error,

v.

JOHN BLACK, John Hagan, Jr., John Hayes, Sr., Francis Wren, J. M. Smiley, and Ephraim McLean.

(See S. C. 18 How. 473–475.)

Where boundaries of claim vague, until location and survey, government may sell the land—survey necessary to sever the land.

When the boundaries of a confirmed claim are vague and uncertain, and are to be fixed by a government survey, or such confirmation is only the recognition of a pre-existing right or claim, and before the survey and location the government sells a part of the land not necessarily embraced within the tract confirmed, the title of the purchaser will prevail.

Until confirmation no valid title was vested to any specific land; nor did confirmation locate and sever the land from the public domain. This could only be done by a public survey.

Up to that time government could sell and convey a legal title, regardless of the fact that the concession existed and might be surveyed in the land previously granted.

Argued Apr. 3, 1856. Decided Apr. 25, 1856.

IN ERROR to the Supreme Court of the State of Louisiana for the Eastern District.

This suit was brought in one of the state courts of Louisiana, to try the title of a certain tract of land. Upon agreement, the case was submitted to the court without a jury. Judgment was rendered in favor of the defendants. This judgment having been affirmed on appeal by the Supreme Court of the State, the plaintiffs have brought the case here on a writ of error. A further statement of the case appears in the opinion of the court.

Messrs. **George S. Sawyer** and **George E. Badger** for the plaintiffs in error.

Mr. **J. P. Benjamin** for the defendants in error.

Mr. Justice **Catron** delivered the opinion of the court:

This cause is brought here from the Supreme Court of Louisiana, by a writ of error under the 25th section of the Judiciary Act of 1879. The only question presented for our consideration is, which party has the better right to the land in dispute? The defendant, Black, claims title under an entry made in 1808, and a patent founded on the entry, dated in 1810, in the name of General Lafayette, for a thousand acres. The validity of this title as against the United States is not denied; but the plaintiffs claim to have an elder title, by virtue of a concession to Ursino Bouligny, of forty arpents front by forty arpents in depth, dated January 10, 1796, of which the plaintiffs are assignees. They allege that under an Act of Congress of February, 1813, Bouligny prosecuted his claim to the proper register and receiver, who reported in its favor on the 20th of November, 1816; that their report was confirmed by Act of Congress, the 11th of May, 1820, and that claim was regularly surveyed by order of the Surveyor-General of Louisiana, in 1843, and the survey approved in 1844.

To show the point made and decided on these facts, by the Supreme Court of Louisiana, we give an extract of their opinion, which is found in the record:

"Conceding," says the court, "for the sake of argument, that the claim of the plaintiffs was filed in the Land Office in the manner required by law, before the issuing of the patent to General Lafayette; that it has been confirmed by the Act of Congress of the 11th of May, 1820, and that the confirmation should be made to refer back to the date of the original title, unless that title or a survey made under it by the Spanish surveyor, in compliance with the order of the Governor, will enable the court to ascertain the specific boundaries of the land granted, the location of the warrant under which the patent issued to General Lafayette cannot be disturbed. We have uniformly adhered to the rule laid down by our predecessors in the cases of Lefebvre v. Cameau, 11 La. R. 323; Slack v. Orillon, 11 La. R. 587; Lott et al. v. Prudhomme et al., 3 Rob. La. 293; Metoyer v. Larenaudiere, 6 Rob. La. 130.

"In the case of Lott," the court say, referring to the other two: "We then held, that when the boundaries of a confirmed claim *are [*475 vague and uncertain, and are to be fixed by the operations of the Surveying Department, or such confirmation is only the recognition of a pre-existing right or claim, and before the survey and location the government sells a part of the land not necessarily embraced within the

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tract confirmed, the title of the purchaser will prevail.' Let us test the title of the plaintiffs by that rule, and ascertain whether the land now claimed is necessarily embraced within the tract confirmed to them, supposing that such a confirmation had taken place.

"There was no survey under the Spanish government, and no possession by the grantee. The boundaries are to be ascertained exclusively by the calls of the requête, and of the order of the Governor upon it. Both describe the land as a tract of forty arpents front by forty deep, in the district of Point Coupé, en el parage, called the Lagoon of the Raccourci. It is not stated whether the land is to front upon the Lagoon, or upon the Mississippi River; and as one location would answer the calls as well as the other, the description is, perhaps, on that ground alone defective. Lafayette v. Blanc, 3 Annual, 59.

"But supposing that the front was intended to be upon the river, where is it to begin, how is it to run, and where is it to end? Whether the words of description used mean at the place called the Lagoon, or in the vicinity of the Lagoon, the starting point of the survey is alike uncertain, and the designation of it by the surveyor who located the grant purely arbitrary, so far at least as it affects the rights of the defendants."

Until the confirmation took place (supposing the Act of 1820 did confirm Bouligny's claim), no valid title as against the United States was vested in the grantee to any specific tract of land. We need only to refer to the case of De Villemont v. The U. S. 13 How. 266, for authority to this effect. The cases are alike in all their features.

Nor did the mere act of confirmation tend to locate the claim, and sever the land from the public domain; this could only be done by a public survey, and which was not done till 1844. Up to that date the government could sell and convey a legal title to General Lafayette, regardless of the fact that Bouligny's concession existed, and might be surveyed on the land previously granted. This question was settled by the decision in the case of Menard's Heirs v. Massey, 8 How. 301, and is not now open to controversy.

We order that the judgment of the Supreme Court of Louisiana be affirmed.

Aff'g—5 La. Ann. 510.

THE MECHANICS' & TRADERS' BANK, Branch of the State Bank of Ohio, Plff. in Er.,

v.

HENRY DEBOLT, Late Treasurer of Hamilton County.

(See S. C. 18 How. 380–383.)

This case is ruled by the decisions in Piqua Branch of State Bank of Ohio, 16 How. 369, and Dodge v. Woolsey, decided at this term, ante. page 401.

Submitted Apr. 3, 1856. Decided Apr. 29, 1856.

IN ERROR to the Supreme Court of the State of Ohio.

On the 1st day of April, 1854, the Mechanics' and Traders' Bank, as plaintiff, and H. Debolt, Treasurer of Hamilton County, as defendant, presented to the Court of Common Pleas of Hamilton County an agreed case.

On the 1st day of April, the Court of Common Pleas rendered a judgment in the cause in favor of the defendant.

The plaintiff appealed to the Supreme Court of Ohio.

The agreed case is as follows:

The parties above named hereby agree upon the following facts, upon which a controversy depends between them, and submit the case to the Court of Common Pleas for determination and judgment, in pursuance of section 495 of the Code of Civil Procedure.

It is agreed that the plaintiff is a duly authorized Banking Company under the Act passed by the General Assembly of the State of Ohio, on the twenty-fourth day of February, eighteen hundred and forty-five, entitled "An Act to incorporate the State Bank of Ohio, and other Banking Companies," which Act is made a part of the case; that at the foundation thereof, on the thirtieth day of June, eighteen hundred and forty-five, it assumed to itself a capital of one hundred thousand dollars, and elected to be a branch of the State Bank of Ohio, and as such branch, has, from the said time of its organization under said Act to the present time, carried on the business of banking in the City of Cincinnati.

It is further agreed that the 60th section of the said Act is in the words following, to wit:

Each banking company organized under this Act, or accepting thereof and complying with its provisions, shall semi-annually on the days designated, in the 59th section for declaring dividends, set off to the state six per centum on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which said company or the stockholders thereof, on account of stock owned therein, could otherwise be subject; and the cashier shall, within ten days thereafter, inform the Auditor of State of the amount so set off, and shall pay the same to the Treasurer of State on the order of said Auditor; but in computing the profits of the company for the purposes aforesaid, the interest received on the funded debt of the State held by the company, or deposited with or transferred to the Treasurer of the State, or to the board of control by such company, shall not be taken into account." and it is further agreed, that the days named in the 59th section of said Act, and referred to in the said 60th section, are the first Monday in May and the first Monday in November.

It is further agreed, that on the first Monday of May, eighteen hundred and fifty-one, the said Bank did set off to the State, according to the provisions of said section, the sum of one hundred and ninety-five dollars and sixty-five cents; and on the first Monday in November of the same year, the further sum of two hundred and forty-one dollars and seventy-two cents and it is agreed that the said sums so set off were in fact six per centum upon the profits of said Bank during the half years then respectively expiring, after deducting, according to

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the provisions of said 60th section, the expenses and ascertained losses of the said Company for the said periods, respectively.

It is further agreed, that the Auditor of State did subsequently direct the said amounts to be paid to the Treasurer of State, and that the said order was presented to, and paid by the plaintiff, on the twenty-fifth day of November, in the year eighteen hundred and fifty-one.

It is further agreed, that subsequent to the said payment to the Treasurer of State, upon said order of the Auditor of State, the Auditor of Hamilton County proceeded to list the capital stock of said Bank and its surplus and contingent fund upon the tax list of said county, at the sum of one hundred and two thousand four hundred and sixty-two dollars, and added to the said assessment a penalty of fifty per centum, and charged upon the said sums, amounting in all to one hundred and fifty-three thousand and ninety-two dollars, a tax of two thousand two hundred and ninety-six dollars and thirty-eight cents, being at the rate of —— mills on the dollar.

It is further agreed, that on the twenty-second day of March, eighteen hundred and fifty-four, the said Henry Debolt, Treasurer, aforesaid, did forcibly and against the consent and protest of the plaintiff, take from the plaintiff the said tax of two thousand two hundred and ninety-six dollars and thirty-eight cents, together with the further sum of one hundred and fourteen dollars and eighty-two cents, being a penalty of five per centum thereon, making in all the sum of two thousand four hundred and eleven dollars and twenty cents.

It is further agreed, that the said proceedings of said Treasurer of Hamilton County, and of said County Auditor, well taken in accordance with the provisions of an Act of the General Assembly of the State of Ohio, passed on the 21st day of March, in the year eighteen hundred and fifty-one, entitled "An Act to tax banks and bank and other stocks, the same as other property is now taxable by the laws of the State;" and it is agreed that the 1st section of the said Act is in the words following, to wit:

"That it shall be the duty of the president and cashier of each and every banking institution incorporated by the laws of this State, and having the right to issue bills or notes for circulation, at the time for listing personal property under the laws of this State, to list the capital stock of such banking institution under oath at its true value in money, and return the same with the amount of surplus and contingent fund belonging to said banking institution, to the assessor of the township or ward in which such banking institution is located, and the amount so returned shall be placed on the grand duplicate of the proper county, and upon the city duplicate for city taxes, in cases where such city tax does not go upon the grand duplicate, but is collected by the city officers, and taxed for the same purposes and to the same extent that personal property is or may be required to be taxed in the place where such bank is located; and such tax shall be collected and paid over in the same manner that taxes on other personal property are required by law to be collected and paid over; provided, however, that the capital stock of any bank shall not be returned or taxed for a less amount than its capital stock paid in."

It is further agreed, that the plaintiff, the Mechanics' and Traders' Bank, has never accepted the said Act nor any part of the said Act passed on the 21st day of March, eighteen hundred and fifty-one, as an amendment to the charter of said Bank, nor in any way assented to the same as a valid law, so far as the said Act related to the said Bank, and to the listing of the capital stock and surplus and contingent fund of said Bank, and to the payment of any tax thereon different from the tax provided for in the said 60th section of the said Act passed on the twenty-fourth day of February, eighteen hundred and forty-five; and it is agreed that the said 1st section of the said Act passed on the twenty-first day of March, eighteen hundred and fifty-one, does provide for a tax different from the tax prescribed by the said 60th section of the Act passed on the twenty-fourth day of February, eighteen hundred and forty-five.

The controversy between the parties defendant upon the following question, to wit: Whether the Act passed on the twenty-first day of March, in the year eighteen hundred and fifty-one, entitled, "An Act to tax banks and bank and other stocks, the same as other property is now taxable by the laws of this State," is contrary to the Constitution of the United States, so far as the said Acts relate to the said Mechanics' and Traders' Bank, and imposes on the said Bank any tax. If the court shall determine this question in the affirmative, then judgment is to be entered in favor of the plaintiff against the said defendant, for the sum of two thousand four hundred and eleven dollars and twenty cents ($2.411.20), with interest from the 22d day of March, in the year eighteen hundred and fifty-four. If the court shall decide the said question in the negative, then judgment is to be entered against the plaintiff for costs. It is agreed that all other questions are waived, and that the judgment to be entered herein, shall be subject to review and reversal as in other cases.

Mechanics' and Traders' Branch Bank,
by C. J. Nourse, Cash.
H. Debolt.

On this agreed statement, the Court of Common Pleas held that the law of the case is in favor of the defendant, and rendered judgment accordingly.

This judgment was affirmed by the Supreme Court of Ohio on a writ of error, whereupon the plaintiff sued out this writ of error.

The counsel for the plaintiff in error alleged error in this, to wit:

1. That the court erred in holding that an Act passed by the General Assembly of the State of Ohio, on the 13th day of April, 1852, entitled, "An Act for the assessment and taxation of all property in this State, and for levying taxes thereon according to its true valuation in money," is not contrary to the Constitution, as far as the said Act relates to the said Mechanics' and Traders' Bank, and imposes upon the said Bank a tax.

2. The court erred in affirming the [illegible] judgment of the Court of Common Pleas of Hamilton County.

3. The court erred in not reversing the said

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judgment of the Court of Common Pleas of Hamilton County.

Wherefore the said Mechanics' and Traders' Bank prays that a citation may issue and the said judgment of the Supreme Court of Ohio may be reversed, annulled, and held for nothing, and that she may be restored to all things she has lost by reason thereof.

Messrs. A. F. Perry and Henry Stanbury for the plaintiff in error.

Mr. G. E. Pugh for the defendant in error.

Mr. Justice Wayne delivered the opinion of the court:

Upon our examination of the agreed statement in this case, we find that it is ruled by the cases of The Piqua Branch of the State Bank of Ohio v. Knoop, 16 How. 369, and that of Dodge v. Woolsey, decided at this term.

We therefore reverse the decree of the Supreme Court, and direct a mandate to issue accordingly.

Dissenting Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice Campbell.

Rev'g—1 Ohio, S. C. 591.

384*] *THE MECHANICS' AND TRADERS' BANK, Branch of the State Bank of Ohio, Plff. in Er.,

v.

CHARLES THOMAS, Treasurer of Hamilton County.

(See S. C. 18 How. 384-385.)

This case is ruled by the decisions in the cases of Piqua Branch of State Bank of Ohio v. Knoop, 16 How. 369, and that of Dodge v. Woolsey, decided at this term, ante, p. 401. Same decision.

Submitted Apr. 3, 1856. Decided Apr. 29, 1856.

IN ERROR to the Supreme Court of the State of Ohio.

This case was submitted on an agreed statement of facts to the Court of Common Pleas of Hamilton County, Ohio.

The case is substantially the same as the preceding case, The Mechanics' and Traders' Bank v. DeBolt.

A new question is made as to the effect of the new constitution adopted by Ohio in Sept., 1851, upon the contract as to taxation contained in the 60th section of the Bank Law of Feb., 1845. This question was also raised in the case of Dodge v. Woolsey, ante, p. 401, referred to in the opinion of the court. See that case, for a full discussion of the questions involved in this case.

A judgment, rendered by the Court of Common Pleas in favor of the defendant, was affirmed on error by the Supreme Court of Ohio. The plaintiff thereupon brought the case here on a writ of error.

Messrs. Henry Stanbury and Aaron F. Perry for plaintiff in error.

Mr. Pugh for defendant in error.

Mr. Justice Wayne delivered the opinion of the court:

We find upon the agreed statement of facts in this case that it is ruled by the decision of the court in the cases of The Piqua Branch of the State Bank of Ohio v. Knoop, 16 How. 369, and that of Dodge v. Woolsey, decided at this term. We therefore reverse the decision of the Supreme Court of Ohio, and direct a mandate to be issued accordingly.

Dissenting, Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice Campbell.

RICHARD D. WOOD, John Yarrow, James Abbott, and James Bacon, Copartners Under the Name and Style of Wood, Abbott & Co., Appts.,

v.

ALEXANDER V. DAVIS.

(See S. C. 18 How. 467-470.)

Jurisdiction—citizenship of formal parties immaterial.

Formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction, if the citizenship or character of the real parties be such as to confer it within the 11th section of the Judiciary Act.

After the real parties had appeared and defended mere agents or attorneys were no longer parties in interest or necessary parties.

Argued Apr. 17, 1856. Decided May 5, 1856.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the Circuit Court of Jo. Daviess County in the State of Illinois by the appellee, for an accounting, and the surrender of a certain note and a certain deed, and for an injunction.

On petition of Wood, Abbott & Co., the cause was removed into the Circuit Court of the United States for the Northern District of Illinois, which court ordered the cause remanded to the state court from which it was sent. The case is now here on appeal from that order.

A further statement appears in the opinion of the court.

Messrs. George T. Campbell and A. Browning, for the appellants:

1. The joinder by plaintiffs, in a state court, of defendants, citizens of the same state, who have no interest in the controversy, and whose relation to the suit appears from the record, will not deprive the defendants in interest, citizens of another state, of a right to remove the cause to the federal tribunals.

Denniston v. Potts, 11 S. & M. 36; Jackson v. Stiles, 4 Johns. 493; Ruan v. Gardner, 1 Wash. C. C. 145; Ward v. Arredondo, 1 Payne, 410, Browne v. Strode, 5 Cranch, 303; Russell v. Clark, 7 Cranch, 98; Wormley v. Wormley, 8 Wheat. 421; Boon v. Chiles, 8 Pet. 532; McNutt v. Bland, 2 How. 9.

The defendants, whose citizenship would affect the jurisdiction in this case, appeared by the record to be mere nominal defendants.

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Sto. Eq. Pl. sec. 221; Saville v. Tankred, 1 Ves. Sr. 101; Bailey v. Inglee, 2 Paige, 278; West v. Randall, 2 Mas. 197; Fenwick v. Reed, 1 Mer. 123; Marshall v. Sladden, 7 Hare, 428; Veazie v. Williams, 8 How. 134.

Messrs. **George E. Badger** and **J. M. Carlisle**, for the appellee:

The Illinois defendants were real, and not merely nominal parties.

The relief prayed against them is material, proper, and competent for the State Court, but not competent for the United States Court; and without a decree against them, the plaintiff cannot have complete and adequate relief upon the whole transaction.

The authorities cited by the appellant show that the jurisdiction in such case is in the State Court. In addition, see Smith v. Rines, 2 Sumn. 338. That the Illinois defendants have no interest in the cause, is immaterial. The appellant has a substantial interest as against them. The case was also properly remanded to the State Court, because all the defendants had not joined in the petition for removal; because no application was made to the Circuit Court to dismiss the bill as to the home defendants.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Northern District of Illinois.

Davis, a citizen and resident of Illinois, filed a bill in the 14th judicial district of that State, in chancery, against the appellants, citizens and residents of Pennsylvania, and for other persons who will be more particularly noticed hereafter, setting out various dealings and business transactions between the complainant and appellants under the firm of Wood, Abbott & Co., from the year 1843 down to the year 1849. That in October of the latter year, the firm claiming to be largely in advance to the complainant, sent one of the partners to his place of business for the purpose of securing a settlement of the accounts, and security for the balance of indebtedness. The balance was ascertained to be some $29,000, the payment of which was eventually secured by the conveyance of certain parcels of real estate; the firm, at the same time, entering into an agreement to resell and reconvey the same for the amount of the debt and interest, in one, two, three and four years. The complainant also gave his notes for the amount of the purchase money. All the notes have been paid, and parcels of the land reconveyed from time to time, except the last note of $6,000, and the parcels of land retained as security for its payment.

This note having become due, the firm of Wood, Abbott & Co., the appellants, transmitted it and a deed of the land to Foster & Stohl, with directions to collect the money, and on receipt of the same to deliver the deed to the complainant. The note having been presented for payment, it was refused, upon which they placed it in the hands of Hooper & Campbell, attorneys at law, for collection. The 469*]bill in this case was filed *against Wood, Abbott & Co., the appellants, Stohl and Foster, the agents, and Hooper & Campbell, the attorneys, setting out the facts substantially as above stated, together with the additional charges that the account presented by the firm of Wood, Abbott & Co. was overcharged and fraudulently made up, and that a much less balance was due to them than the amount secured upon a fair and equitable adjustment. The bill avers that Stohl and Foster had no interest in the transaction except to receive the money on the note, and to deliver the deed as agents of Wood, Abbott & Co.; and that Hooper & Campbell, have no interest except as attorneys for the collection of the note. There is a prayer for subpœna against all the defendants, and for answers; also that an account be taken between the complainant and Wood, Abbott & Co.; and the note be given up, and the deed be delivered to complainant; that an injunction be issued, enjoining Stohl and Foster, and Hooper & Campbell, from delivering over the note to the appellants.

The firm of Wood, Abbott & Co. entered their appearance at November Term, 1853, and petitioned the court, under the 12th section of the Judiciary Act, for a removal of the cause to the Circuit Court of the United States, on the ground that they were citizens and residents of the State of Pennsylvania; which application was granted.

The appellants, afterwards, in April, 1854, filed an answer to the bill in the Circuit Court of the United States; and on the 29th of June, 1855, that court ordered the cause to be remanded back to the state court from which it was sent.

The case is now here on an appeal from that order.

The ground upon which the cause was remanded is, that four of the defendants were citizens of the State of Illinois—namely: Stohl and Foster, and Hooper & Campbell—the same State of which the complainant was a citizen. And this presents the question whether or not these defendants were parties in interest in the subject of litigation, or, in other words, were proper or necessary parties in the suit. It has been repeatedly decided by this court, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction, if the citizenship, or character of the real parties, be such as to confer it within the 11th section of the Judiciary Act.

7 Cranch, 98; 3 Cranch, 267; 1 Curt. 575; 8 Wheat. 421; 5 Curt. 469; 5 Cranch, 303; 2 Curt. 273.

It would be difficult to state a case of parties more destitute of interest, or in which they were used merely as formal parties, than in the case of the defendants. Stohl and Foster were simply agents of Wood, Abbott & Co., with special instructions in which the complainant had no participation, and which could *be recalled at any time, before carried [*470 into execution; and until carried into execution, the complainant certainly could set up no right under them, much less a right in disregard and defiance of them. Even if the State Court had gone on and decreed against these defendants, and compelled a surrender of the note, or a delivery of the deed in the absence of the principals, it could not have extinguished the note, or have transferred the title to the

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land, as the decree could have no binding effect upon them. Before the surrender could extinguish the note, or the delivery could have the effect to pass the estate in the land, the decree must operate upon the principals, the real parties in interest, and coerce them to make such surrender or delivery. The agents had no authority to represent them in the litigation. Nor had they any interest of their own in the subject in controversy. This is not the case of a stakeholder, or holder of a deed as an escrow, where a trust has been created by the parties which is sought to be enforced by one of them. In all such cases the trustee may be a proper party, as he has a duty to perform, and which the court may enforce if improperly neglected or refused.

The above view applies with equal if not greater force to the case of the attorneys.

Even if there could be any doubt about the correctness of the view above taken, after the real parties in interest appeared and took upon themselves the defense, the defendants, Stohl and Foster, and Hooper & Campbell, were no longer parties in interest, or necessary parties, as the possession of the note and of the deed by the agents and the attorneys, was, in judgment of law, the possession of the principals and clients, and any decree or injunction against them would bind the agents or attorneys.

6 Ves. 143; 1 Mer. 123; 1 Daniel's Pr. 343; 7 Hare, 428; Story Eq. Pl. secs. 229, 231, 232.

We are satisfied that the decision of the court below was erroneous, and that the order remanding the cause to the State Court must be reversed, and the cause restored to its place in the Circuit Court of the United States.

JAMES W. GOSLEE, Duncan Frieson, Hannibal S. Blood, and John Goodrich, Owners of the Steamboat Autocrat, Libelants and Appts.,

v.

THEODORE SHUTE, Executor of Maria Shute, Deceased, and Mary A. Shute, Owners and claimants of the Steamer Magnolia.

(See S. C. 18 How. 463-467.)

Collision—rule on the Mississippi—negligence.

Two steamers meeting each other on the Mississippi, the rule is that the ascending boat should keep near the right bank, and the descending one about in the middle of the river. It is error for a steamer to leave the way established by usage. Not having an efficient watch is enough to charge a steamer with fault.

Argued Apr. 15, 1856. Decided May 6, 1856.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The libel in this case was filed in the District Court of the United States for the Eastern District of Louisiana, by the appellants, to recover damages resulting from a collision.

The District Court holding both boats in fault, divided the damages, and gave judgment in favor of the libelants for $17,900. On appeal by both parties, the Circuit Court reversed this decree and dismissed the libel, with costs. The libelants then took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Albert Pike, John O. Sargent and John J. Crittenden, for the appellants:

1. The Magnolia committed the first fault.

2. The Autocrat committed no fault and was guilty of no negligence; but being involved in doubt and peril by the fault of The Magnolia, selected a mode of extrication which, in the judgment of her proper officer, was the most proper and prudent under the circumstances.

3. In pursuing this course, even if it were erroneous, her movement would have been successful, had it not been for the second fault committed by The Magnolia, in failing to make a proper answer to the signal of The Autocrat.

4. The whole damage should be borne by the Magnolia, or, that The Autocrat should suffer only one half the damage, even if her error should be considered a fault.

For the rules of law applicable to this view of the case, we shall cite The Genesee Chief v. Fitzhugh, 12 How. 461; The Woodrop Sims, 2 Dods. Ad. 83; The Seringapatam, 5 Notes of Cases, 66; Ward v. Armstrong, 14 Ill. 283; The Lochlibo, 1 Eng. L. & Eq. 651; The Lady Anne, Ib. 670; 13 How. 101; Abb. on Ship. pp. 230-240; The Nautilus, 1 Ware, 529, 2d ed.

Mr. J. P. Benjamin, for the appellees:

1. On the evidence, the case set up on the libel is overthrown, not only by the testimony of the defendants, but by that of the libelants themselves.

2. The conduct of libelants was marked by carelessness, rashness, and a reckless disregard of the most ordinary rules of prudence in the navigation of steamboats on rivers.

3. The Autocrat was not provided with a sufficient number of attentive officers on duty at the time of the collision.

4. She was not provided with the proper watch or lookout.

5. She was run at a criminal rate of speed in a dark night, with a descending boat in view.

6. There was not committed by the officers of The Magnolia any one of the acts of omission or commission imputed by the libel.

7. The opinion of the judge of the Circuit Court exonerating the defendants from this imputed fault, is fully sustained by the evidence.

In support of the foregoing points, the following authorities will be cited for the defendants:

St. John v. Paine, 10 How. 557; Genesee Chief v. Fitzhugh, 12 How. 443; The Iron Duke, 2 W. Rob. 378; The Virgil, 2 W. Rob. 202; The Melona, 5 Notes of Cases, 550; The Gazelle, 2 W. Rob. 516; The Flint, 6 Notes of Cases, 271; The Europa, 2 Law & Eq. 557; The Lord Saumarez, 6 Notes of Cases, 601; The Juliet Erskine, 6 Notes of Cases, 633; The Vivid, 7 Notes of Cases, 128.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in admiralty, from the Circuit Court for the Eastern District of Louisiana.

The libelant charges, that on a trip from New Orleans to Memphis in the steamer Autocrat, with a full cargo and a great number of

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passengers, The Magnolia ran into her, forward of the wheel on her larboard side, which caused her to sink in less than ten minutes; by which the boat and cargo were lost, and the lives of several passengers.

On the hearing in the District Court, it was held that both boats were in fault; and under the well established rule of the Admiralty, the damage was divided. From that decision an appeal was taken to the Circuit Court, which reversed the decree of the District court. The appeal now before us is from the Circuit Court.

As usual, in collision cases, there is some conflict among the witnesses in regard to the facts of the case, as well as to matters of opinion.

On the 9th of February, 1852, the steamboat Magnolia, descending the Mississippi River, one hundred miles above New Orleans, about five o'clock in the morning, landed to wood, on the left bank of the river, at a place called Col. Robinson's wood yard. Before the boat left the wood yard, when the pilot was on deck and about to take the helm, his attention was called to an ascending boat, which was near Bayou Goula, a mile and a half or two miles below. When first seen, the ascending boat was running to the right bank of the river.

There is a bar on the left side of the river about a mile below the wood yard. The course of ascending boats is to cross into the bend, just above Bayou Goula, and keep up the right shore some six or seven miles. This course was taken by The Autocrat, averaging, generally, less than one hundred yards from the right shore.

On leaving the wood yard, The Magnolia backed out on both wheels, her bow being fast on the shore; as she came off, both engines were stopped, and then the boat went ahead on both wheels to check her up. As soon as this was done, her stern being opposite the wood yard, the larboard engine was stopped, 465*] *to let her come round by the action of the starboard wheel. The Autocrat continued up the right bank until she came opposite, or nearly opposite, to Col. Butler's residence. At this place she was within less than one hundred yards of the shore, when she changed her course to the left shore, nearly in the direction of the wood yard which had a few minutes before been left by The Magnolia. The river at this place is about three quarters of a mile wide.

In rounding, The Magnolia passed the middle of the river, but as her bow was thrown down the stream, The Autocrat, turning suddenly to the right, approached with a speed of some ten or twelve miles an hour. As The Autocrat approached, by a tap of the bell she signified her intention to cross to the left bank, and before the bow of The Magnolia, whose bell was rung two taps, indicating the same direction. Seeing the imminent danger, The Magnolia rang her bells to back; and it is stated by her pilot, that when the collision happened she lay upon the water, not having a descending movement of more than at the rate of a mile or a mile and a half to the hour. The Autocrat struck her with so much force as to turn her bow up the stream. In less than ten minutes The Autocrat sunk in deep water. It was not more than five minutes after The Magnolia left the wood yard, until the collision occurred. The pilot says The Magnolia was brought round, as soon as could be done, by the action of her starboard wheel.

The nose of The Magnolia struck The Autocrat's guard near the forward part of the cylinder, on the larboard side, and the hull, at the other end of the cylinder, and brought up in her wheel. The collision took place not far from the middle of the river, somewhat nearer to the right bank than to the left. After the boats were separated, the machinery of The Autocrat continued to work for a few minutes, her course being directed to the right bank, on reaching which, she went down.

Entire accuracy of witnesses as to the direction and position of the boats in a case of collision at night, is not to be expected. The peril is too great and absorbing to note and detail the events as they transpired, by the officers and hands of either boat. The leading facts being ascertained by the weight of the testimony, when properly considered, will lead to a more just result than by a minute examination of the evidence.

What was the duty of the respective boats, when they first came within view of each other? The Magnolia was at the wood yard on the left bank of the river; The Autocrat was near Bayou Goula, crossing over to the right bank of the river, about a mile and a half below the wood yard.

Although there is some contrariety of evidence in regard to *the usage which [*466 should govern the respective boats, occupying the positions above stated, yet the weight of the evidence clearly establishes the rule, that the ascending boat should keep near the right bank and the descending one about in the middle of the river. Each boat was bound to keep a vigilant and competent watch, and to slacken the speed of the boat and stop it, as the danger becomes imminent. This is dictated by a common prudence of a qualified pilot.

The principal fact relied on to show fault in The Magnolia is, that she left the wood yard, and described too large a circle in rounding; that the larboard wheel should have made back-water, which would have reduced the circle and thrown the bow down the stream in less time.

After a misfortune has happened, it is easy to see how it might have been avoided. If The Magnolia had remained at the wood yard some eight or ten minutes longer, there could have been no collision. But this is not a fair mode of trying the case. Had the officers of The Magnolia a right to expect that The Autocrat would not depart from her course; and if she had not done so, could the boats have come in contact? It is clear, if the ascending boat had continued near the right bank of the river there would have been no collision. This is an important fact. Admit that The Magnolia passed the middle of the stream in rounding, still ample space was left for the ascending boat. One third or even one fourth of the river, the water being deep, was sufficient for this purpose. The testimony shows that at least one third of the river, along the right bank, was open for The Autocrat.

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But it is said that the pilot of The Autocrat, seeing The Magnolia was rounding off from the wood yard, had a right to conclude that it intended to cross over to the right bank. This was a little after five o'clock in the morning; daylight was breaking, but the stars had not disappeared.

Being acquainted with the locality of the wood yard, and the general course of the river, the pilot of The Autocrat must be presumed to know that a large boat could not round in a narrow circle. His inference would naturally be, that the boat was rounding from the wood yard, and not to cross the stream. But admit that the direction of The Magnolia was doubtful—it was the duty of the officers of The Autocrat to slacken her speed, and even to post her engines, until those doubts were removed. No such precautions were used. The Autocrat, by a great pressure of steam, was propelled onward, changing her course; and in attempting to pass the bow of The Magnolia, came in contact with her. Her pilot had hoped, it seems, to pass her stern; but to any prudent man, either attempt would have been considered 467*] *a dangerous experiment. His great error, however, consisted in leaving the way established by usage; such to him would have been the way of safety. Every deviation from it, in meeting a boat, is always hazardous, and often fatal.

There was another defect, in not having an efficient watch on The Autocrat. This is indispensable, especially in navigating our western rivers. The captain was asleep; the watchman did not occupy the proper position; there, in fact, was no watch to direct or advise the pilot; he seems to have been left to the exercise of his own judgment, unaided by suggestions or facts from any quarter. This is enough to charge The Autocrat with fault.

Leaving the wood yard by The Magnolia, under the circumstances, was not charged as a fault in the libel, nor was it so stated in the protest. The Magnolia had an efficient watch at the proper place for observation, and an experienced pilot. She rounded in the ordinary way. While the pilot of the Autocrat was a mile from The Magnolia, he ascertained that she was a descending boat. Still under the impression that she intended to run down the right bank, the course of The Autocrat was so changed across the river, in the direction of the wood yard, as to bring the boats in conflict. Had the pilot of The Autocrat designed to produce a collision, he could not have taken a different course from the one he did take. From intimidation, or some other cause, he showed a culpable defect of judgment, and a disregard of the established usage.

The Magnolia seems to have taken every precaution she was required to take to avoid the collision. She was in her proper place, near the middle of the river, moving down the stream with less force than the current. If The Autocrat had met the crisis with the same precaution, a collision could have caused little or no damage.

The decree of the Circuit Court is affirmed.

Dissenting, Mr. Chief Justice Taney, Mr. Justice Wayne, and Mr. Justice Daniel.

JACOB STRADER et al., Plffs. in Er.,
v.
CHRISTOPHER GRAHAM.

(See S. C. 18 How. 602.)

In a case dismissed for want of jurisdiction, this court cannot give costs.

Argued May 9, 1856. Decided May 9, 1856.

IN ERROR to the Court of Appeals for the State of Kentucky. See former report of this case, 10 How. 82.

Mr. Crittenden, of counsel for the defendant in error, moved the court to amend their judgment entered in this case at the December Term, 1850, and to give a judgment for the costs in this court in favor of his client.

Whereupon, it is now here considered by the court, that this court cannot give a judgment for costs in a case dismissed for want of jurisdiction.

And it appearing to this court that this case has been dismissed for want of jurisdiction, it is thereupon now here ordered by this court, that the said motion be, and the same is hereby overruled.

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*In the Matter of THE UNITED [*476
STATES
v.
SHERMAN M. BOOTH.

(See S. C. 18 How. 476–478.)

Where writ of error to state court had been served on the clerk of state court, and no return had been made, before any further proceeding is had, a rule was made upon the clerk to make the return at next term or show cause, and case was continued.

Argued May 6, 1856. Decided May 9, 1856.

IN THIS case a writ of error was issued to the Supreme Court of the State of Wisconsin. To this writ no return was made, and the question now before the court arises on a motion made by the Atty-Gen., to file an authentic copy of the record of the said Supreme Court of the State of Wisconsin, with a certificate of other proceedings since had, and to proceed to final judgment on said copies.

A further statement of the case appears in the opinion of the court.

See, also, 62 U. S. 21 How. 506.

Mr. C. Cushing, Atty-Gen., for the United States.

No counsel appeared for the defendant in error.

Mr. Chief Justice Taney delivered the opinion of the court:

The court proceed to dispose of the motion made by the Attorney-General to docket the case of The U. S. v. Booth, to stand for argument in this court at the next term.

In support of this motion he has produced a copy of the record of the proceedings in the Supreme Court of Wisconsin in the above-mentioned case, certified by the clerk under the seal of the court, by which it appears that Booth was indicted in the District Court of the United States for the District of Wisconsin, for aiding a fugutive slave to escape from the

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custody of the marshal—the marshal having the said slave at that time legally in his custody; and that upon that indictment the said Booth was tried and found guilty, and sentenced by the court to be imprisoned for one month, and to pay a fine of $1,000. That while he was thus imprisoned he obtained a writ of habeas corpus from the State Court; and upon a hearing in the Supreme Court of the State, was discharged from imprisonment by that court, upon the ground that the imprisonment under the sentence of the District Court of the United States was illegal.

It further appears, that a writ of error afterwards issued from this court, at the instance of the Attorney-General in behalf of the United States, returnable at the present term, and directed to the judges of the Supreme Court of the State of Wisconsin, in order to bring the said proceedings and judgment here for revision, according to the provisions of the 25th sec-
478*] tion of the Act of *Congress of 1789, ch. 20. But no return has been made to the writ; and it appears by the affidavit of the District Attorney, filed with the motion, that the writ of error was duly served on the clerk of the Supreme Court of the State, and that he was informed by the said clerk that the court had directed him to make no return to the writ of error.

Upon this state of facts the Attorney-General has made the motion above mentioned.

The writ of error, without doubt, was rightfully issued from this court, to carry into execution the appellate powers confided to it by the Constitution and laws of the United States; and it was the duty of the clerk to obey it, and to send a transcript of the record and proceedings therein mentioned, together with the writ of error, to this court at the present term. And certainly the order of no other tribunal will justify an officer in disobeying the process of this court lawfully issued.

The refusal of the clerk, however, cannot prevent the exercise of the appellate powers of this court; and the court will take such order in the case, as will enable it to fulfill the duties imposed upon it.

But in a matter of so much gravity and importance, we deem it proper, before any other proceeding is had, to lay a rule upon the clerk to make the return required by the writ of error, on or before the first day of the next term of this court; or to show cause, if any he hath, to excuse or justify his neglect or refusal to obey the writ.

The motion to docket the case is, therefore, continued over to the next term, and the court will make the following orders:

Order, May 9, 1856.

On consideration of the motion made in this case on a prior day of the present term, to wit: on Tuesday, the 6th inst., it is now here ordered by the court that this motion be, and the same is hereby overruled.

Order.

It having been suggested and shown to this court by the Attorney-General of the United States that the writ of error heretofore allowed and awarded by the Chief Justice of the Supreme Court of the United States, and which issued out of this court pursuant to the several Acts of Congress in such case made and provided, directed to the Supreme Court of the State of Wisconsin requiring the record and proceedings of the said Supreme Court of the State of Wisconsin in the matter of Sherman M. Booth for a writ of habeas corpus, and to be discharged from imprisonment, to be sent to this court, has not been returned pursuant to the exigency of the said writ. It is thereupon ordered that the clerk of the said Supreme Court of the State of Wisconsin do make due return of the said writ of error pursuant to the mandate therein contained, and according to the laws of the United States in that behalf on or before *the 1st day [*479 of the term of this court next to be holden at the City of Washington on the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-six, or then and there show cause why such return has not been made in conformity to the law.

And it is further ordered that a copy of this rule be served on the said clerk on or before the first day of August next.

STEPHEN V. R. ABLEMAN, Plff. in Er.,
v.
SHERMAN M. BOOTH.

(See S. C. 18 How. 479.)

Two cases involving same facts and points must be argued together.

Where two cases involve the same questions of constitutional law, growing out of one transaction and dependent on the same facts, the court will order them to be argued together.

Argued Jan. 4, 1856. Decided May 9, 1856.

IN ERROR to the Supreme Court of the State of Wisconsin.

This is a branch of the preceding case, and arose out of the same proceedings.

Booth was committed to the custody of the plaintiff in error, the United States Marshal for the District of Wisconsin, by a commissioner of the District Court of the United States for said district, under a charge of having aided and abetted the escape of a fugitive slave from a deputy-marshal, who had him in charge under the Act of Congress of September 18, 1850.

Subsequently, said Booth was discharged on a writ of habeas corpus from said custody, by one of the associate justices of the Supreme Court of Wisconsin, whereupon the said marshal took the case, on a writ of certiorari, to the Supreme Court of Wisconsin, which court affirmed the order discharging the prisoner.

The said marshal then brought the case here on a writ of error.

For a very full statement of the case see the report on the decision on the merits. 62 U. S. 21 How. 506.

Mr. C. Cushing, Atty-Gen., for plaintiff in error.

No opposing counsel.

Mr. Chief Justice Taney delivered the opinion of the court:

Upon looking into the transcript in this case, we find that the questions of constitutional law which it involves, arose in a preliminary

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proceeding in the case between the same parties, of which we have just spoken. In that case, the whole subject was disposed of in the State Court, and the principal question in it is precisely the same with that which is presented in this, which the Attorney-General proposes to argue. The two cases ought to be argued together. It would hardly be proper for the court, where questions of so much interest are concerned, to hear a portion of them at one term and a portion of them at another. All of the questions which are involved in the two cases have grown out of one transaction, and depend upon the same facts, and it is impossible to decide one without disposing of the principal question in the other. The court, therefore, will not hear the argument in these cases separately. They must be argued together. And as the principal case is not before the court in a form that will enable the court to hear it at the present term, this preliminary portion of it must be continued until the next term, to be argued when the whole subject is ready for hearing.

See 21 How. 506.

SOLOMON S. MASTERS and William K. Masters, Trading as Partners under the Firm and Style of S. S. Masters & Son, Plffs. in Er.,

v.

FREDERICK L. BARREDA and Philip Barreda, Trading as Partners under the Firm of F. L. Barreda & Brother.

(See S. C. 18 How. 489–497.)

Stoppage in transitu—notes not payment—indorsement of bills of lading—no bar to recovery for money due.

When there is a dealing between merchants for successive cargoes of merchandise on time, for which notes were to be given, payable from the date of ascertaining the quantity of each cargo, and an arrangement is afterwards made, for the substitution of an interest account for the notes, the interest account to depend upon the continuance of the original time of credit, and that the buyer's balance on account should always be under a certain sum; and the buyer exceeds that amount and refuses to make payment to bring the account within that sum, the seller may stop the delivery of the undischarged portions of any cargoes, though the same was in the course of being delivered to the buyer upon the seller's indorsement of the invoices and bills of lading of such cargoes.

In the absence of all understanding between the buyer and seller that any cargo which had been delivered and not actually paid for, though notes had been given for same, was not to be considered within the new arrangement, such cargo must be taken into the computation in ascertaining whether the balance due by the buyer exceeds the amount of credit allowed to him.

Such arrest of the delivery of the cargoes, notwithstanding the indorsement and delivery of the bills of lading to the seller, is no bar to the recovery of the amount due for the merchandise actually received by the seller.

Argued Apr. 24, 1856. Decided May 12, 1856.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

This was an action of assumpsit brought in the Circuit Court of the United States for the Eastern District of Virginia, by the defendants in error, to recover a balance of $77,696.13, arising from sales of guano.

At the trial of the case, the court below refused the instructions prayed by both parties, and instructed the jury as follows:

"1st. Under the contract made by the letters of the 9th, 10th, and 11th of March, the amount of the cargo of The Lucy Elizabeth, and for which notes had been given, must be taken into the calculation and charged against the defendants, in determining whether the balance against them amounted to $40,000.

2d. If by this mode of computation, the balance against the defendants for guano previously sold and delivered, amounted to $40,000 at the time when the further delivery of the cargoes of The Beatrice and Ailsa was refused by the plaintiffs, the refusal was justifiable under the contract.

They were now bound in such state of the account, to deliver these cargoes on credit; and if they offered to deliver them on the payment of the money or satisfactory security, and the defendants refused to comply with these terms, the plaintiffs had a right to stop the delivery, notwithstanding the previous indorsement and delivery of the bill of lading to the defendants; and the refusal, as stated in the testimony, is no breach of contract on the part of the plaintiffs, and is now a bar to the recovery, in this action, of the amount due for the guano actually received by the defendants."

And thereupon the jury found a verdict for the plaintiffs for the sum of $74,696.13, with interest thereon at the rate of six per centum per annum, from Sept. 12, 1854, till paid.

The defendants have brought the case here on a writ of error.

A very full statement appears in the opinion of the court.

Mr. Reverdy Johnson, for the plaintiff in error.

Messrs. Jos. H. Bradley, J. M. Carlisle and F. L. Smith, for the defendants in error:

1. For the excess of limit ($10,232.97), Barreda & Brother had no right to require of Masters & Son, payment in cash as they did, by their letter of May 12, 1854, and this, though the contract failed to provide for the terms of payment, as to such excess.

Kent's Com. Vol. II. p. 592 and 496, 6th ed.

2. The payment or tender of the price in such case, is a condition precedent, implied in the contract of sale, without which the purchaser cannot take the goods. If payment be not made immediately, the contract becomes void.

Kent's Com. Vol. II. pp. 493, 496; Bloxam v. Saunders, 4 Barn. & C. 941.

3. The sale of cargoes of The Beatrice and Ailsa being for cash, upon the non-payment thereof, Barreda & Brother had a right to assert the vendor's lien, and retain any portion thereof not delivered (Pars. Cont. Vol. I. p. 440, and cases cited in note (O); Bank of Columbia v. Hagner, 1 Pet. 455); and this notwithstanding the transfer of the bill of lading, the delivery of the guano under which was provisional upon the payment therefor in cash.

Fland. Sh. pp. 464, 465, sec. 490; Nathan v. Giles, 5 Taunt. 558; Allen v. Williams, 12 Pick. 297.

4. There are no formal or technical words in the contract, and it is to be construed according to the intent of the parties, to be gathered from the said correspondence and dealings.

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Schuylkill Nav. Co. v. Moore, 2 Whart. 491; Barton v. Fitzgerald, 15 East. 530; Douglas v. Reynolds, 7 Pet. 122; Lee v. Dick, 10 Pet. 493; Bell v. Bruen, 1 How. 186; Lawrence v. McCalmont, 2 How. 426, 449, 450.

5. The contract of the 10th of March did not change the course of dealings, but fixed certain new terms of payment, which were precedent to the delivery, viz.:

1st. By changing the mode of settlement from notes at four months to an open interest account; and,

2d. By affixing the precise limit of $40,000 to the credit to be given on such purchases.

The account to be opened was to embrace both the after-purchases and such purchases as were then unpaid for.

6. It being conceded by the defendants below that the guano received by them prior the 17th of May, and unpaid for at that time, exceeded $40,000; the vendors had a right to stop the further delivery, except upon such terms as would be satisfactory to them, and the further right to recover the value of so much as had been delivered, with interest, and the instruction given by the Circuit Court was right.

2 Pars. Cont. 35; Smith v. First Cong. Meeting House in Lowell, 8 Pick. 177; Moulton v. Trask, 9 Met. 577; Perkins v. Hart, 11 Wheat. 237; Ches. & O. Canal Co. v. Knapp, 9 Pet. 541; Giles v. Edwards, 7 Durn. & E. 181.

Mr. Justice Wayne delivered the opinion of the court:

This is an action of assumpsit brought in the Circuit Court of the United States for the Eastern District of Virginia, by the defendants in error, against Masters & Son, to recover from them a balance of $77,966.13, aris-
491*] ing from the sales of guano, *as stated in the bill of particulars, at pages 3 and 4 of the record.

The transactions out of which this dispute arose commenced on the 21st of January, 1854.

Barreda & Brother, residing in the City of Baltimore, were largely engaged in the importation of guano into the United States. Masters & Son were shipping and commission merchants in Alexandria, Virgina. Barreda & Brother had found it necessary in conducting their business to establish a limit of credit, both as to time and amount for purchases made by those who dealt with them. For any excess above that credit, purchasers had to pay cash, or give satisfactory paper, with their indorsement. The uncontradicted statement of the Barredas, in their letter to Masters & Son of the 15th May, 1854, corroborated by other circumstances, shows, that in the year 1852, this limit of credit was $25,000; and that their dealings with the Masters, from that time up to the sale of two cargoes of guano on the 21st January, 1854, and afterwards, until changed by the letters between them of the 9th and 10th March, 1854, had been regulated accordingly.

The sale of the two cargoes of guano, just mentioned, is as follows:

"We have sold to Messrs. S. S. Masters & Son two cargoes of Peruvian guano—from vessels Lucy Elizabeth three hundred and thirty-five tons, and Giavour two hundred and seventy-one—both on their way from Peru. The said guano to be delivered in the port of Alexandria, in Virginia, when the vessels may arrive. Messrs. Masters & Son will act as our agents to receive the cargo and attend to the vessels, free of any charge, and to pay the value of the guano they may receive, at the price of $47.50 per ton in bulk, in notes payable in Baltimore, four months after date.

F. Barreda & Brother.

Baltimore, 21st January, 1854."

Subsequently to that date (the precise time does not appear from the record), Masters & Son purchased from the Barredas another cargo of the ship Princess Alice, and on the 18th February a fourth—that of the ship Ailsa.

The Lucy Elizabeth arrived with her cargo at Alexandria on the 1st February. The Giavour with hers, about the 10th of the same month. Masters & Son attended to unlading the cargoes of both vessels, and sent to the Barredas a certificate of the cargo received from The Lucy Elizabeth, on the 2d March, viz.: 485.21.4 tons of No. 1 guano (in bulk at $47.50 per ton), and 25.1.21 tons of No. 2 guano in bulk, for which they were charged $24,108.64; the quantity of No. 2 being charged *to [*492 them at $42.50. They remitted to the Barredas on the 6th March, three notes of hand payable on the 2d and 5th of July; two of them for $8,000, and a third for $8,108.64; amounting to $24,108.64. Up to this time, the cargoes of The Giavour and The Princess Alice had not been ascertained, though both ships were then being unladed under the agency of Masters & Son, according to the arrangement in the memorandum of sale of the 21st January. And the correspondence shows that then there had not been any extension by the Barredas of the amount of credit, which had hitherto been allowed to Masters & Son upon their previous purchases. In this state of their dealing Masters & Son wrote to the Barredas on the 9th of March: "As our purchases are likely to be pretty large this year, and we noticed some time ago that one of our mutual friends (W. H. Fry) had arranged with you to keep an interest account with him, at six per cent., and we, for the same reason, prefer not to give notes. Further, as it is at times an advantage to have it in our power to make payments when the local exchange is most favorable, we will be obliged, if you will allow us also this accommodation, giving us an average credit of four months on these other cargoes." To this letter Barreda & Brother reply on the 10th March. They state, we will "keep an interest account with you, at six per cent., to facilitate your payments, provided that you will never exceed an average time of four months for the payment of each cargo; and that the balance on account against you will always be under forty thousand dollars, being the largest credit we use to allow." The Masters' reply in a letter of the 11th March: "Your acceptance of our proposition, made with the view of our not having to pay the whole value of our purchases in notes, etc., is also duly appreciated—and we note the conditions regarding the open account."

At the date of this arrangement, there was charged to Masters & Son on the books of Barreda & Brother $24,108.64, the value of The Lucy Elizabeth's cargo, for which the Masters had given three notes, payable on the 2d

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and 5th July. Eighteen days after this arrangement the Masters sent to the Barredas a certificate of Giavour's cargo, amounting to $17,094.34, and remit a payment on account of it of $6.000. The next item in the account is the value of the cargo of The Princess Alice, amounting to $38,029.92. But they had written to the Barredas on the 30th March, saying: "The Ailsa cannot now reach this too soon for us, and we prefer not relinquishing our purchase of the said cargo; and further, we believe we are selling by considerable the bulk of the guano applied for here (we wish it was at a better profit), and find the demand good. From 493*] present prospects *we shall want a cargo each ensuing month. With your present unprecedentedly large importations, we suppose we can make our calculations to get this supply from you without having to look far ahead." The Barredas answer: "For the present, we have no cargo to offer you in the time you mention." But on the 18th April they write: "We will send you The Beatrice; reply immediately." Masters & Son write on the same day: "We will take The Beatrice." And the Barredas rejoin: "Ship Beatrice will be ordered to you, provided she arrives before the end of May next." She arrived on the 24th April and was ordered to Masters & Son. On the same day the Barredas ask in another letter: "Will you take The Ailsa if she arrives here?" The masters answer: "Send The Ailsa if she comes as heretofore concluded upon." She arrived early in May, and was ordered to Alexandria. Thus, in the whole, five cargoes were bought by the Masters from the Barredas. Each of them upon a credit of four months, notes having been given for that of The Lucy Elizabeth, with the understanding by both parties that notes were not to be given for the other purchases, the quantities of which had not been ascertained when the arrangement of the 10th March was made, and that they were to be paid for according to that arrangement. But the value of three of the cargoes had been ascertained, amounting, according to the returns of Masters & Son to Barreda & Brother, to $79,232.90. Payments had been made to the amount of $29,000. On the 12th May the Barredas wrote, calling the attention of Masters & Son to the state of the account, and requesting them to make a remittance of $10,232.90, "as our limit in your account is $40,000, and it being then beyond the limit of the credit in the amount of the remittance asked for." In a postscript to the letter, they say: "Of course the value of The Beatrice and Ailsa cargoes must be paid cash. 2 P. C. off." To this letter the Masters reply without making the remittance, and say: "On the 9th March last, we had purchased from you four cargoes of guano, about 2,500 tons, or $120,000 worth, at four months—no other terms mentioned (and to this moment we have never heard of any other), three of the said cargoes were received and being received, and the fourth was daily expected. On the above-named date we asked you to allow us to keep an interest or open account with you, as we did not like to pay the whole value of our purchases in notes; to this you had no objection to the value of $40,000; the balance, as we had to infer, we must settle for agreeably to the original bill of purchase." To this letter the Barredas reply: "Yours of the 13th instant has been received. When we first went into business with you, we mentioned to you that our limit for credit was $25,000, *we making to you the sales of three, or [*494 four, or twenty cargoes, our impression would have been, as was in that case, that we were to accept your paper for $25,000, and the balance that you might owe in satisfactory paper with your indorsement. Certainly you could never have expected us to accept your notes for such an amount as our sales, though your responsibility may be superior to it. Afterwards, when you proposed to open with us an account with interest, to facilitate your payments, we agreed to it; provided that you would never exceed an average time of four months for the payment of each cargo, and that the balance on account against you will always be under $40,000—this being the largest credit we use to allow. You also understood in the same way our conditions, and took good care to make a remittance of $6.000, together with the return of The Giavour's cargo, to keep yourselves within the limits of your credit with us." In a few days after writing their letter of the 17th, Barreda & Brother made an effort, through the agency of Mr. Coyle, to have an amicable settlement with Masters & Son, offering to them either of the following propositions: that they would deliver to Mr. Coyle all the guano received from The Beatrice and Ailsa, and such a portion of the cargo of The Princess Alice as may be necessary to cover the $10.234.90 of excess of their account—or settle their values in cash less two per cent.—or give satisfactory paper with their indorsement, payable in New York or Baltimore, at four months from the day when the offer was made, that being the 22d of May.

Neither of these propositions were accepted, and this suit was brought to recover the balance on account against Masters & Son, including the value of all the guano they had received from The Lucy Elizabeth, The Giavour, Princess Alice, Beatrice, and Ailsa, after having given to them credit for payments made. There is no dispute concerning either the debit or credit side of the account, but the controversy arose from the different view entertained by the parties as to their respective rights under the arrangement made for an interest account and the limit of credit mentioned in it, and whether, in the actual state of the account and under the course pursued by the Barredas, they were justified in arresting the delivery of the undischarged portions of cargoes of The Beatrice and Ailsa, on account of the neglect and refusal of Masters & Son to make the required remittance to reduce the account against them to $40,000.

Our first objection to the construction of that arrangement as given by Masters & Son, is its variance from the terms used by them in their letter of the 9th of March, asking for the substitution *of an interest account, in- [*495 stead of giving notes for their purchases, and from their language in their letter of the 11th March, in reply to the letter of the Barredas of the 10th, granting their request upon the conditions mentioned in it. They preface their application by saying, "as our purchases will be very large this year, we prefer not to give

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notes, and will be obliged if you will allow us an interest account, giving us an average credit of four months on these other cargoes; and in their letter of the 11th say, your acceptance of our proposition, made with the view of our not having to pay the whole value of our purchases in notes, etc., is also duly appreciated, and we note the conditions regarding the open account." If from the first an implication may be made that it was their intention that the favor asked by them was to be applied to future purchases, and not to include purchases which they had made and which had not been paid for, there can be no doubt that their understanding of the arrangement was, that it was to include both, when in thanking the Barredas for their acceptance of their proposition, they state it was made with the view of their not having to pay the whole value of their purchases in notes. Besides having applied the arrangement to their purchases of the cargoes of The Giavour and Princess Alice, both of which had been bought, but neither of which had been ascertained when they asked for an interest account, and when it was granted, they could not afterwards give to the arrangement an exclusive application to cargoes to be thereafter bought; and when they say their request for an interest or open account had been made with the view of not having to pay the whole value of their purchases in notes, and afterwards say, "we note the conditions regarding the open account," one of them being that the balance on account against them shall never be larger than $40,000, it is conclusive that they then understood that amount to be the extent of their credit for all of their purchases, according to the account as it then stood on the books of the Barredas, or as it might be enlarged.

But it was urged that the limit of the amount of their credit was not to exceed at the time when the Barredas wrote their letter of the 12th May. It was said that the amount then still due for the cargo of The Lucy Elizabeth should not have been taken into the computation in ascertaining whether the balance due by the Masters amounted to more than $40,000, because that cargo had been sold under a different contract, in no way connected with the other purchases. Such, however, was not the fact, for The Giavour's cargo was bought under the same memorandum of sale; and the cargo of The Princess Alice had been bought before the cargo of The Giavour had been as-496*] certained; *and the Masters, after the arrangement had been made for an interest account, applied it to both, when their cargoes were ascertained, by not giving notes for either, and transmitting their certificates of the quantity of each, without any direction that a new and separate account of their cost should be made of them distinct from the debit against them in the books of the Barredas for the cargo of The Lucy Elizabeth. Had it been intended otherwise, they should have given such a direction; and not have said, we note the conditions regarding the open account, the limitation of the credit to be allowed being one of them, expressed in language so plain that it cannot be doubted that the Barredas never meant to give to Masters & Son a larger credit upon their purchases than $40,000; and that, when their account exceeded it, they were to have the right to call for payments to reduce it to that amount. When they called for the remittance of $10,232.90, the account against Masters & Son exceeded it by that amount. They failed to make the payment, and continuing to refuse to do so, we are of the opinion that the Barredas had a right to arrest the delivery of the cargoes of The Beatrice and Ailsa, notwithstanding the indorsement and delivery of the bills of lading to Masters & Son, and that their refusal to deliver the same, as stated in the testimony, is no breach of contract, and is not a bar to the recovery in this action of the amount due for the guano actually received by Masters & Son. Such was the instruction given by the court upon the trial of the case in the Circuit Court; and having expressed our concurrence with that view, we will only add, that when there is a dealing between merchants for successive cargoes of merchandise upon time, for which notes of hand were to be given, payable from the date of the ascertainment of the quantity of each cargo, and an arrangement is afterwards made for the substitution of an interest account for the notes which were to be given; and in that arrangement, the seller stipulates that the allowance of the interest account should depend upon the continuance of the original time of credit; and that the buyer's balance on account should always be under a certain sum; and the buyer exceeds that amount, and refuses to make a remittance or payment, upon the call of the seller, to bring the account within that sum, the seller may arrest the further delivery of any cargo or cargoes, though the same was in the course of being delivered to the buyer upon the seller's indorsement of the invoices and bills of lading of such cargoes.

In the absence of all understanding between the buyer and seller that any cargo which had been delivered and not actually paid for, though notes of hand had been given for the same; * was not to be considered within [*497 the new arrangement, such cargo must be taken into the computation in ascertaining whether the balance due by the buyer exceeds the amount of credit to him.

Judgment of the Circuit Court is affirmed.

GUSTAVUS T. BEAUREGARD, Heir and Executor of Madame Emilie T. Poultney, Complainant and Appellant,

v.

THE CITY OF NEW ORLEANS, Wm. H. Layton et al.

(See S. C. 18 How. 497-503.)

Federal courts follow state laws, and state decisions upon title to lands—if court has jurisdiction, proceedings cannot be impeached collaterally—they are binding on all other courts—proceeding for sale of lands is in rem—purchaser claims title, not of heirs, but by operation of law.

This court follows the laws of the several states whenever they properly apply.

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This court also follows the decisions of state courts upon questions arising out of the common law of the State, when applied to the title of lands.

Upon such cases the relation of the courts of the United States to a state is the same as that of its own tribunals; they administer the laws of the State.

When the proceedings of a court of justice are collaterally drawn in question, and it appears on the face of them that the subject matter was within its jurisdiction, they cannot be impeached for error or irregularity.

If a court has jurisdiction, its decisions on all questions that arise regularly in the cause are binding upon all other courts until they are reversed.

Where the object is to sell the real estate of an insolvent or embarrassed succession, the settled doctrine is, there are no adversary parties—the proceeding is in rem—the administrator represents the land.

In all courts which have power to sell the estate of decedents, their action operates on the estate, not on the heirs of the intestate. A purchaser claims not their title, but one paramount. The estate passes by operation of law.

Argued Apr. 28, 1856. Decided May 12, 1856.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The bill in this case was filed in the Circuit Court of the United States for the Eastern District of Louisiana, by the plaintiff's testatrix, to annul the sale of a portion of the succession of John Poultney, deceased, which had been made under the authority of certain decrees in the state courts.

The court below found in favor of the defendants, and entered a decree dismissing the bill. The case is now here in appeal.

A further statement appears in the opinion of the court.

Mr. John Henderson for the appellant.

Mr. Miles Taylor for the appellees.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiff's testatrix filed this bill in the Circuit Court to annul a sale of a portion of the succession of John Poultney, deceased, which had been made under the authority of decrees in the First District Court of New Orleans, and of the Court of Probate of that City, alleging a defect of jurisdiction in the courts, and fraud and irregularity in the proceedings. 498*] *Her title to the succession is as heir at law of the children, and heirs of John Poultney, of whom she was the mother.

In May, 1818, John Poultney, a merchant of New Orleans, purchased of Mad. Rousseau her plantation lying on the Mississippi River, a short distance above New Orleans, and which is now included within the corporate limits.

The price agreed to was $100,000, one fifth of which was paid at the time, and notes with the indorsement of Harrod & Ogdens (a firm composed of Charles Harrod, Peter V. Ogden, and George M. Ogden), payable in five annual installments, and secured by a mortgage on the property, were given for the remainder. The mortgage contains a stipulation that, in the event the indorsers should pay either of the notes, they should be subrogated to the rights of the vendor and holder of the mortgage for indemnity. In April, 1819, Poultney acknowledged in a petition to the First District Court that his affairs were embarrassed, and that he could not meet his engagements; he made a statement of his property and debts, showing a surplus in his favor, and prayed the court to convene his creditors that they might deliberate upon his proposition for a respite of one, two, and three years.

The court made the order, the creditors were convened, the requisite number agreed to the proposition, and an order was accordingly entered the 28th June, 1819, for a respite of one, two, or three years.

Harrod & Ogdens appeared at this meeting—claimed to have paid the first installment on the purchase of the Rousseau plantation, and assented to the action of the creditors, reserving their mortgage security.

In October, 1819, John Poultney died. His widow, the plaintiff's testatrix, in January thereafter renounced her right as partner in community, and failed to qualify as tutrix of her two children, one aged five, the other seven years, who were the heirs at law of John Poultney, and did not, until eight years after the sales referred to, take any concern about the succession.

The representation made by John Poultney of his affairs at the time his petition for a respite was exhibited, implies a hopeless state of insolvency. His debts were acknowledged to be $235,000, while his property is rated at $266,000—but from its nature affording but little prospect that such an amount could be realized. By the renunciation of his widow of her title as partner in community, and her failure to interpose on behalf of her children, the succession was unrepresented, and was what is termed in the Louisiana Code a vacant estate. In February, 1820, a portion of the creditors of Poultney informed the District Court that this succession was insolvent—had no representative, *nor claimant—and prayed that [*499 measures might be taken for the appointment of a syndic to represent and administer it for the benefit of all concerned. A meeting of the creditors was ordered by the court—and took place—resulting in the appointment of three syndics (one of whom was Peter V. Ogden), who were recognized by the court. On the 9th of May, 1820, Harrod & Ogden represented in a petition to the District Court the facts of the purchase by Poultney of the Rousseau plantation, their payment of the first installment of the purchase money, and their liability to pay another then shortly after to become due; that the succession of Poultney was insolvent, and was in the hands of syndics; and prayed that the plantation might be seized and sold for the satisfaction of their debt and the installments yet unpaid on the mortgage, and for a citation to the syndics. The usual order of seizure was made by the district judge, and a citation was served on one of the syndics. On the 29th

NOTE.—State decisions govern U. S. courts as to state statutes and as to rule of property—see note to Clark v. Graham, 5 L. ed. U. S. 335.

State laws and decisions govern U. S. courts as to title and transfer of real estate by grant or devise—see note to Elmendorf v. Taylor, 6 L. ed. U. S. 290; and note to Jackson v. Chew, 6 L. ed. U. S. 583.

It is for state courts to construe their own statutes. U. S. Supreme Court will not review their decisions except when specially authorized to by statute—see note to Commercial B'k v. Buckingham, 12 L. ed. U. S. 169.

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May the syndics agreed in court to the terms of sale and waived the appraisement, and the property was sold on the 13th June by the sheriff on the writ of seizure for the payment of the money then due, the purchaser agreeing to assume the mortgage.

At this sale, George M. Ogden, one of the firm of Harrod & Ogden, was the purchaser, and a deed was subsequently executed to him by the sheriff under the order of the court.

Some time after the close of these transactions, a conviction seems to have been impressed on the minds of Harrod & Ogden that the proceeding in the District Court were inoperative; and in 1824, Harrod and the representative of Ogden commenced a suit in the Court of Probate, having for its object to obtain a satisfaction of the same debt, by the sale of the same property. They sought a seizure and sale of the property, without taking any notice of what had been done in the District Court, and prayed a citation to Mad. Poultney as tutrix of her children. No citation appears in the record, but there is evidence of a seizure, judgment and sale.

The purchasers were Charles Harrod and Francis B. Ogden, who are charged to be the representatives of the first purchaser, G. M. Ogden. These purchasers afterwards, in 1824, represented to the District Court that the debt to Mad. Rousseau had been paid, and that the mortgage of George M. Ogden, given, in 1820, to secure the unpaid installments, was not operative, for that the District Court had no jurisdiction to make the sale, and asked that it might be raised from the property. The sheriff admitted all the facts, and the court granted the petition:

These were the last proceedings which had any relation to the case.

The defendants, by plea and answer, affirm 500*] that these proceedings *were conformable to law, and vested the purchasers with all the title which John Poultney ever acquired in the property, and that the plaintiff never had any right therein; that they had no participation in, nor knowledge of, any fraud; but that they have translative titles from these purchasers, and rely upon their sufficiency.

In 1832. Mad. Poultney assumed the office of tutrix of her minor children, and commenced, immediately after, suits in the state courts of Louisiana for the recovery of portions of this plantation. Three of these suits were decided in the Supreme Court in 1835, after elaborate and learned arguments, and a patient investigation by the court. Poultney's Heirs v. Cecil. 8 La. 322; —— v. Ogden. 8 La. 428; —— v. Barrett, 8 La. 441. These decisions were made upon a state of facts similar to that presented in this record; and the discussion in those cases has diminished the care and responsibility of this court. For it is apparent that the questions presented to us relate exclusively to the local jurisprudence of Louisiana. When the controversy arose, all the parties were citizens of that State, while the subject of the suit is the validity of titles passed under decrees of its courts, and in the course of duty, by their executive officers.

The material inquiries are, whether the First District Court had a jurisdiction competent to the legal transfer of the succession of a debtor, who was enjoying a respite from the claims of his creditors for an unexpired term, at the time of his death and before any default had arisen in the fulfillment of the conditions of the respite as to payment. 2. Whether this jurisdiction could be exerted without any citation to the natural heirs, or any measures taken to secure their interests in the succession. 3. Were the modes prescribed for the disposal of the estates of insolvent debtor, or of minors, essential constitutents of a valid exercise of the jurisdiction; and for the neglect of these, may the sale be collaterally attacked? 4. Did the death of Poultney determine the jurisdiction of the District Court, and remove to the Court of Probate the administration and settlement of the succession, and were all the proceedings in the District Court coram non judice? 5. Was a citation to the heirs necessary to a valid decree of sale in the Court of Probate? An important share of the attention of all courts of a limited jurisdiction is engrossed in ascertaining the causes over which they may legitimately claim cognizance, and the administration of an involved or insolvent succession, from the number of the parties in interest, and the variety of conflicting and complicated claims that are oftentimes exhibited, frequently affords difficult questions of this description.

The Supreme Court of Louisiana treat the questions arising *upon the records now [*501 before us, as difficult and embarrassing, calling for undivided and anxious attention, and much care was employed in deciding them, so as to maintain in that State an accordant system of jurisprudence. The claim of an embarrassed debtor to exhibit the condition of his affairs to a court with a view to obtain its assistance to convoke his creditors, that they may deliberate upon a proposition to grant him a delay or respite, and to bind the minority to the conclusions of a consenting majority, is one which has no recognition in the common law. It was derived in Louisiana from the continental codes of Europe. upon which the legal institutions of that State are founded. The Supreme Court of Louisiana, upon an investigation of those codes, determined that the death of Poultney in a state of insolvency without heirs who were willing to accept his succession unconditionally, and thereby to afford security for the fulfillment of the conditions of the decree of respite which the debtor had assumed, relieved his creditors from their obligations to respect it, and empowered them to proceed in rem, against the estate of their debtor in the hands of a syndic.

The same tribunal (Supreme Court of Louisiana), after tracing the sources of the jurisdiction of the District Court, extending, as it did, to "all civil cases," determined that it was not without jurisdiction ratione materiæ of a suit against such an estate, and that judgments rendered in that court were not radically null. They say, "the undisputed exercise of such a jurisdiction for a long series of years, the general acquiescence of the legal profession, the universal understanding among the people, as well as the courts and bar, form together such contemporaneous interpretations of the laws relating to conflicting jurisdictions, that, however doubtful it may appear on a close analysis, it cannot now be disturbed without the greatest

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injustice, and inflicting incalculable mischiefs on the country." And in Robinett v. Compton, 2 La. Ann. 847, 855, the same court says: "That, previous to the passage of the Act of the 18th March, 1820, fixing the jurisdiction of the courts of probate in this State, it seems to have been settled by various decisions of this court that the district courts were not deprived of jurisdiction ratione materiæ in such cases. The practice was universal to bring suits against successions in the District Court, and we are not prepared to say it was erroneous." And, since the Act of 1820 (which, however, was not promulgated so as to be in force when this sale was made), the court say "that such judgments in that court might be erroneous, but were not mere nullities." The jurisdiction of the District Court to render the judgment, being admitted, the further question arises, was the jurisdiction so exercised as to be operative. The Supreme Court, in the case of Cecil, above 502*] cited, *determine "that the rules which apply to the sale of minors' property, as such, when the title is fully vested in them, are not strictly applicable to a case like the present, where the rights of minors were contingent and residuary, subject to the undoubted claims of creditors deducto ære alieno, and who, in this very case, appear as beneficiary heirs claiming property already alienated for the payment of debts," etc. And in McCollough v. Minor, 2 La. Ann. 466, the same court affirm "that in cases like this, the purchaser is not bound to look beyond the decree."

The jurisdiction of the court was undoubted, and the jurisprudence of the State has long since been settled, that a bona fide purchaser at judicial sale is protected by the decree. 11 La. 68; 13 La. 432; 16 La. 340; 3 Rob. 122. The judgments of the Supreme Court of Louisiana upon the validity of the sales impugned in this bill, were given more than twenty years ago. They have formed the foundation upon which the expectations and conduct of the inhabitants of that State have been regulated. They have quieted apprehensions and doubts respecting a title to an important portion of a large and growing city. They have invited a multitude of transactions and engagements in which the well-being of hundreds, perhaps thousands, of the citizens of that State depend. In this bill there are several hundreds of defendants.

The constitution of this court requires it to follow the laws of the several States as rules of decision wherever they properly apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title of lands.

No other course could be adopted with any regard to propriety. Upon cases like the present the relation of the courts of the United States to a state is the same as that of its own tribunals. They administer the law of the state, and to fulfill that duty, they must find them as they exist in the habits of the people, and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the States and the Union would be productive of the greatest mischief and confusion. Jackson v. Chew, 12 Wheat. 153.

But, if we were required to depart from that jurisprudence to find a solution of these difficult and embarrassing questions, we should not have to leave the precedents afforded by this court for the support of many of their conclusions. This court has contributed its share to that stability which results from a respect for things adjudicated: Status reipublicæ maximé judicatis rebus continetur." It is the settled doctrine of the court, that when the proceedings of a court of justice are collaterally drawn *in question, and it appears [*503 upon the face of them that the subject matter was within its jurisdiction, they cannot be impeached for error or irregularity; tnat, if a court has jurisdiction, its decision upon all questions that arise regularly in the cause are binding upon all other courts until they are reversed. 2 Pet. 157; 1 P. 340. And when the object is to sell the real estate of an insolvent or embarrassed succession, the settled doctrine is, there are no adversary parties—the proceeding is in rem—the administrator represents the land. They are analogous to proceedings in admiralty, where the only question of jurisdiction is the power of the court over the thing, the subject matter before them, without regard to the parties who may have an interest in it. All the world are parties. In the Orphans' Court and all the courts which have power to sell the estates of decedents, their action operates on the estate, not on the heirs of the intestate. A purchaser claims not their title, but one paramount. The estate passes by operation of law. 2 How. 310; 11 S. & R. 426; 6 Port. 219, 249.

The identity of the principles applied by the Supreme Court of Louisiana, in ascertaining the effect of the judgments of their courts, and those accepted as true by this court, leave no question resting upon the authority of the state tribunals, except that of the nature and extent of the jurisdiction of their courts under the organic law of the State. And no principle would authorize the court to dissent from their conclusion on that subject, when the land disposed of was within their borders, and the parties in interest were citizens belonging to their community.

Our opinions is, that the pleas of the defendants afford a complete answer to the bill, and that the decree of the Circuit Court must be affirmed.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE UNION BANK OF TENNESSEE, Appellants,

v.

MICAJAH J. VAIDEN, and John H. Keith, Administrator of Wm. Jolley.

(See S. C. 18 How. 503-507.)

Laws of state cannot limit remedies in federal courts—settlement of estate in Mississippi no bar to judgment in federal court.

The law of a state limiting the remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state, for the

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recovery of any property or money there, to which they may be legally or equitably entitled.

Where administrators procured the estate to be declared insolvent and settled in Mississippi in state court: Held, that such proceedings were no bar to a judgment in the United States court, in favor of citizen of another state, although the judgment creditor did not appear in the state proceedings; and that the surplus in the hands of the administrators must be applied to the payment of such judgment, in preference to the claim of the heirs or distributees.

Argued May 1, 1856. Decided May 12, 1856.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

The case is stated by the court.

Mr. Coxe for the appellants.

Mr. Fred P. Stanton, for the appellees:

The decrees of probate courts, in cases of estates reported insolvent, cannot be questioned or set aside, unless by regular appeal taken, or on account of fraud.

Hutch. Code, 667, 668, 673, 683, 684; Chewning v. Peck, 6 How. (Miss.) 524; Smith v. Berry, 1 Sm. & Mar. 321; Addison v. Eldridge, 1 Sm. & Mar. 510; Herrings v. Wellons, 5 Sm. & Mar. 354; Dahlgren v. Duncan, 7 Sm. & Mar. 280.

Creditors whose claims have not been presented to the commissioner are forever barred, even when the estate proves not to be insolvent.

Allen v. Keith, 26 Miss. 232; Anderson v. Tindall, 26 Miss. 332; Trezevant v. McQueen, 13 Sm. & Mar. 311.

The laws of the state from which the executor or administrator derives his authority must prevail in the federal as well as in the state tribunals. Citizens of other states, possibly, cannot be prevented from suing in the federal courts, in order to establish their demands; but the effect of a judgment must be controlled by the local law, otherwise the conflict of jurisdiction would be irreconcilable and disastrous.

Williams v. Benedict, 8 How. 107; McGill v. Armour, 11 How. 142; Story's Confl. of Laws, sec. 512, 3d ed.

Mr. Justice Wayne delivered the opinion of the court:

This is an appeal from the District Court for the Northern District of Mississippi.

The appellants filed a bill in December on the equity side of the District Court against the appellees.

"The bill charges that in November, 1846, the Bank instituted a suit on the law side of the same District Court against William Jolley, as indorser of a bill of exchange held by plaintiffs. Jolley appeared to the suit, and filed his plea. He died in March, 1847, and appellees were appointed his administrators by the Panola Court of Probate, in Mississippi. The suit against Jolley was revived against his administrators, the appellees, and in June, 1851, the same came on for trial on the issue joined on the single plea of non assumpsit, and a judgment was rendered in favor of plaintiff for $5,041.33, with costs. Upon this judgment execution was issued, which was returned by the marshal nulla bona. The judgment remains wholly unpaid, and there is no visible property in the hands of the administrators upon which a levy could be made.

The bill proceeds to charge, that pending the said suit against the administrators in April, 1848, they represented to the said Probate Court of Panola County, that the estate of their intestate was insolvent, and procured a declaration to be made by said court to that effect, whereas the bill charges that the said estate was not and is not insolvent, and that the assets in the hands of the administrators are more than sufficient to pay all the liabilities of the estate. That the administrators have converted the assets into cash to the amount of upwards of $20,000, and have fully paid all the debts of intestate, with the single exception of that due to complainant. The debts they have paid amount to about $11,000, and the administrators have upwards of $9,000 in cash or available assets belonging to the estate, which is not required for the payment of any other debt, but refuse to apply any part thereof to the payment of complainant's *debt, and will shortly pay the same [*505 over to the heirs at law of Jolly, unless prevented by the interposition of the court.

The defendants pretend that complainants have no right to require payment of their judgment out of said assets, because they have not established the claims upon which the judgment is founded before the Probate Court of Panola County, and had the same allowed by said court, but complainants are advised and insist that such allowance by said Probate Court is not necessary.

Sundry special interrogatories are appended to the bill.

In June, 1852, defendants filed their answer. The principal averments in the bill are admitted—it is admitted that they have received assets to the amount of $20,000; that they have paid all the debts which have been legally established against the estate to the amount of more than $13,000, and have in their hands assets to the value of $6,500, and that if complainant's claim is disallowed, the estate will be worth to the heirs about $6,000. They are advised that complainant's judgment is barred, and if they were to pay it, they would pay it in their own wrong.

They deny that they did illegally or fraudulently procure the estate to be declared insolvent. When they took charge of the estate as administrators, it was appraised at $18,090.-76½, and debts or claims against it were brought to the notice of respondents $18,597.40. Respondents, looking to probable results, believed it might prove and would probably prove insolvent; under these circumstances they procured the declaration. The clerk was appointed commissioner of insolvency, and publication was made for the period of twelve months, warning all creditors of Jolley to present their claims to the commissioner for allowance. In April, 1849, the commissioner made his report, and an order was passed requiring all persons interested to appear and except to the report at July Term, 1849. At July Term respondents alone excepted to the report; they excepted to two claims which had been allowed; one of these claims was allowed, the other disallowed; and in October Term, 1849, the report was approved and confirmed (p. 8). Respondents ap-

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pend a transcript to these proceedings, and rely upon the same as a bar to complainant's claim."

To the answer of the defendants a general replication was filed, and on the hearing of the cause, the court decreed a dismissal of the complainant's bill.

In the argument of the case in this court, the counsel of the defendants urged the following grounds against the right of the complainants to recover.

"If the complainants' demand is not barred [*506] by their failure to present it in the Probate Court, their remedy is at law, and not in equity. The defendants admit that they have $6,000 in their hands, belonging to the estate of their intestate. If they are bound to pay this to the complainants, and refuse to do so, they are guilty of a devastavit, and are liable to an action on their bond. In their answer, they expressly deny that complainant (the Bank) has made out a cause entitling it to relief in the premises, and that this court has jurisdiction thereof.

But the complainants are entitled to no relief, either in equity or at law.

The defendants cannot be prejudiced by suffering judgment to go against them on the plea of non assumpsit. Hutchison's Code, 657, sec. 57; Hemphill v. Fortner, 11 Sm. & Mar. 344.

The decrees of probate courts, in case of estates reported insolvent, cannot be questioned or set aside, unless by a regular appeal taken, or on account of fraud.

Hutchison's Code, 667, 668, 673, 683, 684; Chewning v. Peck, 6 How. Miss. 524; Smith v. Berry, 1 Sm. & Mar. 321; Addison v. Eldridge, 1 Sm. & Mar. 510; Herrings v. Wellons, 5 Sm. & Mar. 354; Dahlgren v. Duncan et al. 7 Sm. & Mar. 280.

Insolvency may be declared when the debts appear to be greater than the probable value of all the real and personal property. The court has a discretion, which, when exercised, is conclusive, unless a direct appeal be taken. Planters' Bank v. Saunders' Adm'r 2 Sm. & Mar. 304.

As to the responsibility of an administrator who pays debts, when the estate subsequently becomes insolvent, see Woodward v. Fisher et al. 11 Sm. & Mar. 304; Bramblet v. Webb et al. 11 Sm. & Mar. 438.

Creditors whose claims have not been presented to the commissioner, are forever barred, even when the estate proves not to be insolvent. Allen & Apperson v. Keith and Vaiden, 26 Miss. 232; Anderson v. Tindall, 26 Miss. 332.

The creditor must present his claim to the commissioner of insolvency, though he have a suit pending against the administrator. Trezevant et al. v. McQueen, 13 Sm. & Mar. 311.

And when a commission of insolvency has been regularly opened and closed, it will not be reopened, even at the instance of a judgment creditor, whose judgment bears date since the closing of the commission. Harrison v. Motz et al. 5 Sm. & Mar. 578.

The foregoing authorities must be deemed conclusive against the appellants, unless the rendition of a judgment by a federal court can be held to take away from the probate courts their exclusive jurisdiction, in the administration of the assets of deceased insolvents. But there can be no doubt that the laws of the state, from which the exe- [*507] cutor or administrator derives his authority to act, must prevail, as well in the federal as in the state tribunals. Citizens of other states, possibly, cannot be prevented from suing in the federal courts in order to establish their demands; yet the effect of the judgment, its lien or other operation upon the assets of the deceased, must be absolutely controlled by the local law; otherwise the conflict of jurisdictions would be irreconcilable and disastrous. And such, it is believed, is the well-established doctrine of this and all other courts.

Story's Conflict of Laws, 3d ed. sec. 521; Williams v. Benedict, 8 How. Sup. C. 107; McGill v. Armour, 11 How Sup. C. 142.

But we do not deem it necessary to discuss them in detail, for the law of a state limiting the remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state for the recovery of any property or money there, to which they may be legally or equitably entitled. This principle was fully discussed, and decided by this court, in the case of Suydam v. Brodnax et al., 14 Pet. 67. We refer to the reasoning in support of it given in that case without repeating it, or thinking it necessary to add anything on this occasion. It concludes this case.

And it is our opinion, under the circumstances and the testimony in this case, that the surplus in the hands of the defendants must be applied to the payment of the judgment of the complainant in preference to any claim which has been asserted to it for the heirs at law or distributees of the intestate, Jolley.

We reverse the decree of the court below, and shall remand the case, with directions to that court for further proceedings in conformity with this opinion.

WILLIAM STAIRS et al., Plaintiffs,

v.

CHARLES H. PEASLEE.

(See S. C. 18 How. 521-530.)

Tariff—repeal in Act of 1851—determination of appraisers—additional duty.

The Tariff Act of March 3, 1851, repealed so much of the former laws as provided that merchandise when imported from a country other than that of production or manufacture, should be appraised at the market value of similar articles, at the principal markets of the country of production or manufacture, at the period of exportation to the United States.

Where cutch had been shipped from Halifax to Boston, the court further held, "that in estimating the value of the cutch, it was the duty of the appraisers to determine what were the principal markets of the country from which it was exported into the United States," and their decision that London and Liverpool were the principal markets for that article is conclusive.

The appraisement appearing to have been legally made, the additional duty of twenty per cent., under the 8th section of the Tariff Act of July 30, 1846, was rightfully exacted by defendant, the value of the cutch, as appraised by the United States Appraisers, having exceeded by ten per centum the invoice value.

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Argued Feb. 15, 1856. Decided May 12, 1856.

ON A certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Massachusetts.

This suit was brought in the Circuit Court of the United States for the District of Massachusetts, by the plaintiffs, to recover of the defendant, the Collector of Customs for the port of Boston, certain duties alleged to have been illegally exacted on fifty bags of cutch, shipped by the plaintiffs at Halifax, consigned to Messrs. Clark, Janes & Company, of Boston. The case is very fully stated by the court.

Mr. A. W. Griswold for plaintiff:

The Tariff Act of March 3d, 1851, did not repeal so much of former laws as provided that merchandise, when imported from a country other than that of production or manufacture, should be appraised at the market value of similar articles at the principal markets of the country of production or manufacture, at the period of exportation to the United States, but the proviso in the 16th section of the Tariff Act of 1842 is still in force.

5 Stat. at L. 564; Act of March 3d, 1851, ch. 38, sec. 1; 9 Stat. at L. 629; Act July 30, 1846, ch. 74, sec. 3; 9 Stat. at L. 43.

It was not the intention of Congress to repeal or modify the said proviso; and that intention, if it can be ascertained, must govern in the interpretation of these statutes.

Greely v. Thompson, 10 How. 225; Norcross v. Greely, 1 Curt. 116; Barnard v. Morton, 1 Curtis, 409.

The Act of March 3, 1851, was passed in consequence of the decision by this court of the case of Greely v. Thompson, 10 How. 225; and the intention of Congress was simply to change the time of appraisement from the date of purchase to that of exportation.

Maxwell v. Griswold, 10 How. 242; Norcross v. Greely, 1 Curt. 116; Barnard v. Morton, 1 Curtis, 409; 1 Kent's Com. 462; see, also, 9 Stat. at L. 43, 629; 5 Stat. at L. 564; 3 Stat. at L. 733; 4 Stat. at L. 274, 592.

Section 1 of the Act of March 3d, 1851, is not repugnant to or inconsistent with the proviso in section 16 of the Act of August 30, 1842, but is cumulative, and should be construed with it in pari materia.

U. S. v. 67 Packages, etc., 17 How. 93; Wood v. U. S. 16 Pet. 364; U. S. v. Freeman, 3 How. 564; Daviess v. Fairbairn, 3 How. 646; Morlot v. Lawrence, 1 Blatchf. 612; Saving Institution v. Mackin, 23 Me. 360.

The appraisers should have estimated the value of the cutch at the market of Calcutta, at the time of the exportation from Halifax.

5 Stat. at L. 564; Greely v. Thompson, 10 How. 225; Grinnell v. Lawrence, 1 Blatchf. 350.

If the cutch was not liable to duty on the appraised value at Calcutta, then duty should have been assessed on its value in Halifax, at the period of its exportation to the United States.

Act of August 30, 1842, ch. 270, sec. 16; 5 Stat. at L. 564; Act of July 30, 1846, ch. 74, sec. 8; 9 Stat. at L. 43; Act of March 3d, 1851, ch. 38, sec. 1; 9 Stat. at L. 629; U. S. v. Ship Recorder, 1 Blatchf. 218.

If the court should hold the appraisements legally made, still the additional duty of twenty per centum was wrongfully exacted.

Act of 1846, ch. 74, sec. 8; 9 Stat. at L. 43; Kreisler v. Morton, 1 Curt. 415.

Messrs. R. H. Gillet and C. Cushing, Atty. Gen. for defendant:

The Act of March 3, 1851, repealed all former laws, declaring that imports should be appraised at their value in the markets of production or manufacture. As the law now stands, the valuation is to be made as of the time of exportation, and as of the place of the principal markets of the country from whence exported; not from the time of purchase or place of manufacture or production. The cutch was rightfully appraised at the market value at London and Liverpool; London and Liverpool being the principal markets of exportation of the country whence imported.

The appraisement having been legally made at ten per cent, or more, above the invoice value of the goods, the additional duty of 20 per cent. on the appraised value was properly exacted.

Mr. Chief Justice Taney delivered the opinion of the court:

This case comes before the court upon a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Massachusetts.

It is an action for money had and received, brought by the plaintiffs, who are merchants, residents and doing business at Halifax, Nova Scotia, to recover of the defendant, the Collector of Customs for the port of Boston, money alleged to have been illegally exacted on payment of duties on fifty bags of cutch, shipped by the plaintiffs at Halifax, consigned to Messrs. Clark, Janes & Co. of Boston.

The invoice was dated at Halifax, November 10, 1858, and the cutch was entered at the custom house, Boston, on the 16th of the same month at the invoice value.

The value of the cutch, as appraised by the United States Appraisers, exceeded by ten per centum the invoice value; and the plaintiff appealed, and a re-appraisement was held by two merchant's appraisers, and their appraisement also exceeded by ten per centum the invoice value; whereupon the defendant assessed a duty of ten per centum ad valorem on the appraised value, and also an additional duty or penalty of twenty per centum on the same value, under the 8th section of the Tariff Act of July 30, 1846.

*It was proved that the cutch was the [*525 product of the East Indies only, and that Calcutta was the great market of the country of production. And it appeared on the trial that this fact was known to the appraisers when the appraisement was made. It was also proved that London and Liverpool were the principal markets of Great Britain, exclusive of India, for said article; and, so far as appeared at the trial, this cargo was the only one known to have been sold in, or exported from, Halifax.

It was also proved that the appraisers appraised the cutch at its market value in London and Liverpool, and not at Halifax or Calcutta, at the period of its exportation from the port of Halifax to the United States.

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The case coming on to be tried, it occurred as a question:

1st. Whether the Tariff Act of March 3, 1851, repealed so much of all former laws as provided that merchandise, when imported from a country other than that of production or manufacture, should be appraised at the market value of similar articles at the principal markets of the country of production or manufacture at the period of the exportation to the United States.

On which question the opinions of the judges were opposed.

2d. Whether, in estimating the dutiable value of the cutch, the appraisers should have taken the value at the market of Calcutta, or London and Liverpool, or Halifax, at the period of the exportation from Halifax.

On which question the opinions of the judges were also opposed.

3d. Whether, if the appraisements were legally made, the additional duty of twenty per centum, under the 8th section of the Tariff Act of July 30, 1846, was rightfully exacted by the defendant.

On which question the opinions of the judges were opposed.

Wherefore, upon the motion of the plaintiffs, the points were certified to this court for final decision.

The first question certified by the Circuit Court depends altogether upon the construction of the Act of 1851 (9 Stat. at L. 629).

The language of this Act of Congress is general, and embraces all importations of goods that are subject to an ad valorem duty; and directs that their value shall be estimated and ascertained by the wholesale price at the period of exportation to the United States, in the principal markets of the country from which they are imported. The time and the place to which the appraisers are required to look, when making their appraisement, are both distinctly specified in the law—the time being the period of exportation, and the place the country from which they were imported into the United 526*] States. It makes no *reference to their value in the country of production, or the time of purchase. And as there is no ambiguity in the language of the Act, and it embraces all goods subject to an ad valorem duty, the court would hardly be justified in giving a construction to it narrower than its words fairly import.

It is true, as urged by the counsel for the plaintiff, that in the previous laws upon the same subject, the country of production or manufacture was the place to which the appraisers were referred in order to ascertain their value. And undoubtedly the previous Acts of Congress, and the policy which they indicate, are proper to be considered in interpreting the Act of 1851, and might influence its construction, if its language was found to be ambiguous. But that is not the case in the present instance. The law taken by itself will admit of but one construction—and that is, the appraisement must be made, by the value of the goods in the principal markets of the country from which they are exported, at the time of such exportation to the United States. And so far as these provisions are inconsistent with the provisions of previous laws, they show that Congress had changed its policy in this respect, and intended to repeal the laws by which it had been established.

As regards the second point certified, the word "country" in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control. The question was brought before the Treasury Department in 1817; and on the 29th of September in that year, instructions were issued by the Department, in a circular addressed to the different Collectors, in which the construction above stated is given to the word. The practice of the government has ever since conformed to this construction; and it must be presumed that Congress, in its subsequent legislation on the subject, used the word according to its known and established interpretation.

Apart, however, from this consideration, we regard the construction of the Treasury Department as the true one. Congress certainly could not have intended to refer to mere localities or geopraphical divisions, without regard to the state or nation to which they belonged. For, if the word "country" were used in that sense, the law furnishes no certain and fixed limits to guide the appraisers in determining what are its principal markets: and it would often be difficult to decide whether the market selected by appraisers, to regulate the value, was actually within the limits of the country from which the exportation was made. And, moreover, if the construction contended for by the plaintiff could be maintained, it would soon be found that goods would *not gener- [*527 ally be exported directly to the United States, from the principal market where they were procured, but sent to some other place where they were not in demand, to be shipped to this country, and invoiced far below their real value. The case before us shows what may be done to evade the payment of the just amount of duty; and neither the words of any revenue law, nor any policy of the government, would justify a construction alike injurious to the public and to the fair and honest importer.

It follows, therefore, as the cutch in question was shipped and invoiced from Halifax, that it was the duty of the appraisers to estimate and appraise it according to its value in the principal markets of the British dominions. What markets within these dominions were the principal ones for an article of this description, was a question of fact, not of law, and to be decided by the appraisers, and not by the court. They, it appears, determined that London and Liverpool were the principal markets in Great Britain for the goods in question, and appraised the cutch according to its value in these markets. And as the appraisers are by law the tribunal appointed to determine this question, their decision is conclusive upon the importer as well as the government.

The third point presents a question of more difficulty.

By the Act of Congress of 1842 (5 Stat. at L. 563), it was provided that in cases where goods purchased were subject to an advalorem duty, if the appraisement exceeded the value at which they were invoiced by ten per cent. or more, then in addition to the duty imposed by law on the same, there should be levied and collected

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on the same goods, wares and merchandise, fifty per cent. of the duty imposed on the same when fairly invoiced.

It would seem, however, that this provision was found by experience to operate, in some instances, unjustly upon the importer; and that it sometimes happened that, under favorable opportunities of time or place, goods were purchased in a foreign country for ten per cent. less than their market value in the principal markets of the country from which they were imported into the United States. And if they were so invoiced, the importer was liable for the above mentioned penal duty, although he was willing and offered to make the entry at their dutiable value. The fact that the invoice value was ten per cent. below the standard of value fixed by law, subjected him to the penal duty: and he had no means of escaping from it.

The 8th section of the Tariff Act of 1846 was obviously intended to relieve the importer from this hardship. It provides that the owner, consignee, or agents of imports which have been actually purchased, may, on entry of the 528*] same, make such *addition in the entry, to the cost or value given in the invoice, as, in his opinion, may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made, or in which the goods imported shall have been originally manufactured or produced, as the case may be; and to add thereto all the costs and charges which, under existing laws, would form a part of the true value, at the port where the same may be entered, upon which the duties should be assessed. And the section further provides that if the appraised value shall exceed by ten per cent. or more, the value so declared on the entry, then, in addition to the duties imposed by law, there should be levied a duty of twenty per centum ad valorem on each appraised value—with a proviso that in no case should the duty be assessed upon an amount less than the invoice value.

The difficulty has arisen upon the construction of this Act. It appears that the goods in question were entered at the value stated in the invoice, without any addition by the importer. That value, upon the appraisement, was found to be more than ten per cent. below their dutiable value. And it has been argued, on behalf of the plaintiff, that the penal duty imposed by this law is incurred in those cases only in which the importer makes an addition to the invoice value; and that this provision does not embrace cases in which goods are entered at the invoice cost or value, although that value should be more than ten per cent. below the appraisement.

We think this construction cannot be maintained. It is the duty of the importer to enter his goods at their dutiable value—ascertaining it according to the rules and regulations prescribed by law. The entry required is not a mere list of the articles imported. It must also state their value. And if he enters them at the value stated in the invoice, it is a declaration on his part that such and no more is the amount upon which the ad valorem duty is to be paid. It is the value declared on the entry, as much so as if he had availed himself of the privilege conferred by this Act of Congress, and entered them at a higher value. He is, consequently, subject to the penal duty, if the value declared in the invoice is ten per cent. below the appraisement. And this construction is strengthened by the proviso in the same section, which directs that in no case should the duty be assessed upon a less amount than the invoice value. This provision, it would seem, was introduced upon the principle that the party having admitted the value in the invoice which he produces (and which he is bound to produce when he makes the entry) shall not be permitted to deny the truth of the declaration he thus makes, and enter them at a lower value.

*Indeed, the plain object and policy [*529 of the law would be defeated by the construction contended for. It was evidently the purpose of this section of the Act of 1846 to relieve the importer from the hardship to which he was exposed by the Act of 1842, where the undervaluation in the invoice arose from error, or ignorance of the mode of valuation prescribed by the Revenue Laws of the United States. For, while it gives him the privilege of relieving himself from the penal duty, by entering them at their true dutiable valuation, it would, according to the construction claimed by the plaintiff, hold out to him, at the same time, the strongest temptation not to avail himself of it—as a much higher penal duty would be exacted, when he added to the value in the invoice, if he still fell ten per cent. below the appraisement, than if he had stood upon the invoice itself. For, in the former case, he would be subject to a penal duty of twenty per cent. on the dutiable value of the goods, and in the latter, would be liable to only fifty per cent. on the amount of duty which he would be required to pay. It would be difficult to assign a reason for such a distinction; and we think none such is made by the law, and that the importer is liable to the penal duty of twenty per cent. wherever the goods are undervalued in the entry: and it matters not whether this undervaluation is found in an entry made according to the value in the invoice, or in an entry at a higher valuation by the importer.

The Treasury Department, in carrying into execution the Act of 1846, has given to it the same construction that the court now place upon it; and the penal duty of twenty per cent. has been constantly exacted for an undervaluation in cases where the entry was according to the value stated in the invoice, as well as in cases where an addition had been made by the importer.

In the case of Bartlett v. Kane, reported in 16 How. 263, the entry was at the invoice price, and as that was found by the appraisers to be ten per cent. below its dutiable value, the penal duty was exacted by the government officers. A portion of the goods were warehoused, and afterwards entered for exportation. And the owner demanded a return of the twenty per cent. as a portion of the duty he had paid, and which he was entitled to have refunded upon the exportation of the goods. The demand being refused, the suit above mentioned was brought against the Collector to recover it. But this court held that this penal duty was legally levied by the Collector, and legally retained, and the plaintiff failed to recover.

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It will be observed that the right of the Collector to demand and retain this penal duty for an undervaluation in the invoice, was directly in question in that suit; and if the Act of 1846 does not embrace cases of that description, the 530*] plaintiff was *undoubtedly entitled to recover. But the point now made was not suggested in the argument, nor noticed in the opinion of the court, nor was any distinction in this respect taken between an undervaluation, in an entry at the invoice value, and an undervaluation where the importer added to the value.

We do not refer to this case as a judicial decision of the question before us; because, although it was in the case, the attention of the court was not called to it. But it certainly may fairly be inferred from it that in 1853 when this case was decided, no doubt had been suggested as to the construction of the Act of 1846, and that the mercantile community, and the members of the bar to whom their interests were confided, concurred with the Secretary in his construction of the law. And after the construction had been thus sanctioned, impliedly, in a judicial proceeding in this court, and acted on for so many years by all the parties interested, the court think it ought to be regarded as settled, and that what has been done under it ought not to be disturbed, even if this construction was far more doubtful than it is. We shall, therefore, certify to the Circuit Court:

1. That the Tariff Act of March 3, 1851, repealed so much of the former laws as provided that merchandise, when imported from a country other than that of production or manufacture, should be appraised at the market value of similar articles at the principal markets of the country of production or manufacture at the period of exportation to the United States.

2. That in estimating the value of the cutch, it was the duty of the appraisers to determine what were the principal markets of the country from which it was exported into the United States, and their decision that London and Liverpool were the principal markets for that article is conclusive.

3. The appraisement appearing to have been legally made, the additional duty of twenty per cent., under the 8th section of the Tariff Act of July 30, 1846, was rightfully exacted by the defendant.

MARIA De La SOLIDAD De ARGUELLO et al., Claimts., and Appts.,
v.
THE UNITED STATES,
and
THE UNITED STATES, Appt.,
v.
MARIA De La SOLIDAD De ARGUELLO et al., Claimts., etc.

(See S. C. 18 How. 539-553.)

Mexican grants—insufficient proof of—adjudication upon—distinction between—Act of 1824.

In Mexican claim, where the archives of government show no trace or evidence of a grant from the Governor, and its existence is not proved by any one who had seen it, its existence and loss being assumed because none can be found, the grant is not proved by pasturing or cutting timber on the land, nor are such acts ground of an adverse claim.

Nor does the refusal of the Governor to grant the land to another, because it belonged to or was claimed by claimant, operate to give title by estoppel.

When the equity of claimant has been adjudicated and the boundary and quantity ascertained, it is conclusive.

Distinction between "empresario" contracts for colonization, and grants to Mexican citizens. Construction of Act in relation thereto—Restraint by the Mexican Act of 1724 of grants of land within the littoral leagues had no application except to colonies of foreigners; not to Mexican citizens.

Argued Apr. 10, 1856. Decided May 12, 1856.

APPEALS from the District Court of the United States for the Northern District of California.

The case is stated by the court.

Messrs. T. H. Benton, Jones & Strode, for Arguello.

Messrs. C. Cushing, Atty.-Gen. and R. H. Gillet for the United States.

The arguments of counsel, being almost entirely confined to the facts, are not there given.

Mr. Justice Grier delivered the opinion of the court:

The claimants in this case presented their petition to the commissioners for settling private land claims in California, praying to have their title confirmed "to a certain tract of land called the 'Rancho de las Pulgas.' " They allege that this tract contains twelve square leagues of land, having a front on the Bay of San Francisco of four leagues, bounded southerly by a creek called San Francisquito, and northerly by the San Mateo, and extending back from the bay some three leagues to the Sierra or range of mountains, so as to include the valley, or Cañada de Raymundo.

The commissioners confirmed the claim to the extent of four leagues in length between said creeks, and one league in breadth, excluding the valley Raymundo, and bounded by it on the west. This decision of the commissioners was confirmed by the District Court, and both parties have appealed to this court.

We shall first consider the appeal of the claimants.

Have they shown a title to more than the four leagues confirmed to them by the commissioners and the court below?

The appellants represent the heirs of Don Luis Arguello, who died about the year 1830.

1. They allege that Don José Dario Arguello, father of Don Luis, being one of the founders of the country, and in its military service as commandanté of the Presideo at San Francisco, was the owner of a tract called "Las Pulgas," by virtue of some title or license derived from Don Diego Borica, then Governor of the Province, who was in possession of it as early as 1795; that this early title has been lost, and remains only in tradition.

2. That, in 1820 or 1821, Don Pablo Vincenté de Sola made a new title to Don Luis Arguello, who had succeeded his father, Don José, in the possession.

3. That after the death of Don Luis, in 1830, his family remained in possession; that in Au-

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gust, 1835, one Alvisu petitioned the Governor for a grant of the "Cañada de Raymundo," and, it being found that the heirs of Arguello claimed that valley to be within the bounds of their Rancho Pulgas, notice was ordered to be given to the widow and heirs, of Alvisu's petition. That they appeared by their attorney, Estrada, before the Governor, and protested against the grant to Alvisu; and that the Governor, on inquiry, acknowledged the justice of the claim of the Arguello, and refused to grant the valley to Alvisu.

541*] *4. That in October, 1835, Estrada, the executor of Luis Arguello, and acting as agent for the family, made application to the Governor, setting forth their long possession, and praying a corresponding title to be issued in their names; and that the Governor, after examining into the justice of their claim, issued a decree of concession dated 26th of November, 1835, which was approved by the Territorial Assembly on the 10th of December following.

This last-mentioned decree or grant thus approved is the only documentary evidence of title exhibited by the claimants. If it includes within its boundaries the "Cañada de Raymundo" as part of "Las Pulgas," it will follow that the claimants have shown a complete title thereto; and our inquiry would end here. Therefore, though last in order in the claimants' deraignment of their title, we shall consider it first.

On the 27th of October, 1835, Don José Estrada, executor of Don Luis Arguello, presented his petition on behalf of the widow and heirs, to Don José Castro, the Governor, praying for a grant of the "rancho of Las Pulgas," and describing its boundaries as "from the Creek of San Matteo to the Creek of San Francisquito, and from the Estheros (the estuary or bay), to the Sierra, or mountains." The petition alleged, also, that the Arguellos had "been in possession of the same since 1800, as is publicly and notoriously known, but the papers of possession had been mislaid."

The rough draft (diseno), accompanying this petition, represents a range of hills designated as "Lomeria baja," and parallel to these a range of loftier character marked "Sierra;" between these ranges is a cañada, or valley; this is the Valley Raymundo. The claim of the petition is evidently intended to include it.

On the 26th of October, 1835, the Governor made the usual order requiring the alcaldé of San Francisco de Assiz to take information as to the land, and make return of the expediente. The alcaldé made a report, accompanied by the testimony of three witnesses, who proved an occupancy of the rancho of Las Pulgas by the Arguellos for many years as a cattle range. One describes it as extending from east to west (evidently a mistake for north to south) four leagues, and from the estuary to the hills (lomas) situate at the west of Monte Redonda and Cañada "Raymundo." This would include the valley now claimed. But the second witness describes it as "about four leagues" from creek to creek, and "one league" from the estuary to the mountains covered with trees, the third as "four leagues from creek to creek and one league from the estuary to the mountains covered with trees, of the Cañada Raymundo."

542*] *The petitioner did not exhibit any documentary evidence of a prior grant of any given quantity of land, or setting forth any certain boundary, nor did the witnesses pretend to have ever seen any.

When the report was returned to the Governor, he made the following order, dated 26th November, 1835:

"Monterey, November 26, 1835.

In view of the petition with which this espediente begins, and the information of three competent witnesses, and in conformity with the laws and regulations of the subject, the minor orphans of the deceased citizen, Don Luis Arguello, at the petition of José Estrada, citizen, are declared the owners in property of the tract known under the name of 'Las Pulgas;' reserving the approval of the M. E. Territorial deputation, to which this espediente shall be sent, the corresponding patent to be signed, and recorded in the corresponding book delivering it to the interested parties for its suitable uses. Senor Don José Castro, senior member (vocal) of the M. E. Territorial Deputation, and Political Chief, ad interim, of Upper California, thus ordered, decreed and signed; to which I certify."

On the next day (27th of November, 1835) the Governor executed the following document to serve as a title or letters patent. It is signed by the Governor and Secretary, and recorded in the archives.

"Whereas, citizen José Estrada has petitioned in the name of his wards, José Ramon and Luis Arguello, and the girls M'a Concepcion and M'a Josefa, minors and legitimate children of the deceased citizen, Luis Arguello, having previously taken the deposition of proper witnesses, and they having declared the land called 'Las Pulgas' to have been their property of the deceased ever since the year of 1800, whereof the limits are on the south, the Arrogo of San Francisquito, on the north, that of San Matteo, on the east the estuaries, and on the west the Cañada de Raymundo; and using the faculties which are conferred on me by decree of this day, and in the name of the Mexican nation, I have come to declare him the owner thereof by the present letters, this grant being understood as made in entire conformity with the disposition of the laws with the reservation of the approval of the most excellent territorial deputation. The land herein mentioned is four leagues in latitude and one in longitude. In consequence, I order that the present, serving as a title to him, and to be held as firm and valid, be recorded in the book thereto corresponding, and be delivered to the petitioner for his security and other purpose."

The claimants rely upon the first document, dated November 26, *which gives no [*543 definite boundary or quantity; and argue that, the grant being thus approved by the Assembly, the power of the Governor over it ceased, and consequently, that the document, dated on the 27th, which defines the boundaries and quantity of the concession, is not the definitive grant described in the rules and regulations of 1828. But a glance at these rules and at the contents of these documents, will show the fallacy of this assumption.

The first section of these regulations gives the authority to governors (gefé politico) to grant vacant lands. The second directs the

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form and manner in which those who solicit such grant shall address the Governor. The third requires the Governor to obtain the necessary information required by the laws of 1824, and consult the municipal authorities, whether there are any objections to making such concession. By the 4th section, the Governor being thus informed may "accede or not" to the prayer of the petition. This was done in two ways—sometimes he expressed his consent by merely writing the word "concedo" at the bottom of the expediente; at other times it was expressed with more formality, as in the present case. But it seldom specified the boundaries, extent or conditions of the grant. It is intended merely to show that the Governor has "acceded" to the request of the applicant, and as an order for a patent or definitive title in due form to be drawn out for execution. It is not itself such a document as is required by the 8th section, which directs "that the definitive grant asked for being made, a document, signed by the Governor, shall be given to serve as a title to the parties interested."

The document of the 26th has none of the characteristics of a definitive grant. It shows only that the Governor assents that the petitioner shall have a grant of a tract of land called "Las Pulgas." It describes no boundary, and ascertains no quantity. It contemplates a "corresponding patent," and does not purport itself to be such document.

On the contrary, the document of the 27th has all the formalities of a definitive title, and purports on its face to be made for that purpose. It gives the boundaries of the tract known as "Las Pulgas," viz.: "On the south, the Creek San Francisquito; on the north, the San Matteo, on the east, the estuary; on the west the Cañada de Raymundo, four leagues in length and one in breadth."

The Mexican authorities have themselves given a construction to this grant in 1840, when they granted the Cañada de Raymundo to Coppinger, calling for "Las Pulgas" as its eastern boundary. Moreover, judicial possession was given to the Arguellos, establishing 544*] the western boundary of the *Las Pulgas, one league west of the Estuary or Bay of San Francisco.

The commissioners and the court below having confirmed the claim of the appellants to the extent of this legal title, the question on their appeal is, whether they have shown any title to the valley of Raymundo, or for any land west of the boundary adjudged to Las Pulgas by the Mexican authorities, so many years ago. In support of their claim the appellants rely upon a supposed grant from Governor Borrica to Don José Arguello, at an early day, and a regrant or new title to Don Luis Arguello, in 1820 or 1821, by De Sola.

Much parol testimony, and some historical documents, have been introduced on this subject. The value and effect of this evidence has been very fully discussed by the commissioners and the court below. We fully concur in their conclusions on this subject, but do not think it necessary to indicate our opinion by a special and careful examination of it. It will be sufficient to state the results at which we arrived after a careful consideration.

1. There is not sufficient evidence to satisfy our minds that any grant was ever made by Governor Borrica, or by De Sola. The archives of government show no trace of evidence of such a grant from either of them. They have not proved the existence of it by the testimony of anyone who had seen it; they assume the existence and loss of the documents, from the fact that none can now be found.

Without stopping to inquire whether, by the Spanish law, a subject could claim against the King by prescription, we will assume, for the purposes of this case, that as a presumption of fact, the court would be justified in presuming a grant on proof of fifty years continuous, notorious, adverse possession of a tract of land having certain and admitted and well-defined boundaries; and inquire whether we have such evidence as regards this valley of Raymundo, and the eight additional leagues of land now claimed to belong to the ranches of Las Pulgas.

Don José Arguello was, for many years, commandant of the Presidio of San Francisco; after his death he was succeeded in the command by his son Don Luis. As early as 1797, the King's horses were pastured and herded on this rancho. As early as 1804, soldiers, under the command of Don José, resided in huts on the land included in the grant made to appellants in 1835, and had charge of cattle said to belong to the commandant Don José. The sheep of the neighboring mission of Santa Clara were sometimes pastured on it. The King's cattle, as well as those of the commandant, were pastured on it as late as 1821. After the death of Don José, his son and successor in office, *Don Luis, continued the occupa- [*545 tion of it, by his herds and herdsmen. The cattle on this rancho, at some seasons, wandered over the valley of Raymundo, and to the foot of the western Sierra. Don Luis also cut timber at one time on the hills west of said valley.

About 1821, Governor Sola had the King's cattle removed, and permitted Don Luis to remain in possession of the rancho, which he continued to claim as his own up to the time of his death; though he took no steps towards obtaining a definitive title. As to the extent of his claim; his eastern, northern, and southern boundaries by the creek and the estuary were well known and ascertained. The western, though said to be the hills, or mountains, and in one sense, a fixed boundary, was very uncertain. It might be at one league from the bay to the first range of woody hills, or four leagues to the highest summit of the main ridge of the Sierra. Not one of the witnesses who attempt to establish this title by tradition can state what number of square leagues it contained.

No inference of an adverse claim or grant can be drawn from the fact that the commandant of a post pastured his own cattle with those of the King, or that the son and successor in office should continue in possession of the rancho by permission of the Governor after the King's cattle were removed. The fact that the cattle of Arguello wandered to the mountains and over this valley afford no necessary presumption that he claimed it or owned it. And in a frontier country the cutting of timber is very equivocal evidence of even a claim of ownership of the land. The evidence shows al-

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so an unequivocal denial of Don Luis that his claim extended beyond the bounds of the grant since made to his heirs, or included the Cañada Raymundo.

The fact that the Governor, in 1835, refused to grant this valley to Alvisu, because it belonged or was claimed by the heirs of Arguello, cannot operate to give a title to them by way of estoppel. The only inferences that can be drawn from these proceedings are: 1st. That Alvisu applied for the land. 2d. That the Arguellos claimed it. 3d. That the Governor refused, for that reason, to grant it to Alvisu. It has always been the wise and just policy of the Mexican government to avoid granting litigious titles. Hence the caution shown in refusing to grant to Alvisu till the true extent of the Arguello claim was established. Estrada, who acted on that occasion for the widow and heirs, reserved to himself the right "to further develop their claim." This was immediately done by his application to the Governor for a title, and the proceedings thereon in 1835, which have been already noticed. This proceeding was instituted for the purpose of hav-546*] ing a direct adjudication *on the claim of the Arguellos, and the extent and boundaries of Las Pulgas, which they then occupied as a rancho. Here we have the first proceeding which can operate as an estoppel on either party. The King may be estopped by his deed, and the appellants by accepting as a definitive title to the Las Pulgas a deed excluding the valley of Raymundo, are estopped from asserting that it is included in their grant. Here, for the first time, we have a juridical investigation to ascertain and fix the boundaries of Las Pulgas. A name which represented heretofore an unknown quantity had been reduced to certainty. This grant has been registered among the public archives, accepted by the claimants, and possession delivered accordingly. Having thus, by a regular juridical proceeding, ascertained the boundaries and quantity of land represented by the name of Las Pulgas, the valley of Raymundo being without the boundary so fixed, is, in 1840, granted as public land to Coppinger.

There is no evidence to show either fraud or mistake in these proceedings. The appellants have got Las Pulgas by a valid title, according to the boundaries ascertained by the proper public authorities, and cannot now be permitted to recur to vague tradition of a vague and uncertain boundary, to unsettle the titles to a large territory since granted to others.

The case of The United States v. Roselius, 15 How. 31, bears a strong resemblance to the present. There it was decided, that, "when a part of the land claimed under a Spanish title was granted to and accepted by the claimant, without any saving of his claim, this must be taken to satisfy his whole claim upon the equity of the government." It is, say the court, in the nature of a compromise, and conclusive as to the rights of the claimant.

In the case before us, the equity of the claimant was adjudicated after an investigation of the claim, and an ascertainment of its boundary and quantity. But, whether it be treated as res judicata or as a compromise, it is equally conclusive as to the claims of the appellant on the equity of the government.

2. We come now to the consideration of the appeal entered on behalf of the United States.

The authenticity of the patent or concession to the claimants for Las Pulgas, in 1835, is not disputed; but it is contended that it is void, "because, under the regulations of 1824, lands lying within the littoral leagues could not be granted by territorial governors, but only by the supreme government."

On the contrary, it is contended by the counsel for the claimants, "that this clause in the colonization laws is not intended as a general prohibition of grants of land within those boundaries, but refers only to foreign colonization; and is applicable to States only, and not to the Territories of the Republic."

*It is evident from an inspection of[*547 this Act of 1824, and consequent regulations of 1828, that they contemplate two distinct species of grants. 1st. Grants to impresarios, or contractors, sometimes called pobladores, who engaged to introduce a body of foreign settlers; and 2d. The distribution of lands to Mexican citizens—"families or single persons."

While these countries were under the dominion of Spain, the Governors had authority to make grants of the latter description, while those of the former required the sanction of the King. As examples of such colonization contracts in Louisiana, those of the Marquis of Maison Rouge and the Baron de Bastrop may be referred to. They came under the consideration of this court in the cases of The United States v. King and Coxe, 7 How. 833, and the United States v. Philadelphia, 10 How. 610. These contracts were executory. They designated a certain tract of country, which was "appropriated" to be gratuitously distributed among the colonists, but did not confer an absolute or immediate title to the whole tract to be colonized by the contractor. "As the object of these grants was to obtain a body of foreign agriculturists, who would settle together under one common leader, in whom the government could confide, liberal terms were offered. A body of such colonists, besides opening, cultivating and improving the wild lands, served as a protection against the Indians, and created inducements to others of their countrymen to join them, and thus promote the early settlement of the province."

The same policy was pursued by the Mexican government. Besides the desire of fortifying themselves against apprehended attempts at subjugation by Spain, they had before their eyes the prosperous growth of the United States consequent on the liberal encouragement of European immigration. But, while anxious to encourage immigration of foreigners, they nevertheless entertained some jealousy, well founded, perhaps, that in case of conflict with a powerful neighbor, their sympathies and allegiance might not be safely relied on.

Hence, the caution exhibited in requiring the approval of the supreme government "to grants made to impresarios for them to 'colonize with many families.'" But while a judicious policy might forbid the settlement of large bodies of foreigners on the boundaries and sea coast, we cannot impute to them the weakness, or folly, of confining their native citizens to the interior, and thus leaving the sea-coast a wilderness without population. On the contrary, the same considerations of policy which excluded foreigners, would encourage the settlement of natives within those bounds, the statute books of Mex-

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ico abound in Acts offering every inducement to 548*] Mexican families to settle on the *frontiers; proffering gratuitous grants of land and of agricultural implements—expenses of their voyage—maintenance for a year—and leave to import certain articles free of duty. The military posts in the territory were on the sea-coast; and it would be strange policy indeed which would isolate the posts intended for the protection of settlers, and compel them to dwell among the savages without protection. Numerous enactments, also, exhibit their cautious jealousy with respect to foreigners, and especially their coterminous neighbors on the north. An Act of 1828 directs all Spaniards living on the coast of the Mexican gulf to retire twenty leagues from it. Another, of 1830, prohibits settlements of foreigners from coterminous nations on any part of their border states.

A careful examination of this decree of 1824, and regulations of 1828, will show that their letter conforms to this policy, pursued with so much solicitude. The title to the decree shows its subject to be "colonization." The term "colonization" implies immigration in numbers. The 1st section speaks of the subjects of such colonization as "foreigners." It guarantees to them security of person and property. The 2d and 3d describe the lands open to such colonists, and requires the states to make rules and regulations for colonization within their limits. The 4th (whose construction is now under consideration) forbids the colonization of the territory comprehended within twenty leagues of the boundaries of any foreign State, and within ten leagues of the sea-coast, without the consent of the supreme executive power. The 6th section provides that no duties shall be imposed on the entrance of "foreigners." The 7th forbids the immigration of "foreigners" to be prohibited prior to 1840, except of some particular nation, and under peculiar circumstances. The 7th indicates the possibility that the government may find it necessary to take measures of precaution for the security of the federation with respect to foreigners who come to colonize.

These are all the sections of the Act which refer directly to colonization. The subjects of it are called "foreigners" throughout. They are the only persons to whom the 4th section has any reference or application.

The 9th section first speaks of the "distribution of lands" to individuals and families, as distinguished from colonists, and provides that Mexican citizens should be preferred, without distinction of classes, except as to those who have rendered special service to their country.

Thus we have seen that the first eight sections apply wholly to colonists and foreigners. It would be contrary to every canon of construction to apply the provisions made for them 549*] to the *subject introduced for the first time in the 9th section, or to select the 4th section as applicable to native citizens, while the other seven are confined by their terms to "foreigners."

The regulations of 1828, made for the purpose of carrying into execution the law of 1824, evidently give this construction to that Act. It makes a clear distinction between "empresairo" contracts for colonization, and grants to Mexican citizens. In conformity with the 4th section of that Act, it requires grants to "impresarios" to have the sanction of the supreme government, while those made to individuals or families, need only the approval of the territorial deputation. This may be said to be a legislative construction of the Act of 1824, and demonstrates that this restraint of grants within the littoral leagues, had no application except to colonies of foreigners.

If anything further were wanted to fortify this construction, the uniform practice of the territorial governors to make grants to individuals and families within those bounds would be conclusive.

The petition of Jimeno in 1840, praying the Governor to apply to the supreme government for a confirmation of these grants, confirms the views we have taken. It shows what had been the antecedent practice on the subject, and that, although Jimeno had doubts about its legality, others had not.

On the whole, we are of opinion that the judgment of the District Court is correct, and it is adjudged that the said claim of the petitioners is valid as to that portion of the land described in the petition, which is bounded as follows, to wit: On the south by the Arroyo, or Creek of San Francisquito, on the north by the Creek San Mateo, on the east by the Esteras, or waters of the Bay of San Francisco, and on the west by the eastern borders of the valley known as the "Cañada de Raymundo," said land being of the extent of four leagues in length and one in breadth, be the same more or less, and it is therefore hereby decreed that the said land be, and the same is hereby confirmed to them; and it is further adjudged and decreed that the said petitioners have and hold the same under this confirmation in the following shares or proportions, to wit: Maria de la Soledad Ortega Arguello, one equal undivided half thereof; José Ramon Arguello, one equal undivided fourth part thereof; Luis Antonio Arguello, one equal undivided tenth part thereof; and S. M. Mezes three equal undivided twentieth parts of said premises.

And as to the portion of the premises described in said petition, which is not included within the boundaries above mentioned, the claim of the petitioners is adjudged not to be valid.

*No. 77, Arguello et al. v. The U. S.; [*550 No. 78, The U. S. v. Arguello et al; No. 92, The U. S. v. Cervantes; No. 94, The U. S. v. Vaca & Pena; No. 99, The U. S. v. Larkin & Missroon.

Mr. Justice Daniel, dissenting:

From the decision of the court in each of these causes (as I have done in that of The United States v. Reading, 18 How. 1, during the present term, and as I should have done in those of The United States v. Ritchie, and of The United States v. Frémont, had I set in the causes last mentioned), I am constrained to declare my dissent.

The decisions in all the causes above enumerated have, according to my apprehension, been made in violation of the acknowledged laws and authority of that government which should have controlled those decisions and the subjects to which they relate; are subversive alike of justice and of the rights and the policy of the United States in the distribution and

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seating of the public lands—of the welfare of the people of California, by inciting and pampering a corrupt and grasping spirit of speculation and monopoly—subversive likewise of rules and principles of adjudication heretofore asserted by this court in relation to claims to lands within the acquired domain of the United States.

It has been this court been repeatedly and expressly ruled, with respect to the Territories acquired by the United States, either by purchase or conquest, that the laws and institutions in force within those Territories at the time of the acquisition, were not from thence to be regarded as foreign laws, and in that aspect to be proved as matters of fact, but that the courts of the United States were authorized and bound to take the same judicial cognizance and notice of these laws which they were authorized and bound to extend to the laws of the several States. This doctrine has been ruled after much consideration and reconsideration, as will be seen in the cases of The United States v. King and Coxe, 7 How. 833; The United States v. The Cities of Philadelphia and New Orleans, 11 How. 609; and The United States v. Turner et al. 11 How. 663.

It is conceded that at the times which the claims now sanctioned by this court came into being, and from a period anterior to the origin of those claims, down to the transfer of the country to the United States, there existed laws and regulations enacted by the Mexican Government with respect to the granting of lands within the Republic, prescribing the modes in which, and the agents by whom, all grants 551*] should be made, and *prescribing also the limitations and exceptions to which the power of making grants was subjected.

Amongst the laws and ordinances here referred to, are those by which the authority of the provincial commanders or governors to originate the titles to lands was conferred and limited. The prerequisites indispensable for the consummation of titles—the immunity from the power of the provincial governor, or from grants or alienations by them, of lands belonging to the Missions; the prohibition of colonization and settlement within twenty leagues of a foreign territory, and within what have been denominated the "littoral leagues," or ten leagues from the sea-coast; and the necessity for a sanction by the Departmental Assemblies to give validity to private or individual titles, were all, by the same system or body of laws, established and proclaimed.

With the wisdom or justice of those laws and ordinances, it is conceived that this court can have no legitimate concernment; much less can it exercise the power to dispense with them, or to modify them in any degree whatsoever. Its province and its duty are confined to inquiries as to the existence of such laws, and to their just effect upon the pretentions of claimants necessarily dependent upon and subordinate to those laws; and to the protection of the United States, the successors and possessors of that authority by which those laws were ordained.

Whenever these inquiries shall lead to the conclusion that such pretentions are unfounded in law, the right to the subjects to which they relate devolves necessarily upon the United States as succeeding to the sovereignty of the Mexican Government; succeeding, also, to the high obligation of so disposing of these subjects as shall render them conducive to the national revenue; shall baffle and defeat the schemes of corrupt and corrupting avarice and monopoly; and shall maintain and secure an equality of privilege and benefit to all the citizens of the nation.

That the laws and ordinances above referred to were solemnly, formally, and legitimately established and proclaimed by the Government of Mexico, is not denied, nor is it pretended that they have ever been expressly or openly repealed by the Government of the Republic. An attempt is made, however, to escape from the authority and effect of those public laws by setting up a practice in violation of them, and, from the proof of this practice, to establish a different code or system by which the former, regularly adopted and promulged, and never directly repealed, has been abrogated and disannulled. The results of this attempt, if successful (and by this court it has been thus far rendered successful), are these: that the laws and institutions of the *Republic [*552 of Mexico, inscribed in her archives, are not to be received and judicially noticed by this court; but they are to be sought for in the existence of machinations and abuses which have at different times obtained, in defiance of the established or regular government—proofs to be collected from sources however impure or liable to improper influences; in other words, the laws of Mexico are to be extracted from statements varying or contradictory as they may be, and resting on the mere assertion of individuals, all of them perhaps interested.

How a proceeding like this is to be reconciled with the decision of this court already cited, or how, indeed, it can be reconciled with uniformity or with the safety either of property or person, passes my comprehension to conceive. It can hardly admit of a rational doubt in the mind of any man who considers the character of much of the population of the late Spanish dominions in America—sunk in ignorance, and marked by the traits which tyranny and degradation, political and moral, naturally and usually engender—that proofs, or rather statements, might be obtained, as to any fact or circumstance which it might be deemed desirable or profitable to establish. And it will very probably be developed in the progress of the struggle or scramble for monopoly of the public domain, that many of the witnesses upon whose testimony the novel and sturdy Mexican code of practice or seizure is to be established, in abrogation of the written law, are directly or intermediately interested in the success of a monopoly by which, under the countenance of this court, principalities are won by an affidavit, and conferred upon the unscrupulous few, to the exclusion and detriment of the many, and by the sacrifice of the sovereign rights of the United States.

A transient view of the circumstances under which these enormous pretentions have been originated, is sufficient, if not for their absolute condemnation, at least to subject them to a most vigilant scrutiny.

If we look at the condition of the country at the time, we find it in a state of almost in-

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cessant agitation, disorder and revolution—controlled in rapid succession by men either themselves directly or violently seizing upon power, or becoming the instruments of those who had practised such irregularities—men whose position was created or maintained by no regular or constitutional authority, but simply by force, and continuing only until overthrown by superior violence. Turning our attention next to the grants themselves, they are without an exception deficient in the requisites prescribed by the established written laws of the country, as indispensable to impart to them validity, but rest solely upon the circum-553*] stances (and boldly *challenging countenance and support here upon those circumstances) that they have originated in practical and temporary usurpations of power; and that, amidst scenes of violence and disorder, have been either maintained or acquiesced in, in defiance of the known public law.

Yet, these avowals with respect to the origin and growth of these claims—avowals which infect and taint their entire being and character, and which ought to consign them to the sternest reprobation—constitute the merits by which they commend themselves to the countenance and support of a tribunal whose highest function is the assertion of law, justice, integrity, order—the dispensation of right equally to all.

Upon such a foundation, such a pretense, or rather such a defiance of authority, I will not, by an abuse of language, call it even a pretense of right, I cannot consent to impair or destroy the sovereign rights and the financial interests of the United States in the public domain. I can perceive no merit, no claim whatsoever, to favor, on the part of the grasping and unscrupulous speculator and monopolist; no propriety in retarding, for his advantage or profit, the settlement and population of new states, by excluding therefrom the honest citizen of small means, by whose presence and industry the improvement and wealth, and social and moral health, and the advancement of the country are always sure to be promoted.

THE UNITED STATES, Appts.,
v.
CRUZ CERVANTES.

(See S. C. 18 How. 553-555.)

Mexican grant—mission lands.

The objection that a Mexican grant was not approved by the Departmental Assembly, has been disposed of by the case of United States v. Reading, ante.

The objection that the land lies within the ten littoral leagues is disposed of by the case of Arguello v. United States, ante, p. 478.

Lands formerly occupied by the mission were not so at the time of this grant, which was also made with the assent of the mission. Since 1834 the public authorities had granted mission lands to individuals, the same as other public lands. Therefore the objection that the land had belonged to the mission is not tenable.

The 17th section of the Regulations of 1828 had no application to lands not occupied by missions, and not made the subject of "colonization."

Argued Apr. 22, 1856. Decided May 12, 1856.

APPEAL from the District Court of the United States for the Northern District of California.

This case was originally brought before the Board of Land Commissioners in California, when the claim of the petitioner was confirmed. On appeal to the District Court for the Northern District of Californa, the decision was reversed and the claim rejected. The claimant then appealed to this court, where, at the December Term, 1853, the decree of the District Court was reversed; it not appearing that the premises were within the jurisdiction of that court, but with leave to amend the proceedings with regard to the jurisdiction or any other matter of form of substance which might be necessary.

16 How. 619.

On presenting the mandate of this court to the District Court, leave was given to amend the proceedings, which was done, and that court affirmed the decision of the Board of Commissioners. The United States thereupon appealed to this court.

A further statement appears in the opinion of the court.

Mr. C. Cushing, Atty.-Gen., for the appellants.

Mr. William Carey Jones for the appellee.

The arguments of counsel, being almost entirely confined to the facts, are not here given.

Mr. Justice Grier delivered the opinion of the court:

The appellee, Cruz Cervantes, having complied with the provisions required by law, obtained a grant from Nicholas Guterriez, then Governor of California, "of a parcel of land known by the name of San Joaquin, bounded on the north by San Felipe, on the south by Santa, on the west by the plain of San Juan, and on the east by the hills of the same name," containing the quantity of two leagues.

This concession, dated April 1, 1836, was presented to the Departmental Assembly for confirmation. The committee reported in favor of the grant—"on the 12th of July it was returned to the committee for its reformation." This concludes the expediente as certified from the archives. It does not appear whether any further action was taken on the subject by the Assembly; nor do the books exist among the archives from which any further facts can be ascertained.

The land granted was reported to be within the ten littoral leagues, and as having at one time appertained to the mission of San Juan Bautista—on a reference of the expediente made to the steward of the mission, their consent was certified, that "the place to be adjudicated to the petitioner so far as the hills, without touching the oak grove," etc.

*Within the space of two years Cer- [*555 vantes entered on the land, built on it, and cultivated it, and continues so to do. On the 10th of February, 1841, juridical possession was delivered to him by metes and bounds with the customary formalities.

The objections to the validity of this grant are: 1st That it was not approved by the Departmental Assembly. 2d. That the land is

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within the ten littoral leagues. 3d. That it belonged to a mission, and it was therefore unlawful to grant it.

1. The first objection, if true in fact, has been disposed of by this court in the case of U. S. v. Reading, decided at this term (18 How. 1). Besides, so far as the archives show any action of the Assembly on this grant, it is an approval of it; and as there is no evidence that it was rejected or annulled, or any further report made on it, the grantee should have the benefit of the presumption of a decision in his favor.

2. The objection that the land lies within the ten littoral leagues, has just been disposed of, in the case of The U. S. v. Arguello, 18 How. 539.

3. As to the objection that the land had belonged to the mission.

The large tracts of land appurtenant to the mission establishments, were never vested in the Church, or any other corporation or individual, by any grant of a legal title. The missionaries and Indians had an usufruct or occupancy of the land, at the will of the sovereign. The record shows, that though the lands now in question had formerly been occupied by the mission, they were not so at the time this grant was made. It was made, also, with the assent of the mission, who set up no claim to further occupancy.

The 17th section of the Regulations of 1828 forbids lands "occupied" by missions from being made the subject of "colonization grants for the present," etc., and can therefore have no application to lands not so occupied, and not made the subject of "colonization." Besides, in 1833 and 1834, the government of Mexico passed laws to secularize the missions; since which time, the public authorities have granted these lands to individuals in the same manner as other public lands; as has been decided by this court in the case of U. S. v. Ritchie, 17 How. 525.

The judgment of the District Court is, therefore, affirmed.

Dissenting, Mr. Justice Daniel.

See dissenting opinion of Mr. Justice Daniel in Arguello v. United States, next preceding case.

Aff'g—Hoff. L. C. 9.

556*] *THE UNITED STATES, Appts.,

v.

JUAN MANUEL VACA and Juan Phelipe Pena.

(See S. C. 18 How. 556-557.)

Mexican grant—condition subsequent—Frémont v. U. S. ante, 241 (17 How. 442), affirmed.

Mexican grant. Where claimant was hindered from performing a condition subsequent, in his grant, which only left grantee's title open to be denounced, by the revolutionary state of the country, the non-fulfillment of it will not work a forfeiture of his title.

The want of a survey, and that there is no sufficient designation of boundaries to sever the land from the public domain, is no sufficient objection, where the quantity is defined and the general locality.

The case of Frémont v. United States, 17 How. 542, applied to this case, and affirmed.

Argued Apr. 24, 1856. Decided May 12, 1856.

APPEAL from the District Court of the United States for the Northern District of California.

The case is here on appeal from the decision of the District Court of the United States for the Northern District of California, reversing the decision of the Land Commissioners, and confirming to the appellees a certain Mexican land claim in that State.

A further statement appears in the opinion of the court.

Mr. C. Cushing, Atty.-Gen., for the appellants.

Messrs. Jones and Strode for appellees.

The arguments of counsel, being confined almost entirely to the facts, are not here given.

Mr. Justice Grier delivered the opinion of the court:

On the 27th January, 1843, the claimants and appellees in this case, Juan Manuel Vaca and José Phelipe Pena (the latter under the name of Armijo), received a grant of land from Micheltorena, then Governor; the boundaries of which, as stated in the grant, are the Sacramento River on the east; on the west the Sierra of Napa; at the north, the Creek of Lihuaytos (which was also given as the name by which the tract should be designated), and the extent ten sitios de ganado mayor. Prior to this grant, a sketch or map was furnished, according to the law, as is shown in the recitals of the grant.

The grant was made, as expressed in it, subject to "the measurements to be made of contiguous ranchos," and the judicial possession to be given after the confirmation of the grant.

Among the contiguous ranchos, on the same creek or river, and which had not been measured, was that of William Wolfskill. Between the claimants and Wolfskill a dispute of boundary arose, which prevented the lands of either from being measured, which continued till 1845.

In 1845 the dispute was settled by proceedings had before the proper authorities, in which it was agreed that Wolfskill should remain with the lands that he claimed on the upper part of the creek, and Vaca and Pena should take theirs adjoining his on the east.

Vaca and Pena petitioned the Governor Poco for a new grant, corresponding to the agreement, and producing the former grant as a foundation for it.

THE UNITED STATES, Appts.,

v.

THOMAS O. LARKIN and John S. Missroon.

(See S. C. 18 How. 557-565.)

Mexican grant—quantity—objection that grant is fictitious, cannot be taken here for first time—other objections.

Mexican grant. Where the concession by governor limits the quantity to eleven square leagues, Held, that the decree of the commissioners and of

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the District Court properly limited the confirmation to same quantity, if contained within the sketch called for by the patent.

The objection, that the grant is a fictitious one, cannot be taken in this court for the first time.

The objection that the grant has not been confirmed by the Departmental Assembly, the circumstances being the same, is settled by Frémont v. United States, 17 How. 542.

The same may be said of the objection, that judicial possession was not taken.

Grant not void for want of condition of possession within a year.

Argued May 1, 1856. Decided May 12, 1856.

APPEAL from the District Court of the United States for the Northern District of California.

The appellees claim a certain tract of land in California under Manuel Jimeno. The claim was confirmed by a decree of the Board of Land Commissioners, which decree was affirmed on appeal by the District Court.

The United States then took an appeal to this court.

A further statement appears in the opinion of the court.

Mr. C. Cushing, Atty-Gen., for the appellants.

Messrs. A. H. Lawrence, A. C. Whitcomb, E. L. Gould, and Wylie, for appellees.

The arguments of counsel, being confined almost entirely to the facts, are not here given.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the District Court of the United States for the Northern District of California, in which a land claim was confirmed to the appellees, and which had been previously confirmed by the Board of Commissioners.

The grant was made to Manuel Jimeno, who was at the time Secretary of the Government of California, by Governor Micheltorena, on the 4th November, 1844.

The petition for the same is as follows:

"Excellent Sir Governor:

I, Manuel Jimeno Cassarin, a resident of this department, represent before Y. E., with due respect, that, inasmuch as it suits my interests to establish a rancho about (port) the Sacramento River, according to the accompanying sketch, I entreat Y. E. to be pleased to grant to me, since it lies completely unoccupied, and nobody has petitioned for it, the land, as it is made apparent by the general map, formed this year by the Land Surveyor Bidwell. By which grace I will receive mercy from Y. E.

(Signed) Manuel Jimeno.

Monterey, November the 1st, 1844."

And on the same day the Governor made the following memorandum:

Monterey, November, 1, 1844.

The party concerned not being able to report, on account of his being at a time concerned, 559*] party and secretary of government, *I order that, whatever it may be convenient to have in mind, for the purpose of coming to a determination, be brought to my knowledge.

(Signed) Micheltorena."

And on the next day directions were given for the issuing of the patent, as follows:

"Monterey, November the 2d, 1844.

After having seen the petition at the head of this record of proceedings, the uncultivated state in which the land petitioned for lies, according to the general map which has been formed of the Sacramento River, and whatever else it was found convenient to attend to, in conformity with the laws and regulations on the subject, I declare Don Manuel Jimeno the owner of eleven square leagues ("Sitios de Ganado Mayor") between Sacramento River, the ranch which the children of Senor Larkin have applied for, and the vacant lands lying south, as the respective sketch shows. Let the corresponding patent be issued; let it be entered in the respective book; and let it be delivered to the party concerned, for his security and other ends.

(Signed) Micheltorena."

And on the 4th November the patent was issued, in the following terms:

"[L. S.] [Maritime Custom House, Monterey.] The citizen Manuel Micheltorena, General of Brigade of the Mexican army, Adjutant-General of the staff of the same, Governor, Commandant-General, and Inspector of the Department of Californias.

"[L. S.] [Govern't of the Department of the Californias.] Whereas Don Manuel Jimeno has petitioned for his personal benefit for the tract of land which is unoccupied between the ranch which has been granted to the children of Don Tomas O. Larkin, the River Sacramento, and the uncultivated lands which are on the side of the south, entirely in conformity with the showing in the corresponding plan. The necessary preliminaries and investigations having been gone through with, as directed by the laws and regulations on the subject; exercising the authority in me vested, in the name of the Mexican nation, I have just granted to him the said land, subject to the following conditions:

1st. He may inclose it without prejudice to the crossways, roads, and right of way; he shall enjoy it freely and exclusively, destining it to the use and cultivation which best suits him.

2d. He shall solicit the proper judge to give him juridical possession *of it in virtue [*560 of this grant, for the which boundaries thereof shall be marked out, within the limits of which, besides the usual landmarks, he shall plant some fruit-bearing or some forest trees of some utility.

3d. If he shall contravene these conditions he will lose his right to the land.

Wherefore, I order this title, being of itself duly firm and valid. Record thereof shall be taken in the proper book, and that it be delivered to the party interested for his security, and for other purposes.

Given in Monterey, this fourth day of November, one thousand eight hundred and forty-four.

(Sg'd) Man'l Michelt'a.

(Sg'd) Franc'o Arce, First Official.

The record of this grant has been taken in the proper book, at folio.

Franc'o Arce.

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On the 21st April, 1846, Jimeno made application to the Departmental Assembly for a confirmation of his grant.

"To the Excellent Departmental Assembly:

I, Manuel Jimeno, represent before Y. E., with all due respect, that by the adjoined title is proved the grant, made in my favor, of a tract of land on the margins of the Sacramento ("corresponde") River, and, inasmuch as it pertains (correspond) to Y. E., to give Y. E. approval.

I beg Y. E. to deign to grant it to me, whereby I will receive grace and mercy. I swear so; and Y. E. will be pleased to excuse my usage of common paper, there being none of the corresponding paper.

(Signed) Manuel Jimeno.

Monterey, April the 21st, 1846."

And on the 3d June, the same year, that body acted upon the application, of which we have the following record:

"Angeles, June, the 3d, 1846.

Account having been given in to-day's session to the Excellent Departmental Assembly, with this instancy, it was ordered to be referred, together with the respective record of proceedings, to the committee on vacant lands.

(Signed) Augustin Olivera."

561*] *Jimeno and his wife conveyed all their interest in the land to the appellees on the 30th August, 1847; soon after which the grantees took actual possession, and have occupied and possessed the same ever since.

The petition to the Governor was accompanied with a sketch or map giving the location and boundaries of the tract solicited, and referred, also, to a general map of the valley of the Sacramento River, made by Bidwell, a land surveyor, the same year. The quantity of land was not specifically designated in the petition. Neither does the patent itself designate the quantity, but refers to the sketch accompanying the petition. But the concession and direction by the Governor to the proper officer to issue the patent, limits the quantity to eleven square leagues, and which concession and direction constitute a part of the evidence of the title, or according to the Mexican vocabulary, a part of the "expediente" and therefore may well qualify and limit the quantity to this number, even if the number of leagues within the boundaries, as given by the rough sketch, exceeded it; especially should this construction be given as the power of the Governor to grant to a single person was limited so as not to exceed this quantity, according to the 12th section of the Decree of the Mexican Congress of the 18th August, 1824.

The decree of the Commissioners, and also of the District Court, very properly limited the confirmation to the extent only of eleven square leagues, provided the quantity should be contained within the sketch called for by the patent, and if there should be less than that quantity, then no more than this lesser quantity is confirmed.

No question appears to have been made as to the practicability of locating the grant in the tribunals below; nor do we see any ground upon which such a question could have been properly raised in the case.

The plan or sketch found in the expediente, in connection with the description given in the grant, furnishes all the materials essential to determine the boundaries. Three sides are given, and the quantity will guide the surveyor in closing the lines by running the fourth.

It has been suggested on the argument here, that this grant is a fictitious one, made by the Governor to the Secretary of the Territory according to the forms of law, for the purpose of defrauding the United States. One answer to the suggestion is, that no objection as to the bona fides of the grant was taken before either of the tribunals below, where it should have been made, if relied on by the government, so as to have given the claimants an opportunity to have met it. To permit it to be taken in the appellate court for the first time, where there is no *opportunity for explanation, [*562 would be a surprise upon them, of which they might justly complain. The Commissioners say, "the grant is fully proven, and we find no cause to doubt its genuineness." And the judges of the District Court observe, "that the grant is fully proved; nor is its genuineness called in question."

Besides this answer to the suggestion, even were we to entertain the question, we see nothing in the record to justify the imputation. The grant was made 4th November, 1844, at a time when California was in the full possession of the Mexican authorities, and more than a year previous to any hostile entry of the forces of the United States, and more than three years before the cession of the country to this Government. The fact that seems most to be relied on to maintain the suggestion is, that Jimeno, the grantee, was the Secretary of the Territory at the time, and hence the grant an act of favoritism. But there is nothing in the Decree of 18th August, 1824, of the Mexican Congress, or in the Regulations of the 21st November, 1828, forbidding such grants. On the contrary, it is known to be the usual mode of remuneration to an officer of the government for meritorious public services. A preference is given to such officers in the distribution of the public lands by the 9th article of Decree of 1824, above referred to.

It is also objected that the grant does not contain the condition of confirmation by the Departmental Assembly; and also that there has been no confirmation by that body.

The 5th Regulation of November, 1828, provides, that grants to individuals or families shall not be definitively valid without the previous approbation of the Departmental Assembly to which the respective "expedientes" shall be referred. There is nothing in this or any other regulation that requires this condition to be inserted in the patent.

It appears from the records in the case, that the grant was submitted to this body by Jimeno on the 21st April, 1846; and that that body, on the 3d June following, referred it to the committee on vacant lands; but, for aught that appears, no further action was had upon it. The expediente, however, which was before this body, seems afterwards to have been returned to the appropriate office for the keeping of these records, and was found in the government archives.

The 6th Regulation of 1828 provides that, "if

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the Governor does not obtain the approval of the Departmental Assembly, he shall report the same to the supreme government," together with the "expediente," for its decision. Inasmuch as the record of the title was found returned by the Governor to the government archives and not forwarded to the supreme gov- [*563*] ernment, it is *insisted, on behalf of the claimants, that the fair presumption is, that the grant had been approved; otherwise, it would not have been returned to government archives.

However this may be, it is not important to determine, as it was settled, after full consideration, in the case of Frémont v. U. S. 17 How. 542, 563; that the omission to procure the confirmation under circumstances existing similar to those attending this case did not operate to defeat or avoid the title.

The grant, in that case, to Alvarado, was made by the same Governor, and in the same year of the present grant, and we may add that the grantee was a military officer of the government at the time; the present grantee was a civil officer.

The same case also furnishes a full answer to the objections, that judicial possession was not taken of the land. We refer to the grounds there stated without repeating them, as that facts in this case fully warrant the view there presented.

It is also objected that the grant does not contain the usual condition of cultivation and habitation within the year. Neither the Act of the Mexican Congress of 1824 nor the Regulations of 1828, prescribe any particular form of grants or patents of the public lands. And there appears to have been no uniformity in the conditions annexed in those issued by the different political chiefs, nor even as it respects those issued by the same individual. Great latitude seems to have been exercised in prescribing these conditions, both as to the number and the nature of them; also, in respect to the time within which the possession was to be taken when inserted as a condition. It is understood that the condition was usually dispensed with in cases where the grantee was in actual possession at the time of the grant. It was probably dispensed with in the present case, as the grantee was the Secretary of the Territory, and his services required at the seat of government; especially as it appears that a civil disturbance had broken out between the political authorities, and which continued down until possession was taken of the country by the United States in 1846 and 1847.

We think it would be going further than required by any of the provisions of the Law of 1824, or Regulations of 1828, to hold the grant void for the want of this condition of possession within a limited time; more especially, as it appears that actual possession was taken of the land as soon as the state and condition of the country would admit, and which has been held ever since. And we are the more bound to hold this construction in respect to this particular condition, as the court have already held, after the fullest consideration, that, even in cases where the condition is contained in the grant, the non-compliance with its terms will not necessarily have the effect to avoid the title. Circumstances may excuse the omission.

*Upon the whole, we are satisfied that [*564 the judgment of the court below was right, and should be affirmed.

Mr. Justice Campbell, dissenting:

In exercising the jurisdiction conferred by the Act of Congress of the 3d March, 1851, in reference to claims for lands in California, it seems to me this court should be satisfied that the claimant has received a title from the Governor who was a legal representative of the Mexican nation, and that no credit should attach to the acts of the usurpers who from time to time occasioned anarchy and civil war in that Territory; that the grant should be, in spirit and effect, a colonization grant, in accordance with the Mexican laws; that it should describe the lands so that they can be identified; and that the conditions of improvement and occupancy should be substantially fulfilled. The case before us is a claim for eleven leagues of land lying on the Sacramento River, with that length, and of a league in width. The papers purport to have been made during the first four days of November, 1844, by the Governor of the Territory, in favor of one Jimeno, the Secretary of the Government. The usual inquiries could not be made, for the party interested was charged with the performance of that duty; though the Governor recites that, in making the grant, he had conformed to the regulations. The patent issued the 4th November, 1844, subject to the conditions that juridical possession should be taken, and the proper boundaries marked out, and that the grantee should plant fruit-bearing or forest trees of some utility; and if he failed to perform the conditions he should lose the land: No act was done by this person during 1844 or 1845, or the early part of 1846, which indicates any claim on his part to this land. There is a petition entered by himself on the expediente, directed to the Departmental Assembly, dated 21st April, 1846, asking for a confirmation and a certificate of one Olivera, dated 3d June, 1846, that it had been presented and referred to the committee of public lands. Here the connection of Jimeno terminates. The preparation of these papers is the whole extent of that connection. In August, 1847, the petitioner, Larkin, Consul of the United States at Monterey, purchases from Jimeno this claim for $1,000, or rather, that is, the price recited in the deed of Jimeno to him. The American flag had been raised at Monterey twelve months before, and the whole country was then in possession of General Kearney.

*We have some unsatisfactory evi- [*565 dence that Larkin, either in 1847 or 1848, sent a Spaniard to enter upon this land; a camp, in which he might find a shelter and some conveniences for collecting cattle, form the facts of this settlement.

Neither Jimeno nor Larkin entered upon or occupied the land. This evidence merely shows that Larkin was laying the foundations for a claim upon the United States, and was wholly unconnected with the Mexican regulations. The evidence satisfied me that this claim was fabricated after the difficulties between the United States and Mexico had occurred, with a view to enable the American Consul at Monterey to profit from it, in the event of the cession of the country to the United States. I lay

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no stress upon the fact that the papers are found in the archives. I presume Jimeno was the keeper of those archives. I dissent from the judgment of the court confirming this claim.

See, also, Mr. Justice Daniel's dissenting opinion in Arguello v. United States, ante, 482.

Aff'g—Hoff. L. C. 41.

ALEXANDER DENNISTOUN, John Dennistoun, William Wood, Partners under the Style of A. Dennistoun & Co., Plaintiffs,

v.

ROGER STEWART.

(See S. C. 18 How. 565-569.)

Jurisdiction—questions certified, must be questions of law—points must be single, and not cover whole case.

In order that this court may have jurisdiction under the Act of April 29, 1802, authorizing divisions of opinion to be certified, the following requisites are necessary:

1. They must be questions of law and not questions of fact—distinctly and particularly stated.

2. The points must be single and not bring up the whole case for decision.

The certificate not presenting to this court any specific question of law, but referring to this court the entire law of the case as it might arise upon all the facts supposed by the court, and which had not been found by the jury, this court cannot take jurisdiction.

Argued Apr. 15, 1856. Decided May 12, 1856.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Alabama.

The case is fully stated by the court.

Mr. Philips for plaintiffs.

Mr. Roger Stewart, in person.

Mr. Justice Daniel delivered the opinion of the court:

This cause comes before us upon a certificate of division in opinion between the judges of the Circuit Court of the United States for the 5th Circuit and Southern District of Alabama.

The evidence before the Circuit Court on which the division in opinion arose, was of the following character:

The defendant, on the 9th day of September, 1850, at Mobile, in the names of James Reid & Co., of which firm the defendant was a member, drew a bill on Henry Goa Booth, at Liverpool, for the sum of £4,417 14s. 11d. sterling, payable at sixty days' sight, to the order of the drawers in London, on account of 1,058 bales of cotton, shipped by the drawers to the drawee by the ship Windsor Castle.

This bill was indorsed by the defendant, by the name and style of his firm, to the plaintiffs, and after acceptance, having been returned protested for non-payment, an action of assumpsit was brought for the amount of the bill and charges by the indorsees against the defendant as drawer.

Upon the trial before the Circuit Court there were introduced and read the testimony of sundry witnesses, examined on the part both of the plaintiffs and the defendant.

The object of the plaintiffs was to sustain their right of recovery upon the bill, by showing that this right had not been lost or impaired by any irregularity or delinquency of the plaintiffs as indorsees and holders of the bill for value.

*By the evidence adduced by the defendant it was designed to show that, previously to the purchase of the 1,058 bales of cotton, and as a part of the agreement on which the purchase was to be made, the defendant, or the person or persons by whom the funds for that purchase should be advanced, should hold the bill of lading of the cargo as security for such advances; that this agreement was adopted by the plaintiffs, who required and received the bill of lading as a precedent condition to their purchase of the bills drawn on Booth by the defendant; that the bill of lading thus received as a security, was transmitted by the plaintiffs to a branch of their firm in Liverpool, and by the Liverpool branch, with the knowledge, and in violation of that agreement, was surrendered to one Byrne, a creditor of Booth, and thus diverted from the purposes it was intended to secure. [*567

Upon the instructions prayed from the court to the jury, the court were divided in opinion upon the following questions:

1. Whether the firm of Dennistoun, Wood & Co., of New York, or the plaintiffs, were bound to hold the said bill of lading for the shipment on the said Windsor Castle as a security for the bill of exchange described in the declaration; and whether any amount of loss arising to the said defendant from their failure to hold the said bill for the purpose of securing the proceeds of the cotton specified therein, for the payment of the bill of exchange described in the declaration, can be used as a defense against the bill, or any part thereof.

2. Whether the said Dennistoun & Co. were required to hold the said bill of lading as a security for any bill of exchange drawn by the defendant or his agents upon the said shipment of cotton, other than those to which the same was attached, or of which they, the said plaintiffs, had specific and direct notice at the time of the settlement with Byrne in the manner stated in the depositions; and whether notice to Dennistoun, Wood & Co., in New York, was operative as a notice to the plaintiffs in Liverpool, though no notice was received by the house in Liverpool of such outstanding bill before said settlement.

3. Whether, if the plaintiffs surrendered the said bill of lading to the said Byrne, under a promise from him that the proceeds of the cotton should be applied to the payment of bills that might come forward, and that this bill should subsequently come forward; and that the plaintiffs have failed to sue said Byrne, or to take any other legal proceeding against him, and that the said Byrne has the proceeds of the cotton more than sufficient to pay the bill, these facts or any other facts in connection therewith that are contained in the said testimony, offer any defense against the case of the plaintiffs.

NOTE.—Cases certified on division of Circuit Court. Jurisdiction of U. S. Supreme Court. On what division should be. See note to Webster v. Cooper, 13 L. ed. U. S. 325.

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568*] *4. Whether any view of the evidence introduced upon the said trial and hereto attached, would warrant the jury in finding for the defendant, upon this point of the defense, to the case of the plaintiffs.

5. And the further question arose, whether the Statute of Alabama regulating the damages upon bills of exchange like the present, returned under protest, regulates the rate of damage in this case.

We think that our jurisdiction of the questions certified on the record of this cause, is forbidden by previous decisions of this court, bearing upon those questions considered separately, as well as upon the case as presented by them in an aggregate point of view.

In the interpretations by this court of the Act of Congress of April 29, 1802, authorizing divisions of opinion at circuit to be certified, the following requisites have been prescribed as indispensable to the jurisdiction of this court over questions upon which the judges shall have been opposed in opinion:

1st. They must be questions of law and not questions of fact—not such as involve or imply conclusions or judgment by the judges upon the weight or effect of testimony or facts adduced in the cause. Vide Wilson v. Barnum, 8 How. 258. And the question or questions upon which the judges were opposed in opinion must be distinctly and particularly stated with reference to that part of the case upon which such question or questions shall have arisen. Vide The United States v. Briggs, 5 How. 208. It is said by the Chief Justice, in delivering the opinion of the court in this case, "we are not authorized to decide in such cases unless the particular point upon which the judges differed is stated;" again, he says: "the difference of opinion is indeed stated to have been on the point whether the demurrer should be sustained. But such a question can hardly be called a point in the case within the meaning of the Act of Congress, for it does not show whether the difficulty arose upon the construction of the Act of Congress on which the indictment was founded, or upon the form of proceeding adopted to inflict the punishment, or upon any supposed defect in the counts in the indictment. On the contrary, the whole case is ordered to be certified upon the indictment, demurrer and joinder, leaving this court to look into the record to determine for itself whether any sufficient objection can be made in bar of the prosecution.

2d. The points stated must be single, and must not bring up the whole case for decision.

In the establishment of this position, the rulings of this court have been reiterated, and most explicit.

Beginning with the case of The U. S. v. John 569*] Bailey, *9 Pet. 257, it is in that case declared by the late Chief Justice, that "the language of the 6th section of the Act to amend the judicial system of the United States shows conclusively that Congress intended to provide for a division of opinion on single points which frequently occur in the trial of a cause; not to enable a circuit court to transfer an entire cause into this court before a final judgment; a construction which would authorize such a transfer would counteract the policy which forbids writs of error or appeals until the judgment or decree be final." To the same effect, and enunciated in language equally if not even more explicit, will be found the decisions of Adams & Co. v. Jones, 12 Pet. 207; of White v. Turk et al. 12 Pet. 238; of Nesmith v. Sheldon et al. 6 How. 41; of Webster v. Cooper, 10 How. 54.

Upon the trial in the Circuit Court the examination of witnesses was introduced and relied on both by plaintiffs and defendant to show the nature of the agreement upon which the cargo of The Windsor Castle was purchased, and upon which the plaintiffs consented to purchase and did purchase the bills drawn by the defendant upon Booth; the character of the security proffered, and said to have been accepted, in the bill of lading, for the indemnity of the plaintiffs in purchasing the bills drawn upon Booth, and the obligation of the same plaintiffs not to surrender that security, nor to use it to the detriment of the defendant. The case was not placed before the judges upon any general or settled principle of the law merchant, nor was their opposition in opinion founded upon a case molded and governed simply by that law, but they have divided upon a case which was or might have been affected by facts heard in evidence, the influence of which facts, as controlling the acts and obligations of the parties, fell peculiarly and properly within the province of the jury.

Again; we do not think that the certificate of the judges of the Circuit Court conforms to the settled interpretation of the Act of Congress as expounded by the cases cited, in presenting to this court any single or specific question of law arising in the progress of the cause, but that it refers to this court the entire law of the case as it might arise upon all the facts supposed by the court, and which have not been found by the jury.

We are therefore of the opinion that this court cannot take jurisdiction of this case as certified from the Circuit Court, but that it should be remanded to that court to be proceeded in according to law.

Cited—3 Wall. 254, 256.

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*ADAM OGILVIE et al., Compl'ts, [*577
v.
THE KNOX INSURANCE COMPANY et al.

(S. C. 18 How. 577-581.)

Case certified for division of opinion—question abstract.

A case certified, on account of division of opinion between circuit judges, being a question of fraud, by agent of Insurance Company, and the liability of the Company for such fraud, and there being no fact shown by which the precise connection of the agent with the Company is established, or the character or extent of his representations upon which the Company was claimed to be bound; Held that the question was abstract and general; and there is nothing before the court upon which the court could deduce any conclusion applicable to the case, and the case was remanded.

Submitted Apr. 18, 1856. Decided May 12, 1856.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Indiana.

The bill in this case was filed in the Circuit

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Court of the United States for the District of Indiana, by the complainants, against the Knox Insurance Co., and twenty-five stockholders of said Company, to enforce the payment of certain judgments against the Company.

On the hearing of the case in the court below, the judges, being opposed in opinion certified the case to this court.

A further statement appears in the opinion of the court.

Mr. Samuel Judah, for complainants:

The subscriptions are not void, but, admitting the truth of the answers, only avoidable at the election of the subscribers; and consequently, until such election, the subscribers were stockholders. If so, they gave it credit and enabled it to obtain the premiums of the complainants, and are within the rule stated in Sto. on Agency, sec. 127.

But this case is stronger; the right of election is limited. A man by negligence may affirm a contract, subject to be avoided by him for fraudulent representations.

The contract will be affirmed, if the party deals with the article as his own (Campbell v. Fleming, 1 A. & E. 40; Ferguson v. Carrington, 9 Barn. & C. 59); or does not use due diligence to discover the fraud. Veazie v. Williams, 3 Story, 612; or did not rescind at once (Selway v. Fogg, 5 Mees. & W. 83; Sar. R. R. Co. v. Row, 24 Wend. 74); or at the earliest moment, Masson v. Bovet, 1 Den. 69; or does not act promptly and rescind in toto. Wheaton v. Baker, 14 Barb. 594; Munn v. Worrall, 16 Barb. 221.

Is there any evidence that the defendants did use any diligence to discover the fraud, or that they did act promptly or did rescind at once?

On the contrary, the admission is, that at the end of three months they renewed their notes. Hence, not only was the Corporation the agent of the defendants when the contracts with the complainants were made, but the defendants have precluded themselves, by their negligence, from all right to rescind.

Hiorns v. Holton, 13 Eng. L. & Eq. 596.

Mr. R. Crawford, for defendants:

Are said depositions competent evidence?

One defendant may be examined by his co-defendant, if not interested in favor of the party examining him.

3 Dan. Ch. Pr. 1036, 1043; 1 Barb. Ch. Pr. 261; 1 Hoff. Ch. Pr. 495; Gris. Ev. 243; Greenl. Ev. sec. 318.

And these text writers are supported by an abundance of authority in England and the United States.

See Piddock v. Brown, 3 P. Wms. 288; Murray v. Shadwell, 2 Ves. & B. 405; Lee v. Atkinson, 2 Cox, 413; Ashton v. Parker, 14 Sim. 632; Warner v. Daniels, 1 Wood. & M. 90; Cowles v. Whitman, 10 Conn. 121; Kirk v. Hodgson, 2 Johns. Ch. 550; McDonald v. Neilson, 6 Johns. Ch. 204; S. C. 2 Cow. 139; Norton v. Woods, 5 Paige, 251; Miller v. McCan, 7 Paige, 457; Hodges v. Mulikin, 1 Bland. 503; Williams v. Maitland, 1 Ired. Ch. 92; Wright v. Wright, 2 McCord's Ch. 185; Holman v. Bank of Norfolk, 12 Ala. 396; Douglass v. Holbert, 7 J. J. Marsh, 1; Allison v. Allison, 7 Dana, 90; Wheeler v. Emerson, 2 Blackf. 293; McPheeters v. McPheeters, 6 Blackf. 221; Sproule v. Samuel, 4 Scam. 135.

Will the fraud of the Insurance Company's agent, in procuring the subscriptions, notes and bills, if sufficient to avoid the subscriptions, notes and bills, as against the Insurance Company, be a defense against these plaintiffs?

These defendants were procured to subscribe by fraud; their subscriptions are absolutely void at their option, and they are not stockholders at all.

It is hardly necessary, but we will refer the court to the following authorities, as to fraud committed by an agent; Chit. Cont. 679-680; 1 Sto. Eq. Jur. sec. 356; Dogget v. Emerson, 3 Sto. 735; Mason v. Crosby, 1 Wood. & M. 342; Swatara R. R. Co. v. Brune, 6 Gill, 41; Crump v. U. S. Mining Co. 7 Gratt. 352.

As to laches in disaffirming, Doggett v. Emerson, 3 Sto. 740; Mason v. Crosby, supra; Smith v. Babcock, 2 Wood. & M. 254.

Mr. Justice Daniel delivered the opinion of the court:

*The complainants, by bill in equity, [*580 claim an indemnity for losses upon policies issued to them by the Company. They allege that the Company, by its charter, were authorized after their organization, to increase the amount of their stock by further subscriptions thereto. That in virtue of the authority of this permission, several individuals, who are made defendants to the bill, did in June, 1850, subscribe for shares in the Company; that they had paid in cash a portion of those shares, and had executed for the residue securities which were still unpaid. The bill further alleges that the Company are destitute of funds or property which can be reached by execution, and prays that the amounts subscribed by the individual defendants as stockholders, and which are still unpaid, may be applied to the satisfaction of the demand of the complainants.

The answer of the Company, which is not made a part of this record, is stated to contain a general admission of the charges in the bill. The individual defendants, whilst they do not deny their subscription to the stock of the Company, nor their execution of the securities for the payment of that subscription, deny their liability to payment thereof, upon the ground that their subscription, and the execution of those securities, were obtained from them by fraudulent representations by the agent of the Company, as to the amount of the stock actually subscribed, and as to the funds possessed by the Company. The depositions of three of the individual defendants were offered in evidence on behalf of others, who were co-defendants, to prove the fraud in the agent of the Company alleged in the answers, and were excepted to as incompetent evidence. But the facts stated by these witnesses are not set forth in the record. At the hearing the following order was made by the court, viz.: And now, at the May Term, 1855, under the pleadings and on the facts above set forth, the following question occurred:

1st. Are the depositions of the defendants, Savitz, Cullom, and Schwartz, under the circumstances of this case, and to the effect above stated, competent as evidence for their co-defendants?

2d. Will the fraud of the agent of the Knox Insurance Company in procuring said sub-

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scriptions, notes and bills, if sufficient to avoid the said subscriptions, notes and bills, as against the said Insurance Company, be a defense against the complainants in this suit?

Upon the first question propounded by the certificate in this case, we deem it unnecessary to express an opinion, because, whatever might be the opinion of this court as to the degree of interest which shall disqualify a witness, we consider the solution of any such question as irrelevant, under the considerations by which our opinion upon this case as presented to us must be controlled.

581*] *The foundation of the case certified, is the assumption of fraud practiced by the agent of the Insurance Company, and secondly, an inquiry as to the liability of the Company from the connection of the Company as principal with their agent, and from the character of the fraud as assumed above.

The question of fraud or no fraud, is one necessarily compounded of fact and of law; and without a correct and precise knowledge of the facts from which the legal conclusions should be deduced, it is not easy to perceive how any legal conclusion can be reached.

In this case, as certified, there is no fact shown by which the precise connection of this alleged agent with the Company, is established; or the character or extent of any representations said to have been made by him, and upon which it is assumed that the Company may be bound. There is nothing, then, before us upon which this court could deduce any inference or conclusion properly applicable to the case as it really exists.

The question which may be propounded, therefore, appears to be one that is entirely general and abstract, and which can admit of no answer but one which is equally abstract and general, and which may, in truth, have no application to the case.

We therefore think that this certificate admits of no other answer than an order that the case be remanded to the Circuit Court, to be proceeded in according to law.

JONATHAN CROCKETT, Archibald C. Spaulding, John Gregory, Christopher Dyer, and Nathaniel Dyer, Libelants and Appellants,

v.

THE STEAMBOAT ISAAC NEWTON, Her Tackle, etc., Isaac Newton, Claimant.

(See S. C. 18 How. 581-584.)

Collision—sailing vessel meeting steamer—deviation of rule.

The general rule is, for a sailing vessel, meeting a steamer, to keep her course, while the steamer takes the necessary measures to avoid a collision.

Though this rule should not be observed when its observance must occasion a collision and a departure from it would prevent one, yet it must be a strong case which puts a sailing vessel in the wrong for obeying the rule.

The court must clearly see, not only that a deviation from the rule would have prevented collision, but that the commander of sailing vessel was guilty of negligence in not seeing the necessity for a departure from the rule, and acting accordingly.

Attempt of steamer to come to landing between vessels at anchor without first ascertaining that the track was clear, was culpable.

Argued Apr. 29, 1856. Decided May 12, 1856.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

In this case the appellants filed their libel as owners of the schooner Hero, against the steamboat Isaac Newton, her tackle, etc., for a recovery of damages alleged to have been sustained by reason of a collision between said vessels.

The District Court dismissed the libel. Libelants appealed to the Circuit Court, by which the decree of the District Court was affirmed.

The case further appears in the opinion of the court.

Messrs. E. C. Benedict and William M. Evarts, for the appellants.

Mr. Henry B. Cowles, for the appellees.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, in a cause of collision, prosecuted by the owners of the schooner Hero, against the steamer Isaac Newton.

On the sixteenth of July, 1850, the schooner, of the burden of one hundred tons, which had been lying at pier No. 15 on the North River, in the City of New York, hauled out of the dock, soon after sunrise got up her mainsail and both jibs, and pushed off into the stream. The tide was about half ebb, setting to the southward and eastward, and the wind was about southeast, but so light that very little way could be made. A brig was at anchor in the river, a little below pier No. 15, about one hundred and fifty yards from the piers: and immediately below the brig, at the distance of about three hundred feet, two ships were also anchored. When The Hero had got within a short distance of the brig, and was nearly between the brig and the town, and while her crew were in the act of hoisting the peak of the foresail, the body of the sail being up, the steamer Isaac Newton came down the river, and seeing no clear passage to her dock at pier No. 16, except that of about three hundred feet, between the brig and the ships at anchor, swung round, passed between those vessels at anchor, straightened up alongside the brig for her dock, and then, for the first time, discovered The Hero directly in her course. The two ships being at anchor astern of the steamer, the latter could not back, without the certainty of injuring herself and one of the ships; she kept on her course, struck The Hero on the starboard bow, which was stove, and the schooner almost immediately filled.

It is pleaded that The Hero was in fault, because her helm was not put hard down and kept there, when the danger was first discovered. The distance between the steamer and the schooner, when the latter straightened up and headed for the former, was only about

NOTE.—Rules for avoiding collision—see note, 41 L. ed. U. S. 1053.

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four hundred feet, as testified by the pilot in charge of the steamer. The opportunity for 583*] the schooner to make any maneuver, *was consequently very small; and though some of the witnesses say there was breeze enough at the moment to give the schooners steerage way, others deny this. It must be remembered that the general rule is, for a sailing vessel, meeting a steamer, to keep her course, while the steamer takes the necessary measures to avoid a collision. And though this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule. The court must clearly see, not only that a deviation from the rule would have prevented collision, but that the commander of the sailing vessel was guilty of negligence or a culpable want of seamanship, in not perceiving the necessity for a departure from the rule, and acting accordingly.

We do not think this was such a case. Besides, the master of the schooner testifies that the helm of the schooner had been put hard down by him, and fastened there in a becket, as soon as he saw the steamer, and before hailed from the latter. In this he is corroborated by his mate and crew. Other witnesses say they saw a man run aft, when hailed, and put the helm first up and then down. This apparent discrepancy may be accounted for by the fact mentioned by those on board the schooner; that after the master had left the helm hard down in a becket, and just before the collision, the mate ran aft. Perhaps he went to the helm, and he may have changed it. But we do not think what he did could have influenced the result. Fault was also attributed to the schooner, in the argument at the bar, because she left her dock when the wind was so light and baffling that she was not really manageable. But we think that there was no impropriety in her being where she was at the time of the collision, with her sails hoisted, waiting for a wind to get out of the harbor, any more than in her being at anchor there. It is true she would have no right to endanger other vessels by drifting afoul of them. This she was bound to avoid by coming to anchor. But till there was danger of this, and none such appears in the case, she had a right to wait for a wind there in daylight, with her sails hoisted.

We hold the schooner to have been free from fault.

After a careful consideration of the evidence, we cannot think the steamer did all that could reasonably be required to avoid the collision. After the schooner was seen from the steamer, we have no doubt a collision, either with the schooner, or with one of the ships at anchor, was inevitable; and that the steamer chose that alternative least dangerous to herself, and ran down the schooner. But the fault was 584*] in not discerning the schooner *before getting into that position. Though the brig was at anchor between the steamer and the schooner when the former was sweeping across the river and heading for the opening between the brig and the ships, yet the sails of the schooner were hoisted, and must have been visible over the hull of the brig. The steamer, therefore, made for this passage, not only without ascertaining it to be clear, but without discovering the sails of the schooner which might and ought to have been seen, and which, if seen, would have warned those managing her that the passage there was not clear. We hold this attempt of the steamer to come to her landing between the vessels at anchor, without first ascertaining that the track was clear, to have been culpable, and accordingly, that she must be condemned in the damages and costs.

The decree of the Circuit Court is reversed, and the cause remanded, to be proceeded with according to law.

Dissenting, Mr. Justice Daniel.

AUGUSTUS LORD, Libelant and Appellant,

v.

THE STEAMBOAT ISAAC NEWTON, her Tackle, etc., Daniel Drew, Claimant.

(See S. C. 18 How. 584.)

Case same as preceding one—same decision.

Argued Apr. 29, 1856. Decided May 12, 1856.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

See, also, the preceding case.

Messrs. E. C. Benedict and William M. Evarts for the appellants.

Mr. Henry B. Cowles for appellee.

Mr. Justice Curtis delivered the opinion of the court:

This being a libel by the owner of the cargo on board The Hero at the time of the collision, is disposed of by the opinion in the case of the libel by the owners of the vessel. It was argued with the other case, depends on the same evidence, and the decree must, in like manner, be reversed, and the cause remanded.

WILLIAM B. CULBERTSON, Appt.,

v.

THE STEAMER SOUTHERN BELLE, Henry B. Shaw, William M. Shaw, Elam Bowman, Sidney A. Lacoste, and John D. Sebastian, Claimants.

(See S. C. 18 How. 584-588.)

Collision—ordinance—steamer entering harbor at night, rules for.

Whether a rule relating to the division of landings for different kinds of boats be established by an ordinance of the place or general usage, is immaterial, if the regulation is generally known.

Where a boat is anchored in the path of vessels, a light, at night, is indispensable; but not where

NOTE.—Rules for avoiding collision—see note, 41 L. ed. U. S. 1053.

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the boat is fastened to the shore at a place set apart for such boats.

When a steamer is about to enter a harbor, great caution is necessary. Ordinary care, under such circumstances, will not excuse a steamer for a wrong done.

A vessel tied to the shore is helpless; therefore the whole responsibility rests on the entering boat.

A steamer, entering harbor during a high wind, is highly culpable in not keeping up steam, so as to have control of the vessel.

Argued Apr. 30, 1856. Decided May 12, 1856.

APPEAL from the District Court of the United States for the Eastern District of Louisiana.

The libel in this case was filed in the District Court of the United States for the Eastern District of Louisiana, by the appellant, to recover damages, resulting from a collision.

The District Court rendered a decree in favor of the libelant for the whole amount of damages sustained by him, and costs of suit. This decree having been reversed, on appeal, by the Circuit Court, the libelant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. J. P. Benjamin and S. F. Vinton for libelant.

Messrs. J. J. Crittenden and Albert Pike for appellees.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal, in admiralty, from the decree of the Circuit Court for the Eastern District of Louisiana.

The libel states that the libelant was the owner of a flat-boat, called The Rainbow, with a cargo of the value of $3,000 and upwards; that the said boat, with its cargo, being a stanch vessel of its kind, with an efficient crew, on a voyage down the Mississippi River, was moored, at night, at Grand Gulf, in the proper and usual place for flat-boats, and securely tied to the bank of the river; that while so fastened close to the shore, the steamer Southern Belle, a regular packet on said river, in attempting to land at the Town of Grand Gulf, run into and sunk the flat-boat, which caused the total loss of the boat and cargo; that the steamer was out of its place and carelessly managed, by reason of which the collision occurred. The libelant claims damages, etc.

The owners of the steamboat, in their answer, allege that she plied as a regular packet between New Orleans and Milliken's Bend, in Louisiana; that in ascending the river on the 3d of January, 1853, shortly before daybreak, she approached the Town of Grand Gulf; that, in drawing near the wharf-boat, used as a landing, it was discovered that another steamer was fastened to the wharf; that as the wind was high toward the shore it was deemed unsafe to make fast to the steamer; The Southern Belle, therefore, dropped down, with the intention of coming in astern of the steamer, and below the wharf-boat; that in making this change, the flat-boat was first seen lying close under the high bank of the river, about thirty yards below the wharf-boat; that an attempt was immediately made to back out and avoid the collision, which could not be done, as the wind blew strongly; that the place occupied by the flat-boat was known to be the cotton landing, where The Southern Belle regularly landed every trip to take cotton on board; that the place appropriated for flat-boats was about three hundred yards above the wharf-boat; that the master of the flat-boat was notified before the collision; that his boat was not moored in its proper place, and that he neglected to keep a light, etc.; that the collision was caused, not by any negligence or want of skill on the part of the crew and officers of *The Southern Belle, but in consequence [*586 of the negligence of the master and crew of the flat-boat, etc.

The District Court decreed in favor of the libelant, for the amount of the damage sustained, which decree was reversed on an appeal to the Circuit Court. The latter decree is now before us on an appeal.

An ordinance of the Town of Grand Gulf, passed in 1838, was given in evidence, relating to the division of the landings for different kinds of boats. In this ordinance, the landings for steamboats, keel-boats, and flat-boats, were designated, and the duties of the harbor master were defined. An objection by the respondent being made, that no sufficient proof had been offered as to the power of the town to pass the ordinance; the objection was obviated by the fact in the record, which showed that the respondent had introduced the ordinance as evidence. It was then insisted that the ordinance had fallen into disuse by common consent, and could not be considered as evidence of a usage or law. But from the evidence it would seem that the duties of the harbor master were performed, and that the places of landing for the different boats were generally understood.

Whether a rule on this subject be established by an ordinance or general usage is immaterial, if the regulation has been so made as to be generally known; and this seems to have been the case at Grand Gulf, in regard to the ordinance in question.

The Rainbow arrived, and was moored within the ground designated for flat-boats, and was fastened to the bank the evening which preceded the morning of the collision. The Southern Belle, in ascending the river, arrived at Grand Gulf about daylight—some of the witnesses say a little before, others a little after. It appears that the moon was shining, and that, in passing the flat-boat, it was light enough to read from it the name of The Southern Belle, on her wheel-house, some hundred yards from the shore. The pilot of the steamer intended to land at the steamboat wharf, three hundred and thirty feet above the place where the flat-boat was fastened. But, in approaching the wharf, he discovered The Atlantic steamer, with cattle on board, occupied it; and the wind being high, he was afraid that an attempt to land, so as to fasten to The Atlantic, might do damage, at least, to the cattle on board of that boat. To avoid this, orders were given to back the boat, and land below the wharf. In doing this, the control of the boat was lost, and the wind to the shore being high, The Southern Belle was thrown against the flat-boat, which immediately sunk her. As the steamer was falling back, it is alleged the flat-

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boat, for the first time, was discovered; but it was too late, under an adverse wind, to avoid the collision. George W. Smith says, The 587*] Southern Belle, by *keeping on her steam, might have landed above the wharf-boat. That landing, for three hundred yards, is as good as the landing below.

At the time the steamer passed within one hundred yards of the flat-boat, it could be seen two hundred yards or more. A witness states at the time, he could distinctly see across the river. It appears from some of the witnesses, that there was space enough to land the steamer below the wharf-boat, and above the flat-boat.

Sometime during Monday night a floating log struck the bow of The Rainbow, so as to break a hole through it, but the damage in a short time was repaired. The bow was turned down the stream to avoid the force of the current.

It is objected that the flat-boat had no lights. She had a light on deck, as proved by her captain and another witness, fifteen minutes before the collision, and at the time it occurred; but as she was fastened to the shore, and from the weight of evidence was in her right place, a light was not necessary. Where a boat is anchored in the path of vessels a light is indispensable; but it is not required where the boat is fastened to the shore, especially at a place set apart for such boats.

When a steamer is about to enter a harbor, great caution is required. There being no usage as to an open way, the vigilance is thrown upon the entering vessel. Ordinary care, under such circumstances, will not excuse a steamer for a wrong done. A vessel tied to the shore is helpless. No movement can be made by it to avoid an entering boat; therefore, the whole responsibility rests on such boat.

It is admitted that where a collision occurs, as the result of uncontrollable circumstances, no responsibility attaches to either party; but this cannot be said of the respondent. The evidence shows no fault in the flat-boat, but there was fault in the steamer. The wind was high when she approached the landing—this should have produced in her officers the utmost vigilance. That they were sensible of this, was shown by their not attempting to fasten to The Atlantic. But they were highly culpable in not keeping up the steam, so as to have the control of their boat. The river was open, so that, had the steam power been kept up, the boat might have been turned against the wind, and made a safe landing. But her headway had been lost by backing, so that she became as a log driven by the winds and waves, and in this manner was thrown upon the flat-boat.

The evidence authorizes the inference that the flat-boat was seen from on board the steamer as she passed it in running up to the wharf. It is inconceivable that others should be able to see the opposite shore of the river, 588*] and for a hundred and fifty *yards plainly discern the flat-boat from the steamboat wharf, while the officers of the steamer, in passing so near the shore, should not have observed it. The responsible officers of a steamer, when about to land, are not presumed to close their eyes; on the contrary, all experience requires an exercise of uncommon vigilance. Landing a boat, especially when the wind is high, is always attended with more or less danger. After making due allowance for the lights of the steamer, which enabled persons from the flat-boat or wharf to see the steamer, and read her name while passing, the vision of those on board the steamer could not have been so defective, or blinded by her lights, as not to perceive the flat-boat. The captain of the steamer was not sworn, and from this a strong presumption arises that his evidence would have been against his owners. He must have been on the alert in landing, as his duty required, and indeed as the evidence shows he was.

There is no ground of suspicion that the officers of The Southern Belle designed to injure The Rainbow—on the contrary, when it was too late, they endeavored to avoid the collision. Their fault consisted in not landing above the wharf-boat, or in not keeping up the steam, so as to give them the control of the boat. The flat-boat was plainly discernible from the wharf-boat; and if the officers of the steamer did not see it, it is because they were wanting in vigilance. But whether they saw it or not, the respondents are liable for the damage done.

The decree of the Circuit Court is reversed.

Rev'g—Newb. 461.

THE UNITED STATES, Plaintiffs,

v.

WILLIAM G. SHACKELFORD.

(See S. C. 18 How. 588-591.)

Challenge of jurors—state laws may be adopted, except in treason and felonies punishable with death—in treason, challenges thirty-five—in other crimes punishable with death, twenty—common law right of government—in misdemeanors, right of challenge conforms to state law.

The power conferred on the federal courts by Act of July 20, 1840, enables them to adopt the laws and usages of the state, as to challenges of jurors, except in treason and other criminal cases where the punishment is death.

In trials for treason and crimes punishable with death, the Act of 1790 prescribes the rule, by which prisoner has thirty-five challenges in treason, and twenty in felony punishable with death. This rule is derived from the common law.

The common law, also, gave the King a qualified right of challenge, which had the effect to set aside the juror till the panel was gone through with without assigning cause, and if there was not a full jury without the person so challenged, then cause must be assigned, or the juror would be sworn.

In trial for misdemeanor, the right of challenge by the prisoner recognized by the Act of 1790, does not necessarily draw along with it the qualified right of challenge, existing at common law, by the government; and unless the laws and usages of the State adopted by rule under the Act of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the state law.

Submitted May 1, 1856. Decided May 12, 1856.

N a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Kentucky.

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The defendant in this case stands indicted in the Circuit Court of the United States for the District of Kentucky, charged with having abandoned the United States mail of which he was a carrier, within the said State. Upon the trial, the defendant claimed the right of peremptory challenge of a person called to be sworn as a juror to try him. The District Judge denied and the Circuit Judge affirmed his right to do so; and upon their disagreement, the cause is certified to this court for its opinion and determination.

Mr. C. Cushing, Atty-Gen. for the plaintiff:

The offense charged in this indictment is simply misdemeanor. Peremptory challenges in such cases are unauthorized at common law.

4 Bl. Com. 53; Christian, Note 7; 1 Chit. Crim. Law, 535; 3 Burns, Justice, 93; 3 Co. Litt. 473; Stev. Crim. Law, 300; Reading's case, 7 How. St. Tr. 264; Oate's case, 10 How. St. Tr. 1079; 2 How. St. Tr. 808; 2 Hawk. ch. 43.

The Judicial Act of the United States and the amendatory Act make no provision for challenges; there is no Act of Congress adopting the provisions of the state laws, the common law, therefore, controls.

Mr. W. L. Underwood, for the defendant:

By the law of Kentucky, the right of peremptory challenge for felony extends to twenty jurors, and for less offenses to three.

7 Mon. p. 677; Kentucky Crim Code of Pr. p. 285, sec. 204.

Congress has left the right of challenge to be regulated by the States in which it may be claimed.

1 U. S. Stat. at L. p. 88; 2 U. S. Stat. at L. p. 82; 5 U. S. Stat. at L., p. 314

The uniform practice of the courts, of the United States, has been to extend to the citizens within the several States the benefit of the right of challenge secured to them within the state of which they are citizens, and are being tried

Mr. Justice Nelson delivered the opinion of the court:

This case comes up on a certificate of division of opinion between the Judges of the Circuit Court of the United States for the District of Kentucky.

The prisoner was indicted for a misdemeanor in wrongfully deserting the mails of the United States, before delivering them to the proper officer or agent, he being a mail carrier at the time, and, as such, having the mails in charge.

21 sec. of Act of Cong. 3d March, 1825; 4 Stat. at L. 107.

A question arose, in impaneling the jury, whether a prisoner was entitled to a peremptory challenge of one or more jurors, upon which the judges were divided in opinion.

The Act of Congress passed 20th July, 1840 (5 Stat. at L. 394), provides that jurors, to serve in the courts of the United States, in each State, shall have the like qualifications, and be entitled to the like exemptions as jurors of the highest court of law of such State now have and are entitled to, and shall hereafter from time to time have and be entitled to; and shall be designated by ballot, lot or otherwise, according to the mode of forming such juries now practiced, and hereafter to be practiced therein, so far as such mode may be practicable by the courts of the United States, or the officers thereof. "And for this purpose, the said courts shall have power to make all necessary rules and regulations for conforming the designation, *and impaneling of [*590 juries, in substance, to the laws and usages now in force in such State; and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects, which may hereafter be adopted by the Legislatures of the respective States for the state courts."

The court is of opinion that the power conferred upon the federal courts to adopt "rules and regulations for conforming the designation and impaneling of juries to the laws and usages in force at the time in the State," enables them to adopt the laws and usages of the State in respect to the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason and other crimes, of which the punishment is declared to be death.

The 30th sec. of the Crimes Act of 1790, provides, that if persons indicted for treason against the United States shall challenge peremptorily above the number of thirty-five of the jury, or if persons indicted for any of the other offenses set forth, for which the punishment is declared to be death, shall challenge peremptorily above the number of twenty persons of the jury, the court in any of these cases shall, notwithstanding, proceed to the trial of the persons so challenging, etc.

This Act of Congress having expressly recognized the right of peremptory challenge in the one case of the number of thirty-five jurors, and in the other of twenty, they should be regarded as excepted out of the power conferred upon the courts to regulate the subject by rule or order under the aforesaid Act of 1840.

The right of challenge in cases specified in the Act of 1790, in respect to the number of jurors, is derived from the common law, which allowed thirty-five in cases of treason, and twenty in cases of felony. 4 Bl. Com. 354, 355; 12 Wheat. 483.

That law also gave to the King a qualified right of challenge in these cases, which had the effect to set aside the juror till the panel was gone through with, without assigning cause, and if there was not a full jury without the person so challenged, then the cause must be assigned or the juror would be sworn.

The court is of opinion that the right of challenge by the prisoner recognized by the Act of 1790, does not necessarily draw along with it this qualified right, existing at common law, by the government; and that, unless the laws or usages of the State, adopted by rule under the Act of 1840, allows it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the state law.

It does not appear in the case before us, whether or not the court below had adopted the state law under the Act of 1840, *as it [*591 existed at or previous to the proceedings certified, and hence we are not enabled to express any opinion upon the particular question certified. But the opinion expressed upon the general question will enable the court below to

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dispose of the case, without any amendment of the record, or further, hearing of the case.

The cause is therefore remanded to the court below, to proceed according to the foregoing opinion.

SUSAN E. CONNER, Widow of Henry L. Conner, Dec'd, Plff. in Er.,

v.

WM. ST. JOHN ELLIOT, Administrator, and Daniel W. Brickle and Wife et al., Heirs of Henry L. Conner, Deceased.

(See 18 How. 591-594.)

Marriage law in Louisiana does not give rights of property where marriage was made in other state—such marital rights are not "privileges of a citizen" within the Constitution—they are rights of the contract.

Where the marriage, through which the appellant claimed, was not contracted in Louisiana, nor in contemplation of a matrimonial domicil in that State, and the spouses had never resided therein, the wife is not a partner in community with the husband by force of the laws of Louisiana.

Such marital rights are not "privileges of a citizen" within the first clause of section 2d of 4th article of the Constitution, and such clause does not give widows who were married and are living in other states, the same rights to property in Louisiana, as the laws of that State do when the marriage was contracted or the spouses live in that State.

No privileges are secured by that clause in the Constitution, except those which belong to citizenship.

Such marital rights are rights attached to the contract of marriage, by the law of the state where they are made or executed.

The law of Louisiana applies to the contract of marriage between persons, whether citizens or aliens, when made there, and does not discriminate between citizens of that State and other persons.

It discriminates between contracts only; such discrimination has no connection with the abovementioned clause in the Constitution.

Argued May 6, 1856. Decided May 12, 1856.

IN ERROR to the Supreme Court of the State of Louisiana for the Eastern District.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. John Henderson, for plaintiff in error:

The provision of the Constitution of the United States, to which the decision in this case and the provisions of the Code are opposed, is sec. 2 of art. 4.

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

Its plainer reading, perhaps, may be paraphrased thus:

"The citizens of each State shall be entitled to all the civil privileges and immunities in all the other States, which each one of those several other States accords to its own citizens."

The usual and most common privation of alienage is incapacity to take, hold, inherit and transmit property. The articles of the Code are a direct penalty of alienage, applied to a citizen of a state of the Union.

Our position is that a Mississippi wife, widow or heir, in regard to real or immovable property in Louisiana, is entitled by constitutional "privilege," to the same rights as a Louisiana wife, widow or heir, in relation to the same property.

Mr. Hamilton in the Federalist, No. 80, p. 321, considers this section "the basis of union;" and attaches much importance, that it is reserved to the federal judiciary "to secure the full effect of so fundamental a provision against all evasion and subterfuge."

Justice Story, in his Commentaries, says: "The intention of this clause was to confer on them, if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the circumstances." Vol. III. sec. 1799 and 1800.

Mr. J. P. Benjamin, for defendant in error:

The law of Louisiana makes no distinction between a Louisiana, Mississippi, or alien wife, widow or heir. It simply says to all who choose to marry in the State, that unless they have otherwise stipulated, the law will presume they contract for a partnership or community; to persons who marry out of the State, it says, that when they come to Louisiana to live, the law will presume a contract between them (in the absence of contrary stipulations) to the same effect as if they solemnized their marriage anew in that State.

The law does not regard a citizenship at all: it has reference to domicil alone.

Mr. Justice Curtis delivered the opinion of the court:

In the course of proceedings which were had in Louisiana, under the laws and in the courts of that State, to determine the rights of parties interested in the succession of Henry L. Conner, deceased, a citizen of the State of Mississippi, his widow, who is the plaintiff in error in this case, filed in the District Court of the Tenth Judicial District of the State of Louisiana, a petition, claiming to be entitled to her rights of marital community, as they exist under the laws of that State. These rights having *been denied by the District [*592 Court, an appeal was prosecuted to the Supreme Court; and it was there held that inasmuch as the marriage, through which the appellant claimed, was not in fact contracted in Louisiana, nor in contemplation of a matrimonial domicil in that State, and the spouses had never resided therein, the wife was not a partner in community with the husband by force of the laws of Louisiana.

On this writ of error, it neither is nor can be denied that the Supreme Court of Louisiana has correctly declared and applied the law of that State to this case. But it is insisted that this law deprives the plaintiff in error, a citizen of the State of Mississippi, of one of the privileges of a citizen in the State of Louisiana, and therefore is in contravention of the 1st clause of the 2d section of the 4th article of the Constitution, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

It appears upon the record that the question was raised by the pleadings, and presented to and decided by the highest court of the State; it is therefore open here, upon this writ of error, for final determination by this court,

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under the 25th section of the Judiciary Act of 1789, 1 Stat. at L. 85.

It appears that the plaintiff in error, though a native born citizen of Louisiana, was married in the State of Mississippi, while under age, with the consent of her guardian, to a citizen of the latter State, and that their domicil, during the duration of their marriage, was in Mississippi. But, while it continued, the husband acquired a plantation, and other real property, in Louisiana. If the marriage had been contracted in Louisiana, the Code of that State, then in force (Code of 1808, art. 3, sec. 4), would have superinduced the rights of community. And at the time when the property in question was purchased by the husband, in 1841, the Code of 1825, then in force, contained the following articles:

"Art. 2369. Every marriage contracted in this State superinduces, of right, partnership or community of acquêts or gains, if there be no stipulation to the contrary."

"Art. 2370. A marriage contracted out of this State, between persons who afterwards come here to live, is also subjected to the community of acquêts with respect to such property as is acquired after their arrival."

And it is insisted that, as these articles gave to what is termed in the argument a Louisiana widow the right of marital community, the laws of the State could not constitutionally deny, as it is admitted they did in fact deny, the same rights to all widows, citizens of the United States, though not married in 593*] *Louisiana, or residing there during the marriage, and while the property in question was acquired.

In other words, that, as the laws of Louisiana provide that a contract of marriage made in that State, or the residence of persons there in the relation created by marriage, shall give rise to certain rights on the part of each in property acquired within that State, by force of the article of the Constitution above recited, all citizens of the United States, wherever married and residing, obtain the same rights in property acquired in that State during the marriage. We do not deem it needful to attempt to define the meaning of the word "privileges" in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true, when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief.

It is sufficient for this case to say that, according to the express words and clear meaning of this clause, no privileges are secured by it, except those which belong to citizenship. Rights, attached by the law to contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed "privileges of a citizen," within the meaning of the Constitution.

Of that character are the rights now in question. They are incidents, ingrafted by the law of the State on the contract of marriage. And, in obedience to that principle of universal jurisprudence, which requires a contract to be governed by the law of the place where it is made and to be performed, the law of Louisiana undertakes to control these incidents of a contract of marriage made within the State by persons domiciled there; but leaves such contracts, made elsewhere, to be governed by the laws of the places where they may be entered into. In this, there is no departure from any sound principle, and there can be no just cause of complaint.

The law of the State further provides, that if married persons come to Louisiana to reside, and acquire property there during such residence, they shall be deemed nuptial partners in respect to such property; but if the domicil of the marriage continues out of Louisiana, the relative rights of the married persons may be regulated by the laws of the place of such domicil, even in respect to property acquired by one of them in Louisiana. *That the first of [*594 these rules, which extends the laws of the State to married persons coming to reside and acquiring property therein, is a proper exercise of legislative power, has not been questioned. But it is insisted that the last, which leaves the rights of non-resident married persons in respect to property in Louisiana to be governed by the laws of their domicil, deprives the wife of her rights as a citizen, in property acquired by the husband during marriage in Louisiana. The answer to this has been already indicated. The laws of Louisiana affix certain incidents to a contract of marriage there made, or there partly or wholly executed, not because those who enter into such contracts are citizens of the State, but because they there make or perform the contract. And they refuse to affix these incidents to such contracts, made and executed elsewhere, not because the married persons are not citizens of Louisiana, but because their contract being made and performed under the laws of some other state or country, it is deemed proper not to interfere, by Louisiana laws, with the relations of married persons out of that State. Whether persons contracting marriage in Louisiana are citizens of that or some other state, or aliens, the law equally applies to their contract: and so, whether persons married and domiciled elsewhere, be or be not citizens or aliens, the law fails to regulate their rights. The law does not discriminate between citizens of the State and other persons; it discriminates between contracts only. Such discrimination has no connection with the clause in the Constitution now in question. If a law of Louisiana were to give to the partners inter sese certain peculiar rights, provided they should reside within the State, and carry on the partnership trade there, we think it could not be maintained that all copartners, citizens of the United States, residing and doing business elsewhere, must have those peculiar rights by force of the Constitution of the United States, any more than it could be maintained that, because a law of Louisiana gives certain damages on protested bills of exchange, drawn or indorsed within that State, the same damages must be recoverable on bills drawn elsewhere in favor of citizens of the United States.

The rights asserted in this case, before the Supreme Court of Louisiana, are not privileges

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of citizenship; consequently, there is no error in the judgment of that court, which is hereby affirmed.

480*] *JOHN BACON and Thomas Robins, Surviving Trustees of the Bank of the United States; Wm. R. White and John Hooper, Citizens of Pennsylvania; Lewis Phoenix and John D. Beers, Citizens of New York, Stockholders of the late Commercial Bank of Natchez, who sue on behalf of themselves and all other stockholders of the said late Commercial Bank of Natchez, who are citizens of other states than Mississippi, who shall come in and seek relief by, and contribute to, the expenses of this suit, Complainants and Appellants,

v.

WILLIAM ROBERTSON, Philip Hoggatt, Henry Chotard, and John F. Gillespie, et al. (names unknown), Stockholders of the late Commercial Bank of Natchéz, and Citizens of the State of Mississippi.

(See S. C. 18 How. 480–489.)

Suit in equity by part of stockholders of corporation, for all, is proper, for distribution of its assets—demurrer of defendant confesses allegations of bill—court has jurisdiction of breach of trust—form of the action.

Part of the stockholders may maintain an action in equity for themselves and the other stockholders, against the trustee of a dissolved state banking corporation, to establish their title to, and obtain distribution of, the surplus of its assets, after its debts have been paid; the corporation having been dissolved by judicial sentence for a breach of its charter.

An Act of the State Legislature prescribed the duties of the trustee, and his manner of procedure, for the payment of the debts, etc., of the corporation, and that "the surplus, if any, shall be ratably distributed among the stockholders."

His demurrer confessed that he had received money, stocks, lands, etc., which he refused to distribute.

Held, that the trustee could not deny the title of the stockholders to a distribution.

Nor is the objection to the jurisdiction of this court tenable The trustee has committed a palpable breach of trust according to the case made by the bill and confessed by the demurrer.

The objection to the form of the suit is not tenable; the number of the parties renders it impracticable to bring all before the court, and therefore the suit may be prosecuted in the form employed in this suit.

Argued April 17, 1856. Decided May 14, 1856.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The bill in this case was filed in the Circuit Court of the United States for the Southern District of Mississippi by the appellants, stockholders in the late Commercial Bank of Natchez, against William Roberston, trustee of the assets of said Bank, appointed under a statute of said State, and against certain other stockholders, to ascertain the surplus of assets and settle the rights of complainants and other stockholders therein. The court below having sustained a demurrer by the defendants, and dismissed the bill, the complainants appealed to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Yerger, Winchester, and G. M. Wharton, for the appellants:

The rule of the common law, that upon a civil death of a corporation, all its real estate remaining unsold reverts to the original grantors, and the debts due to and from it are extinguished, and all its personal property vests in the state or king (1 Bl. Com. 484; 2 Kent's Com. 307; 2 Kyd. Corp. 516; Ang. & Ames Corp. 158), does not apply, in a court of equity, to moneyed or joint stock corporations, or to corporations deriving their powers under a charter, composed of numerous members, all of whom, by the terms of the charter, have a distinct and individual property in the corporate fund.

Lennox v. Roberts, 2 Wheat. 373; Bacon v. Cohea, 12 Sm. & Mar.

The cases cited upon the other side, Edmonds v. Brown, 1 Lev. 237; Rex v. Pasmore, 3 D. & E. 199, 247; Colchester v. Seaber, 3 Burr. 1868; Co. Litt. 13 b; Atty.-Gen. v. Gower, 9 Mod. 226, do not apply to such corporations. The capital stock and other property of such a corporation, is a trust fund for the creditors and stockholders, and equity will enforce the trust at the suit of either.

NOTE.—Where parties interested are numerous, part may maintain a bill in equity for benefit of all. See note to Smith v. Swormstedt, 14 L. ed. U. S. 942.

Where parties form a voluntary association, some of the members representing all substantial interests may bring a bill in equity on behalf of themselves and all the others. Coop. Eq. Pl. 40; Chancey v. May, Prec. Ch. 592; Lloyd v. Loaring, 6 Ves. 773; West v. Randall, 2 Mason, 194; Baldwin v. Lawrence, 2 Sim. & Stu. 18; Hichens v. Congreve, 4 Russ. 562; Gordon v. Pym, 3 Hare, 223; Barker v. Walters, 8 Beav. 92; Mann v. Butler, 2 Barb. Ch. 362.

Such a bill will not be sustained unless brought on behalf of all the parties. Baldwin v. Lawrence, 2 Sim. & Stu. 18; Whitney v. Mayo, 15 Ill. 255.

Such a bill has been allowed in the following instances: A bill brought by treasurer and managers of certain brass works. Chancey v. May, Prec. Ch. 592; by some shareholders in a joint stock company on behalf of all. Hichens v. Congreve. 4 Russ. 562; by some inhabitants of a town on behalf of all. Atty.-Gen. v. Heelis, 2 Sim. & Stu. 67; by part of the shareholders in a canal. Gray v. Chaplin, 2 Sim. & Stu. 267; see Mandeville v. Riggs, 2 Pet. 487.

A few of a large number of persons have been permitted to institute a suit on behalf of themselves and the rest; as parishioners, even where the injurious acts were approved by a majority; Bromley v. Smith, 1 Sim. 8; see Jones v. Garcia del Rio, 1 Turn. & Russ. 300; or pewholders and members of a congregation; Milligan v. Mitchell, 3 Myl. & C. 72; some of the partners in a company of five hundred or more; Small v. Atwood, 1 Younge, 407; a member of a club, which had been dissolved, to recover misappropriated club funds. Richardson v. Hastings, 7 Beav. 323; 11 Beav. 17.

Where the parties are very numerous, and where there exists a common right or a common interest which the bill seeks to establish and enforce, or a general claim or privilege which it seeks to establish or to narrow or take away, a bill has been sustained by or against part, though affecting the interests of persons not parties; and in most cases the decree upon such a bill will be held binding on all

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2 Sto. Eq. Jur. secs. 1196, 1200, 1255, 1256, 1258, 1263.

It is unnecessary to cite authorities to show that this is true during the life of a corporation. It is also true after the dissolution of a corporation.

15 How. 311; Adair v. Shaw, 1 Sch. & Lef. 261; 2 Kent's Com. 354; 6 S. & M. 517; Wood v. Dummer, 3 Mason, 308; Hightower v. Thornton, 8 Ga. 491; Curran v. Arkansas, 15 How. 310; Mumma v. Potomac Co. 8 Pet. 281; James v. Woodruff, 10 Paige, 541; 2 Den. 574; Spear v. Grant, 16 Mass. 9.

This view is, we think, sustained by the spirit of the Acts of Mississippi of 1843 and 1846. The case of Commercial Bank v. Chambers, 8 Sm. & Mar. 9, was a case at law; also Coulter v. Robertson, 24 Miss. 278.

No case can be found in a direct proceeding in equity by the stockholders, where their rights have been fully examined, that the courts of Mississippi have decided against them. Even were the contrary true, however, this court would not be bound to abandon its own decision, and its own views of the principles which govern in a court of equity.

Lane v. Vick, 3 How. 464; Neves v. Scott, 13 How. 270; Russell v. Southard, 12 How. 147; State of Penn. v. Wheeling Bridge, 13 How. 563.

On the question of jurisdiction, it was proper to make the Mississippi stockholders defendants. They had a right to see that Roberston's account was correct.

West v. Randall, 2 Mas. 181.

The courts of the United States will take jurisdiction where justice can be done between the parties before the court, although some are left out because they cannot sue in federal courts.

Shields v. Barrow, 58 U. S. (17 How.) 139; Mallow v. Hinde, 12 Wheat. 197; Elmendorf v. Taylor, 10 Wheat. 167; Cameron v. McRoberts, 3 Wheat. 591; Supreme Court Rule, 47.

Messrs. Lawrence and Benjamin, for the appellees:

The Circuit Court of the United States had no jurisdiction over Robertson as trustee, he being the mere officer of another court under Mississippi laws.

Peale v. Phipps, 14 How. 374; Vaughan v. Northup, 15 Pet. 1; Hutch. Code, ch. 15, pp. 330, 334; Williams v. Benedict, 8 How. 107; Wiswall v. Sampson, 14 How. 64.

And so far as the stockholders are concerned, the Circuit Court had no jurisdiction by reason of the parties, many of whom are citizens of Mississippi; the interest of all were the same.

Contee v. Dawson, 2 Bland, 164; Smith v. Swormstedt, 16 How. 299.

The stockholders had no rights under the forfeiture, except such as were saved to them by the Mississippi statutes. By the common law, upon the dissolution of the Corporation, its real estate reverts to the grantor and his heirs, the personal property passes to the Crown or state, and the debts to and from it are totally extinguished.

Edmonds v. Brown, 1 Lev. 237; Rex v. Pasmore, 3 T. R. 241; Colchester v. Seaber, 3 Burr, 1866; Miami Trans. Co. v. Gano, 13 Ohio, 269; Renick v. Bank, 13 Ohio, 298; White v. Campbell, 5 Humph. 38.

This is the common law in Mississippi, and the legislation has been grounded upon it.

Bank v. Wrenn, 3 Sm. & Mar. 791; Bank v. Chambers, 8 Sm. & Mar. 9; Port Gibson v. Moore, 13 Sm. & Mar. 157; Coulter v. Robertson, 24 Miss. 278.

Mr. Justice Campbell delivered the opinion of the court:

This bill was filed in the Circuit Court against William Robertson, a trustee, appointed to liquidate the affairs of the late Commercial Bank of Natchez, Mississippi, and such of the stockholders of the Bank as are citizens of that State, and is prosecuted by a number of stockholders, owning one fifth part of the capital stock, for themselves, and such of the stockholders as are not citizens of Mississippi or defendants in the bill.

*The Commercial Bank was incorporat-[*481 ed and organized under enactments of the Legislature in 1836, with a capital $3,050,000, divided into shares of $100 each, which are now distributed among two hundred and eighty persons.

The Corporation carried on the business of banking through the agency of presidents, directors, cashiers, and other officers, at Natchez, and four other towns of Mississippi, for a number of years. During this time there was a temporary suspension of specie payments, which the bill avers to have been accidental, and to have formed the only ground for the proceeding taken against the Corporation. In June, 1845, the Circuit Court of Adams County rendered a judgment against the Bank, upon an information in the nature of a quo warranto, preferred pursuant to the Act of the

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other persons standing in the same predicament. Mayor of York v. Pilkinton, 1 Atk. 282; City of London v. Perkins, 4 Bro. P. C. 158; West v. Randall, 2 Mason, 193; Cockburn v. Thompson, 16 Ves. 328; Long v. Young, 2 Sim. 369; Adair v. New Riv. Co. 11 Ves. 429; Weale v. West M. Water Works Co. 1 Jac. & Walk. 369; Duke of Norfolk v. Myers, 4 Madd. 113; Baker v. Rogers, Sel. Ca. in Ch. 74; as by the lord of the manor against some of the tenants, or vice versa, with regard to a mill or right of common, or to cut turf, etc. Conyers v. Ld. Abergavenny, 1 Atk. 285; Brown v. Vermuden, 1 Ch. Cas. 272; Cockburn v. Thompson, 16 Ves. 328; West v. Randall, 2 Mason, 195; Meux v. Maltby, 2 Swanst. 283.

Such a bill filed by a few on behalf of themselves and all others, or against a few and yet to bind the rights and interests of others, is permitted when it is apparent that all the parties stand in same situation and have one common right or interest, the protection of which will be for the common *benefit of* all and cannot be to the injury of any. *Hichens v. Congreve*, 4 Russ. 562; Long v. Younge, 2 Sim. 369; Crease v. Babcock, 10 Met. 532; Taylor v. Salmon, 4 Myl. & C. 142; Benson v. Heathorn, 1 You. & Col. N. R. 326.

If the bill is not filed on behalf of all other persons in interest, but on behalf of plaintiffs only, it is bad on demurrer. Douglas v. Horsfall, 2 Sim. & Stu. 184; Mandeville v. Riggs, 2 Pet. 87.

The primary party to bring or defend an action in regard to corporate rights or property is corporation; yet where corporation refuses, or defendants are in control of the corporation, a stockholder may bring an action in equity in behalf of all. Corporation must be a defendant. Butts v. Woods, 37 N. Y. 317; Dodge v. Woolsey, 18 How. 331; Heath v. Erie Co. 8 Blatch. 347; see Wood v. Draper, 24 Barb. 187.

A stockholder may institute a suit in his own name, in equity, against a wrong-doer, whose acts are injurious to the stockholders, upon a refusal by the directors of the company to institute it. Such a refusal is essential. Memphis v. Ward, 8 Wall 64; see Sweny v. Smith, Law Rep. 7 Eq. 324.

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Legislature of July, 1843. By this judgment the Bank was "prejudged and excluded from further holding or exercising the liberties, privileges and franchises granted by the said charter;" "the liberties, privileges, and franchises granted to the Bank were seized" by the State; the "property, books and assets of the Bank" were adjudged to be seized and delivered to a trustee, who might have execution therefor. William Robertson was appointed that trustee "to take charge of the books and assets of the Bank." His duties are declared, conformably to the Act of 1843, which will be considered in another part of this opinion.

The Bank appealed from this judgment, and in the spring session of the High Court of Errors and Appeals, in 1846, it was affirmed. William Robertson entered upon the office of trustee in July, 1846. He took possession of money, stocks, evidences of debt, and real estate, having a nominal value of near four millions of dollars, and continues to hold them, except in so far as he has applied them to the payment of the charges of the trust, and the debts of the Corporation. The bill alleges that all the debts have been paid, and that only a small sum is due for costs, and that property of great value, consisting of money, stocks, evidences of debt, bonds, and personalty, remains with the trustee, who refuses to account for them to the stockholders. The object of the bill is to establish the title of the stockholders to this surplus, and to obtain the ratable shares of such of them as are able and willing to join as plaintiffs in this suit. The bill names a number of the stockholders as parties, and is fitted to embrace all by the representation of these.

The defendants joined in a general demurrer to the bill; a decree of dismissal was rendered at the hearing at the circuit, and, by appeal, was taken up to this court, to revise that decision.

482*] *When the defendant, Robertson, assumed the office of trustee, his duties were defined by two Acts of the Legislature of the Mississippi. The Act of July, 1843, directed the institution of suits against such of the banking corporations of the State as had violated their charters in such a manner as to incur their forfeiture, and prescribed the form of the suits for the enforcement of that forfeiture. It enacted "that upon a judgment of forfeiture against any bank, the debtors of the bank shall not be released from their debts and liabilities to the same;" but it was made the duty of the Circuit Court, rendering the said judgment, to appoint one or more trustees to take charge of the books and assets of the banks; who should sue for and collect all debts due such bank, and sell and dispose of all property owned by it, or held by others for its use; and the proceeds of the debts when collected, and of the property when sold, to apply, as may hereafter be directed by law, to the payment of the debts of such bank. The trustee was made subject to a criminal prosecution for embezzlement, conversion of the trust property, as a failure to account for it according to law; and both acts prescribed a bond to be given to secure the faithful performance of his duty. The Act of February, 1846, amended and enlarged the scope of the Act of 1843, and was applicable to all trustees appointed under either.

This Act provided a summary remedy in favor of the trustee to obtain the control of the corporate property; for an inventory to be made to the first court, after his appointment; for an order of sale of all the corporate property at auction, for cash, after a notice of ninety days, at specified places; for commissioners to audit the claims against the banks, and for their presentation to these commissioners; for early decisions upon the exceptions to their report; for a final decree of distribution, first, in the payment of expenses, then public dues, costs, and fees, the debts reported, and lastly, "the surplus, if any, shall be ratably distributed among the stockholders." There was a provision that the bills of the Bank should be receivable for debts, and that the debtor might redeem from any purchaser of his debt or obligation (so sold), during two years, by paying the purchase money, all costs, and twelve and a half per cent. interest. The object of the two statutes can hardly be misconceived. They are parts of a system, the latter Act being auxiliary, to, and adopted in aid of, the provisions of the earlier Act of 1843—the two Acts containing the full expression of the will of the Legislature. The circumstances of the Legislature enabled it to defer the promulgation of its entire policy until the year 1846. The exigencies of the State were entirely answered by the directions given in 1843 to the executive officers to take *initiatory measures for placing these [*483 corporations under restraint, and for the security of their property. To effectuate these, involved delay and litigation, and the Legislature might well await their issue, before unfolding this whole plan of liquidation and settlement. The two Statutes which embody it have formed the subject of much discussion in the courts of Mississippi, and difficulty has been experienced there in carrying them into execution. No suit has been instituted there by the stockholders, though their rights have been incidentally debated, both at the bar and by the Supreme Appellate Court. To comprehend the import of this legislation, we must consider the mischiefs it was designed to prevent or remove, and the mode adopted to accomplish the end; for the legislation is of a character wholly remedial. The common law of Great Britain was deficient in supplying the instrumentalities for a speedy and just settlement of the affairs of an insolvent Corporation whose charter had been forfeited by a judicial sentence. The opinion usually expressed as to the effect of such a sentence was unsatisfactory and questioned. There had been instances in Great Britain of the dissolution of public or ecclesiastical corporations by the exertion of the public authority, or as a consequence of the death of their members, and Parliament and the courts had affirmed in these instances that the endowments they had received from the prince of pious founders would revert in such a case. Stat. de terris Templariorum, 17 Edw. II.; Dean and Canons of Windsor, Godb. 211; Johnson v. Norway, Winch. 37; Owen, 73; 6 Vin. Abr. 280. What was to become of their personal estate and of their debts and credits had not been settled in any adjudged case, and as was said by Pollexfen in the argument of the quo warranto against the City of London, was perhaps, "non definitur in jure." Solicitor Finch, who argued

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for the Crown in that cause, admitted, "I do not find any judgment in a quo warranto of a corporation being forfeited." Treby, on behalf of the City, said, "the dissolving a corporation by a judgment in law, as is here sought, I believe is a thing that never came within the compass of any man's imagination till now; no, not so much as in the putting of a case. For in all my search (and upon this occasion I have bestowed a great deal of time in searching), I cannot find that it ever so much as entered into the conception of any man before; and I am the more confirmed in it because so learned a gentleman as Mr. Solicitor has not cited any one such case wherein it has been (I do not say adjudged but) even so much as questioned or attempted; and therefore, I may very boldly call this a case primæ impressionis." The argument of Pollexfen was equally positive. The power of courts to adjudge a forfeiture so as to dissolve a corpora-
484*] tion *was affirmed in that case, but the effect of that judgment was not illustrated by any execution, and the courts were relieved from their embarrassment by an Act of Parliament annulling it. Smith's case, 4 Mod. 53; Skin. 310; 8 St. Tr. 1042, 1057, 1283. Nor have the discussions since the Revolution extended our knowledge upon this intricate subject. The case of Rex v. The Amery, 2 D. & E. 515, has exerted much influence upon text writers. The questions were, whether a judgment of seizure quousque upon a default was final, if so, whether the King's grant of pardon and restitution would overreach and defeat a charter granting to a new body of men the same liberties intermediate the seizure and the pardon. The King's Bench, relying upon the Year Book of 15 Edw. IV., declared the judgment to be final and the new charter irrepealable. But the House of Lords reversed the judgment. The judges, upon an examination of the original roll of the case in the Year Book, discovered that it did not support the conclusion drawn from it, and Chief Baron Eyre says, "that Lord Coke had adopted the doctrine too hastily." The discussions upon this case show how much the knowledge of the writ of quo warranto as it has been used and applied under the Plantagenets and Tudors, had gone from the memories of courts and lawyers. 4 D. & E. 122; Tan. on Quo Warranto, 24. In Colchester v. Seaber, 3 Burr. 1866, where the suit was upon a bond, and the defense was, that certain facts had occurred to dissolve the corporation, and that the creditor's claim was extinguished on the bond, Lord Mansfield said, "without an express authority, so strong as not to be gotten over, we ought not to determine a case so much against reason as that Parliament should be obliged to interfere." The question occurs here, could Parliament interfere? And the answer would be by their authorizing a suit to be brought notwithstanding the dissolution. These are all cases of municipal corporations where the corporations had no rights in the property of the corporation in severalty. The courts of Westminster have found much difficulty in applying the principles settled in regard to such, to the commercial and trading corporations that have come into existence during this century. The courts there, within the last twelve months, have been troubled to discuss whether a commercial corporation could recover damages for the breach of a parol contract, or whether the contract should have had a seal to make it valid. Austra. R. N. M. Co. v. Marzetti, 32 L. & E. 572; 3 Ib. 420. It may be admitted that the courts of law could not give any relief to the shareholders of a corporation disfranchised by a judicial sentence in respect to a corporate right. Their modes of proceeding do not provide for the case as they have not for many others. 1 Plow. 276, 277; *Richards v. Richards, 2 B. & Adol. 447; [*485 Will. Ex. 1129. But this concession does not involve an acknowledgment that the rights of the corporations are extinguished. Courts of chancery have been forced into a closer contact with these associations, and have formed a more rational conception of their constitution and a more accurate estimate of their importance to the industrial relations of society. Those courts have evinced a spirit of accommodation of their modes of proceeding so as to adapt them to the changing exigencies of society. Lord Cottenham, in Wallworth v. Holt, 4 M. & C. 635, in reference to the conduct of suits in which similar associations were concerned, said: "I think it is the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to rules and forms established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy." In the same spirit, Sir James Wigram, V. C. observes: "Corporations of this kind are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold that a society of private persons associated together in undertakings which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights inter se, because, in order to make their common objects more attainable, the Crown or Legislature have conferred upon them the benefit of a corporate character." Foss v. Harbottle, 2 Hare, 491. These just views which have afforded to wise Chancellors a sufficient motive to enlarge the scope and relax the rigor of the rules of chancery proceeding, so as to bring the civil rights of individuals in whatever form they may exist, or however complicated or ramified, under the protection of legitimate judicial administration, have been adopted in the United States, not simply for the improvement of methods of proceeding, but also for the adjustment of rights and the assertion of responsibilities among the members of such associations. In The Bank of the United States v. Deveaux, 5 Cranch, 61, this court held "that the technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially; and the court in that case allowed the corporation to use its corporate name for the purposes of suit in the courts of the United States to represent the civil capacities of the persons who composed it. So the court has held that the corporate acts need not be evinced by writing, nor corporate contracts by a common seal; that corporations are liable on contracts made or defaults or torts committed by their officers or agents in the course of their employment. 12 Wheat. *40; [*486 Ib. 64; 6 How. 344; 14 Ib. 468. In Lennox v

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Roberts, 2 Wheat. 373, the court gave effect to a general assignment of a corporation of its choses in action made in anticipation of the expiration of its charter, and which was designed to preserve to the corporators their rights of property. In Mumma v. The Potomac Company, 8 Pet. 281, it held that the assignment of all the property of a corporation and the surrender and cancellation of its charter, with the consent of the Legislature, did not defeat the right of the judgment creditor to satisfaction out of the property which had belonged to it. The power of courts of equity in cases like these was recognized as adequate to maintain the rights of the parties beneficially interested, and this doctrine was repeated and developed in Curran v. Arkansas, 15 How. 304.

The tendency of the discussions and judgments of the Court of Chancery in Great Britain, and of the courts of this country, is to concede the existence of a distinct and positive right of property in the individuals composing the corporation, in its capital and business, which is subject in the main to the management and control of the corporation itself; but that cases may arise where the corporators may assert not only their own rights, but the rights of the corporate body. And no reason can be given why the dissolution of a corporation, whether by judicial sentence or otherwise, whose capital was contributed by shareholders, for a lawful and perhaps laudable enterprise, with the consent of the Legislature, should suspend the operation of these principles, or hinder the effective interference of the Court of Chancery for the preservation of individual rights of property in such a case. The withdrawal of the charter—that is, the right to use the corporate name for the purposes of suits before the ordinary tribunals—is such a substantial impediment to the prosecution of the rights of the parties interested, whether creditors or debtors, as would authorize equitable interposition in their behalf, within the doctrine of chancery precedents. Stainton v. The Carron Company, 23 L. & E. 315; Travis v. Milne, 9 Hare, 141; 2 Ib. 491. For the sentence of forfeiture does not attaint the rights of property of the corporators or corporation, for then the state would appropriate it. If those rights are put an end to, it would seem to be rather from a careless disregard, or hardened and reckless indifference to consequences, on the part of the public authority, than from any misconceived plan or purpose. For, according to the doctrine of the text writers on this subject, the consequences are visited without any discrimination; the losses are imposed upon those who are not blameworthy, and the benefits are accumulated upon those who are without desert. The effects 487*] of a dissolution *of a corporation are usually described to be, the reversion of the lands to those who had granted them; the extinguishment of the debts, either to or from the corporate body, so that they are not a charge nor a benefit to the members. The instances which support the dictum in reference to the lands, consist of the statutes and judgments which followed the suppression of the military and religious orders of knights, and whose lands returned to those who had granted them, and did not fall to the King as an escheat; or of cases of dissolution of monasteries and other ecclesiastical foundations, upon the death of all their members; or of donations to public bodies, such as a mayor and commonalty. But such cases afford no analogy to that before us. The acquisitions of real property by a trading corporation are commonly made upon a bargain and sale, for a full consideration, and without conditions in the deed; and no conditions are implied in law in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object, nor any reversion, where the succession fails. If the statement of the consequences of a dissolution upon the debts and credits of the Corporation is literally taken, there can be no objection to it. The members cannot recover nor be charged with them, in their natural capacities, in a court of law. But this does not solve the difficulty. The question is, has the bona fide and just creditor of a Corporation, dissolved under a judicial sentence for a breach in its charter, any claim upon the corporate property for the satisfaction of his debt, apart from the reservation in the Act of the Legislature which directed the prosecution? Can the lands be resumed in disregard of their rights by vendors, who have received a full payment for their price, and executed an absolute conveyance? Can the careless, improvident or faithless debtor, plead the extinction of his debt, or of the creditor's claim, and thus receive protection in his delinquency? The creditor is blameless—he has not participated in the corporate mismanagement, nor procured the judicial sentence; he has trusted upon visible property acquired by the Corporation, in virtue of its legislative sanction. How can the vendors of the lands or the delinquent debtors resist the might of his equity? But, if the claims of the creditor are irresistible, those of the stockholder are not inferior, at least against the parties who claim to hold the corporate property. The money, evidences of debt, lands, and personalty acquired by the Corporation, were purchased with the capital they lawfully contributed to a legitimate enterprise, conducted under the legislative authority. The enterprise has failed under circumstances, it may well be, which entitle the State to withdraw its special support and encouragement; but *the [*488 State does not affirm that any cause for the confiscation of the property, or for the infliction of a heavier penalty, has arisen. It is a case, therefore, in which courts of chancery, upon their well settled principles, would aid the parties to realize the property belonging to the Corporation, and compel its application to the satisfaction of the demands which legitimately rest upon it.

In our view of the equity of this bill we have the support and sanction of the Legislature of Mississippi. Their legislation excludes all the consequences which have been imputed as necessary to a sentence of dissolution on a civil corporation. From the plentitude of their powers, for the amelioration of the condition of the body politic, and the supply of defects in their system of remedial laws, they have afforded a plan for the liquidation and settlement of the business of these corporations in which the equities of the creditors and shareholders respectively are recognized, as attaching to all the corporate property of whatever

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description. And the inquiry arises, who is authorized to obstruct the enforcement of these equities in so far as the stockholders of the Commercial Bank of Natchez are concerned? The creditors have been satisfied. The defendant in the present suit is the trustee appointed under these legislative enactments. His demurrer confesses that he has received money, stocks, evidences of debt, lands, and personal property, which he refuses to distribute. He claims that the stockholders have no rights since the dissolution of the Corporation, and if any, they must be looked for in the Circuit Court of Adams County, Mississippi. But the trustee cannot deny the title of the stockholders to a distribution. To collect and distribute the property of the Corporation among the creditors and stockholders, is his commission—for this end he was placed in the possession of the property, and was armed with all the powers he has exercised.

His title is in subordination to theirs, and his duties are to maintain their rights and to consult their advantage. Pearson v. Smeadley, 2 Jur. 758; 3 Pet. 43; 4 Bligh. 1; Willis Trust. 125, 172, 173. He is estopped from making the defense of a want of title in the stockholders. Nor is the objection to the jurisdiction of this court, tenable. Ten years have nearly elapsed since this trust was created. The Acts of the Legislature contemplated a prompt and speedy settlement. They direct the reduction of all the property into ready money, and an early distribution among the parties concerned. The trustee confesses that he has not sold the lands nor personal estate, and that he has refused to distribute the money. He has committed a palpable breach of trust, according to the case made by the bill and as confessed by the demurrer. All the other trusts having been 489*] *fulfilled, the stockholders are entitled to such an administration as will be most beneficial to them, or to a sale of the trust property in the manner prescribed by the Statute of Mississippi. Nor is the objection to the form of the suit tenable. If the trust estate had been liquidated and the interest of the stockholders ascertained, any stockholder might have maintained a suit for his aliquot share without including any other stockholder. Smith v. Snow, 3 Madd. Ch. 10. But the trust estate has not been sold, nor are the names of all the stockholders ascertained, the trustee is called on to account, and the bill asks for the collection and disposal of the remaining property under the authority of the Court of Chancery.

The stockholders are interested in these questions, and are then proper parties to the bill. The number of the parties renders it impracticable to bring all before the court, and therefore the suit may be prosecuted in the form which has been employed in this suit. This court sustained such a bill in the case of Smith v. Swormstedt, 16 How. 288.

We do not intend to decide any of the questions of the cause which may arise as to the mode of administering the relief prayed for in this bill. Our opinion is that the plaintiffs have shown a proper case for equitable interposition by the Circuit Court, and that the decree of that court dismissing the bill is erroneous.

Decree reversed, and cause remanded.

CHARLES McMICKEN, Appt.,
v.
FRANKLIN PERIN.

(See S. C. 18 How. 507-511.)

Champerty—purchase of title after judgment is not—one taking title as security for loan estopped from contesting borrower's title—master's report not reviewed upon objections taken here for first time—appeal will not lie from refusal of Circuit Court to open decree—Circuit Court cannot set aside decree after one term.

In Louisiana, an attorney, though forbidden by the Code of that State from purchasing litigious rights, may purchase property the subject of a litigation after a final judgment settling its title.

Where one borrowed of another, money to purchase property, and its title was taken to the lender as security for the money loaned, he is estopped from contesting the title of the borrower.

The lender cannot be heard to object that there was illegality in the contract between the borrower and the seller of the property.

No objections to a master's report can be made which were not taken before the master. This court will not review a master's report upon objections taken here for the first time.

An appeal will not lie from the refusal of a Circuit Court to open its decree.

Circuit Courts have no power to set aside their decrees in equity, on motion, after the term at which they were rendered.

Argued May 5, 1856. Decided May 14, 1856.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

Mr. John Henderson for appellant.

Messrs. J. M. Smiley and Perin, for appellee.

Mr. Justice Campbell delivered the opinion of the court:

The appellee (Perin) filed his bill in the Circuit Court, alleging that he had been employed to institute suits in the courts of Louisiana, on behalf of certain persons claiming to be the heirs of James Fletcher, for which service he was to receive 50 per cent. on the money value, real or personal, in controversy. Pending the suits, his clients offered to sell their interest to him for $5,000, or to other persons for $10,000. There were some negotiations upon this subject, but nothing seems to have been concluded until after the final judgment had been rendered; after that time, the bill proceeds to state as follows:

"That, upon the said proposition being renewed the complainant addressed divers letters to the defendant, asking for a loan of five thousand dollars for the purpose of purchasing the said interest of the Fletchers in and to the

NOTE.—Attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage. Purchase of interest in the suit or subject of litigation, by attorney.

A contract with his client that an attorney shall at his own cost and charge prosecute a claim, for a certain part of the subject in litigation, is clearly champertous, illegal and void. Halloway v. Lowe, 7 Port. Ala. 488; Weakly v. Hall, 13 Ohio, 167; Martin v. Clarke, 8 R. I. 389; Low v. Hutchinson, 37 Me. 196; Brotherson v. Gonsalus, 26 How. Pr. (N. Y.) 213; S. C. aff'd 6 Alb. L. J. 196; Earle v. Hopwood, 9 C. B. (N. S.) 566.

An agreement that amounts to champerty cannot be supported at law or in equity. Where an

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said property; and that, in reply to the complainant's said letters, the defendant answered in writing, giving a promise of said loan, as will appear by the exhibits C and D; one of which was written by the defendant on the 8th of September, 1848, nearly three months after the judgment for the land had become final and executory.

And your orator further shows unto your Honors that, relying on the promise and honesty of the defendant, and upon the understanding and agreement with him, the complainant purchased the said property of the 509*] said Fletchers, on *the 19th of October, 1848, while the defendant was absent in Cincinnati; and in order to secure the said McMicken in the loan of the said $5,000, the complainant caused the title of the said property to be made out in the name of the defendant, with the express condition that the purchase was made in the name of the defendant for the use and benefit of the complainant, all of which will appear by reference to the act of sale, marked exhibit F; to the letter of the complainant to the defendant, dated on the 19th of October, 1848, accompanying a copy of the act of sale sent to the defendant, marked exhibit G, and other proofs to be hereafter exhibited. That said defendant accepted the said sale, etc., took the said property, etc., and held the same in trust for the use of complainant, and upon no other condition or understanding, subject only to the repayment of the money advanced for the purchase thereof."

The bill avers that the plaintiff being thus invested with all the legal and equitable rights of the heirs of Fletcher, he tendered to the defendant (McMicken) immediately after his ratification of the sale, the sum of $5,050, with the proper interest due thereon, and demanded a conveyance of all the said property and rights so purchased and held in trust, which the defendant refused.

The bill charges certain fraudulent pretexts on the part of McMicken for withholding the deed according to his agreement; denies their validity, and affirms that the plaintiff has been forced into a court of chancery in consequence of the repeated refusals of the defendant to deliver up his property and convey the same to him.

The bill prays that the defendant may, by the order and decree of the court, be required to convey the said property to the plaintiff upon the payment, or render to the said defendant the amount of his advances, and for general relief.

A decree pro confesso was entered at the Spring Term of the Circuit Court, 1853, and at the same term of the court in 1854 a decree was rendered requiring the defendant to convey the property specified in the bill to the plaintiff, upon the payment to the said defendant of the debt reported to be due, within six months after the date of the decree.

It is objected in this court that the arrangement between the heirs of Fletcher and his attorney (Perin), by which the latter became the purchaser of their interest in the subject of the litigation he had been conducting in their behalf, was illegal, and he could take no benefit from his contract. The articles of the Code

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attorney purchases from his client the whole subject matter of controversy for his own benefit, it is champerty, though he has some interest of his own, Cases above cited, and Arden v. Patterson, 5 Johns. Ch. 44.

So a contract with an attorney that he shall prosecute suits for the recovery of property and receive part of the property recovered for his services, and that no compromise shall be made unless he join in it or to indemnify against costs. Strange v. Brennan, 5 Sim. 346; aff'd 2 Cooper, 1; 10 Jur. 649; 15 L. J. Ch. 389; Hilton v. Woods, 4 L. J. Eq. 432; 36 L. J. Ch. 491; 15 W. R. 1105; 16 L. T. N. S. 736; Key v. Vattier, 1 Ham. 132; Scobey v. Ross, 13 Ind. 117; Masters, in re, 1 H. & W. 348.

Counsel who made a contract with client void for champerty can nevertheless recover a just compensation. Caldwell v. Shepherd, 6 Monr. 390; Rust v. Larue, 4 Litt. 425; but see Halloway v. Lowe, 7 Port. (Ala.) 488; Lowe v. Hutchinson, 37 Me. 196.

An agreement by a client to pay his attorney a certain sum for his services in case of success, is held to be valid, and the agreed sum may be recovered. Brown v. Mayor, etc., 9 Hun, 587; Spencer v. King, 5 Ohio, 183; or that he shall have a percentage on the amount recovered in the suit. Ryan v. Martin, 18 Wis. 672; Tapley v. Coffin, 12 Gray, 420; Benedict v. Shuart, 23 Barb. 420; White v. Roberts, 4 Dana, 172; but see Judah v. Trustees, etc. 16 Ind. 56; Elliott v. McClelland, 17 Ala. 206; Boardman v. Thompson, 25 Iowa, 487.

An agreement to give plaintiff's attorney part of the recovery is valid, and defendant cannot give it in evidence. Sussdorf v. Schmidt, 55 N. Y. 319; King v. N. Y. C. & H. R. R. R. Co. 72 N. Y. 607.

So, an agreement by an attorney to conduct a suit and give the plaintiff a fixed share of proceeds after paying expenses, has been sustained. Fogerty v. Jordan, 2 Robt. N. Y. 319.

It is also held that an attorney may purchase all or part of the subject matter of litigation, or contract for payment out of the proceeds. Cases before cited, and Bayard v. McLane, 3 Harr. 216; Lytle v. State, 17 Ark. 693; Newkirk v. Cone, 18 Ill. 449; Fetrow v. Merriwether, 53 Ill. 275.

Contingent fees are not to be generally commended. Ex parte Plitts, 2 Wall. Jr. 453.

An agreement between attorney and client, fairly made, for contingent fees, will be sustained both in law and equity. Stanton v. Haskin, 1 McArthur, 558.

There is nothing illegal, immoral or against public policy in an agreement by an attorney at law to present and prosecute a claim, either at a fixed compensation or for a reasonable percentage upon the amount recovered. Wright v. Tebbitts, 1 Otto, 252; or for a contingent compensation. Stanton v. Embrey, 3 Otto, 548; or to carry on the suit at their own costs and charges and have one half the amount recovered. Mayton v. Raymond, 4 Am. L. Times, N. S. 21; see McPherson v. Cox, 9 Otto, 355.

The question of attorney's compensation in New York is determined by statute, viz.: "The compensation of an attorney or counselor for his services, is governed by agreement, express or implied, which is not restrained by law." Code of Civil Procedure, sec. 66. But in New York an attorney cannot buy demands for the purpose of suing them. Code of Civil Procedure, sec. 73; Penal Code, sec. 136. May buy after commencement of suit. Wetmore v. Hegeman, 88 N. Y. 69. Where he buys primarily for another purpose, and the intent of suing is merely incidental and contingent, he does not violate the statute. Moses v. McDivitt, 88 N. Y. 62. Nor can he advance or agree to advance money needed to carry on the prosecution, as an inducement to placing the claim in his hands. Code of Civil Procedure, sec. 74; Penal Code, sec. 136; Coughlin v. N. Y. C. & H. R. R. R. Co. 71 N. Y. 433; rev'g 8 Hun, 136.

It is provided by U. S. statute, that "nothing herein shall be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties." U. S. R. S. sec. 823.

See, also, as to attorney and client, Hoffman v. Vallejo, 45 Cal. 564; Allard v. Lamirande, 29 Wis. 502; Stearns v. Felker, 28 Wis. 594; Bentiwick v. Franklin, 38 Tex. 458.

As to what is champerty, and how it differs from maintenance, see note to Lewis v. Bell, ante, 203.

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of Louisiana affecting this question are as follows: art. 2623, "a right is said to be litigious whenever there exists a suit and contestation about the same;" art. 3522, No. 22, 510*] *"litigious rights are those which cannot be exercised without undergoing a lawsuit;" art. 2624, "public officers connected with courts of justice, such as judges, advocates, attorneys, clerks, and sheriffs, cannot purchase litigious rights which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity and of having to defray all costs, damages and interest."

The courts of Louisiana have decided "that where a judgment has been rendered, litigation has ceased." Marshall v. McRae, 2 Ann. 79. And when the thing ceded is not contested, and is not the subject of a suit at the time of cession, the thing is not litigious. Provost v. Johnson, 9 Mart. 184. The bill charges that the purchase was made after a final judgment had been rendered, declaring the property to belong to the heirs of Fletcher. The subject of the sale was ascertained, the title recognized, and consequently none of the mischiefs which occasioned these articles could then follow. Such is the conclusion of the commentators and courts of France upon the corresponding articles in the Code Napoleon. Trop. de Vente, sec. 201; 39 Dall. part 2, 196.

But upon well established principles the appellant is estopped from contesting the title of the appellee. The case made is that the appellee borrowed of the appellant a sum of money to complete his purchase, and that the title was placed in the name of the appellant to secure the repayment of that advance. The latter cannot be heard to object that there was illegality in the contract between Fletcher's heirs and the appellee, nor to appropriate to himself the fruit of that contract. The contract between the appellee and appellant is uninfected by any illegality.

The consideration was a loan of money upon a security. The contract between Fletcher's heirs and the appellee is completed and closed, and will not be disturbed by anything which the court may decree in this case. McBlair v. Gibbes, 17 How. 232.

The appellant further objects that his debt was not accurately ascertained by the master upon the decree of reference. In Story v. Livingston, 13 Pet. 359, this court decided that no objections to a master's report can be made which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors and reconsider his opinion. And in Heyn v. Heyn, 4 Jacob. 47, it was decided that after a decree pro confesso, the defendant is not at liberty to go before the master without a special order, but the accounts are to be taken ex parte. This court will not review a master's report upon exceptions taken here for the first time.

511*] *Our conclusion is, there is no error in the final decree rendered in the Circuit Court.

At a subsequent term, the appellant filed a petition in the Circuit Court, alleging that he had been deceived by the appellee in reference to the prosecution of the bill, and had consequently failed to make any appearance or answer, and that he had a meritorious defense.

He prayed the court to set aside the decree, and to allow him to file an answer to the bill. This petition was dismissed. We concur in the judgment of the Circuit Court as to the propriety of this course. This court, in Brockett v. Brockett, 3 How. 238, determined that an appeal would not lie from the refusal of a court to open a former decree, though the petition in that case was filed during the term at which the decree was entered. In Cameron v. McRoberts, 3 Wheat. 591, it decided that the circuit courts have no power to set aside their decrees in equity on motion after the term at which they were rendered.

These decisions are conclusive of the questions raised upon the order dismissing the petition.

The decrees of the Circuit Court are affirmed, with costs.

JOSHUA MAXWELL and Henry N. Walker, Plffs. in Er.,
v.
ALEXANDER H. NEWBOLD et al.

(See S. C. 18 How. 511-517.)

Jurisdiction to review judgment of state court under Act of 1789—record must show that the specific question was raised and decided in state court.

To give this court jurisdiction to review the judgment of a state court, under the 25th section of the Act of 1789, it is not sufficient to raise the objection here and to show that it was involved in the controversy in the state court, and might and ought to have been, considered by it when making its decision.

It must appear on the face of the record that one of the questions stated in that section did arise and was decided in the state court, and that its decision was against the right claimed.

It is not sufficient that it might have arisen or been applicable. It must appear that it did arise and was applied.

A ground of error assigned in the state court that "the charge of the court, the verdict of the jury, and the judgment below, are each against and in conflict with the Constitution, and laws of the United States, and therefore erroneous," is too general and indefinite to come within the provisions of the Act, or the decisions of this court.

The clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error, in the state court, in order that this court may see what was the right claimed by them, and whether it was denied to them by the decision of the state court.

Argued May 7, 1856. Decided May 14, 1856.

IN ERROR to the Supreme Court of the United States for the State of Michigan.

The case is stated by the court.

Messrs. S. G. Haven, A. H. Lawrence, H. H. Emmons, and William Gray, for the plaintiffs in error:

If the judicial sale in Ohio would constitute

NOTE.—How and when question must be raised and decided in a state court in order to make a case for a writ of error from the U. S. Supreme Court,—see note, 63 L.R.A. 33. What the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the U. S. Supreme Court of a writ of error to a state court,—see note, 63 L.R.A. 471.

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a defense in the courts of that State, it should have the same effect in the courts of Michigan, under the Act of Congress, May 26, 1790, ch. 11.

Mills v. Duryee, 7 Cranch, 481; Hampton v. McConnel, 3 Wheat. 234; Green v. Sarmiento, 1 Pet. C. C. 75.

The proceedings in Ohio were in rem, and by the laws of that State, devested all prior liens, and gave to the purchaser of the boat a clear title.

The Supreme Court of Michigan must therefore have decided against the validity of the Act of 1790, for it refused to give the sale the faith and credit it would have received in the courts of Ohio. The record in this case does not show, in express terms, that the validity of such statute was drawn into question; but from the record it does appear, by a clear and necessary intendment, that such must have been the case, and that the decision is as contrary to the Act of 1790. This is sufficient to confer jurisdiction.

Craig v. Missouri, 4 Pet. 411; Smith v. Maryland, 6 Cranch, 286; Harris v. Dennie, 3 Pet. 292; Wilson v. B. C. M. Co. 2 Pet. 245; Crowell v. Randell, 10 Pet. 368.

Mr. C. Cushing, for the defendants in error:

The bill of exceptions is presumed to cover the whole case, and nothing else could have been considered in the Supreme Court of Michigan, or can be considered here. As that presents no question which could have been reviewed under the 25th sec. of the Judiciary Act, it is clear that the case turned exclusively upon the other grounds presented.

Maney v. Porter, 4 How. 55; Mills v. Brown, 16 Pet. 525; Commercial Bank v. Buckingham, 5 How. 317.

Mr. Chief Justice Taney delivered the opinion of the court:

This case comes before the court upon a writ of error to the Supreme Court of the State of Michigan.

The facts in the case, so far as they are material to the decision of this court, are as follows:

The steamboat Globe was built in the State of Michigan, and by the laws of that State the persons who furnish materials for her construction had a lien upon her, and had a right to enforce their claims by a proceeding in rem against the vessel. Before these claims were discharged she was removed to Cleveland, in the State of Ohio, where she received her machinery and was fitted out; and for the debts thus incurred the Ohio creditors, like those in Michigan, had a lien on the vessel, and were authorized to proceed against her by attachment and seizure.

Afterwards, when the steamboat was in the port of Cleveland, the Ohio creditors obtained process against her, and she was seized, condemned, and sold, according to the laws of that State, to satisfy these liens. A certain E. S. Sterling became the purchaser at this sale, and afterwards sold her to Maxwell, one of the plaintiffs in error.

After these proceedings, the steamboat returned to Michigan, and was there seized by virtue of the prior lien created by the laws of that State, as above mentioned. The party at whose instance and for whose benefit the proceeding was instituted under the Michigan lien, had filed his claim in the previous proceedings in Ohio, but was permitted by the court to withdraw it without predjudice.

The plaintiffs in error, who were the owners, or had an interest in the steamboat, appeared in the Michigan Court to defend her against this claim. And the principal ground of defense appears to have been, that the sale in Ohio was not made subject to the prior liens in Michigan; that it was an absolute and unconditional sale, made by competent judicial authority, and vested the property in the purchaser, free and discharged from all previous liens and incumbrances.

The record contains the pleadings, evidence, and admissions of the parties in relation to these transactions, and the proceedings in the state courts. But it is unnecessary to state them at large, as the above summary is sufficient to show the matter in controversy in the state courts, and how the questions raised in the state courts were brought before them.

At the trial in the Circuit Court of Michigan, the defendants *in error, who were [*513 plaintiffs in that court, prayed the court to give the following instructions to the jury:

"1st. That if the jury should find, from the evidence adduced in this cause, that the steamboat Globe, mentioned in the declaration, has been constructed and built in this State, and was used in navigating the waters thereof, and that the debt, claim, or demand, for which she was attached by the plaintiff, has been contracted in this State by the owners, joint owner, or agent thereof, on account of supplies furnished by said plaintiff for the use of said boat, or on account of work done, or materials furnished by said plaintiffs in or about the building, fitting, furnishing, or equipping of said boat in said State; that then said plaintiff acquired and had a lien on said boat for said debt, claim, or demand, under and by virtue of the law of this State.

"2d. That if the jury should be of the opinion, from said evidence, that said claim or demand of said plaintiff constituted a lien on said boat, which had been acquired as aforesaid, and that the contracting parties were then citizens of this State, then that such lien had not been displaced or affected by the legal proceedings resorted to in the court of Ohio, exemplifications of which were introduced in evidence by the defendants; that if any title was acquired under the same, or the laws of Ohio, such title is subordinate to the lien acquired by the plaintiff in this State, by virtue of the laws thereof, that such proceedings do not constitute a valid defense to this action, and that said boat, on coming within the jurisdiction of this court, was subject to be attached for said claim."

And the plaintiffs in error asked for the following instructions on their part:

"1st. That the facts contained in the notice of defendants, and which are admitted as true by the plaintiffs, constitute in law a defense to the plaintiffs' action. 2d. That the sale under the laws of Ohio, if fair and bona fide, constitutes a defense to a purchaser under such laws to a prosecution by a creditor under the laws

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of this State, such as the plaintiffs in this case have shown themselves to be. 3d. That defendant Maxwell's title is good against the lien or claim of the plaintiff, Wight, in this cause, even if that of Sterling was not. 4th. That the filing of the plaintiff's claim in the Ohio court precludes him from raising the objection that such court had no jurisdiction of his rights so as to devest his lien by a sale in that State. 5th. That a lien under the statutes of this State, though valid in its inception, cannot be enforced against a purchaser in good faith under a sale under the laws of the State of Ohio, so given in evidence."

Whereupon the court gave the instructions 514*] asked for by the *defendants in error, and refused those requested by the plaintiffs, who thereupon excepted to these opinions, and the verdict and judgment in that court being against them, they removed the case to the Supreme Court of the State, and assigned there the following errors, for which they prayed that the judgment of the Circuit Court might be reversed:

"1st. The court erred in charging the jury, as requested by the plaintiffs below, and upon the points and to the effect stated more fully in the bill of exceptions filed herein, and to which reference is hereby had.

"2d. The court erred in refusing to charge the jury as requested by the defendants below, upon the points and to the effect stated in the bill of exceptions filed herein, and to which, for fuller particularity, reference is hereby had.

"3d. The charge of the court, the verdict of the jury, and the judgment below, are each against and in conflict with the Constitution and laws of the United States, and therefore erroneous.

4th. By the record aforesaid, it appears that the judgment was given against the plaintiffs in error, whereas, by the law of the land, the said judgment should have been in favor of the plaintiffs in error, and against the defendants in error."

But the Supreme Court, it appears, concurred in opinion with the Circuit Court and affirmed its judgment; and the plaintiffs in error have now brought the case before this court by writ of error, and have assigned here the following errors:

"1st. By the record aforesaid it appears that judgment was given against the plaintiffs in error; whereas, by the law of the land, and under the evidence appearing in the bill of exceptions, the judgment should have been rendered in favor of the plaintiffs in error.

2d. There was drawn in question in this suit, as appears by the said record, a statute of the United States; and the decision and judgment of the said Supreme Court of the State of Michigan was against the validity of such Statute.

3d. The said Supreme Court of the State of Michigan erred in deciding that the said proceedings, judgment and sale had in the State of Ohio, were not a bar to the claim prosecuted in this suit.

4th. The said Supreme Court erred, in that it did not give to the said records of judicial proceedings and sale of the steamboat Globe, had in the State of Ohio, the same faith and credit as they have by law in the said State of Ohio."

Upon these proceedings, as they appear in the record before us, the first question to be considered is, whether any point appears to have been decided in the Supreme Court of the State, which will authorize this court to affirm or reverse its judgment *under the 25th [*515 section of the Act of Congress of 1789. The error alleged here is, that it did not give to the records of the judicial proceedings and sale of the steamboat, had in Ohio, the same faith and credit that they have by law in that State. But to bring that question for decision in this court, it is not sufficient to raise the objection here, and to show that it was involved in the controversy in the state court, and might, and ought, to have been considered by it when making its decision. It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and their decision against the right claimed under it.

It is true, that in some of the earlier cases, when writs of error to state courts were comparatively new in this court, a broader and more comprehensive rule was sometimes recognized. And in the case of Miller v. Nicholls, 4 Wheat. 311, it was said to be sufficient, to give jurisdiction, that an Act of Congress was applicable to the case. But experience showed that this rule was not a safe one; and that it might sometimes happen, that although in one view of the subject an Act of Congress or a clause of the Constitution might be applicable to a case, yet the state court, upon a different view of the case, might have decided upon principles of state law altogether independent of any provision in the Constitution or laws of the United States, and in nowise in conflict with either. And if this court reversed the judgment, upon the assumption that a right claimed under the Constitution or laws of the United States, and to which the party was entitled, had been denied to him, the reversal would sometimes be for a supposed error which the state court had not committed, and upon a point which the state court had not decided. Other cases might be referred to, in which expressions are used in the opinion of the court that might seem in some measure to sanction the doctrine in Miller v. Nicholls; but the general current of the decisions, from the earliest period of the court, will be found to maintain the rule which we have hereinbefore stated. And as this want of harmony in the decisions and language of the court was calculated to mislead and embarrass counsel in the prosecution of writs of error to state courts, this court, at the January Term of 1836, when the subject was again brought before it, in the case of Crowell v. Randall, 10 Pet. 368, determined to give the subject a careful and deliberate examination, in order to remove any doubt which might have arisen from previous decisions. Accordingly, all of the preceding cases are reviewed and commented on in the opinion delivered by the court in that case, and the doctrine clearly announced, that, in order to give jurisdiction to this court, it must appear by the record that one of *the [*516 questions stated in the 25th section of the Act of 1789 did arise, and was decided in the state

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court; and that it was not sufficient that it might have arisen or been applicable—it must appear that it did arise and was applied. This rule has been uniformly adhered to since the decision of that case. We think it the true one, and the only one, consistent with the spirit and language of the section referred to, which so carefully and plainly limits the authority which it confers upon this court over the judgments of state tribunals.

Applying this principle to the case before us, the writ of error cannot be maintained. The questions raised and decided in the State Circuit Court, point altogether for their solution to the laws of the State, and make no reference whatever to the Constitution or laws of the United States. Undoubtedly, this did not preclude the plaintiffs in error from raising the point in the Supreme Court of the State, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not, depends upon the questions raised and decided in that court. But neither of the questions made there by the errors assigned refer in any manner to the Constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the Act of Congress, or the decisions of this court. It alleges that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But what right did he claim under the Constitution of the United States which was denied him by the state court? Under what clause of the Constitution did he make his claim? And what right did he claim under an Act of Congress. And under what Act, in the wide range of our statutes, did he claim it? The record does not show—nor can this court undertake to determine that the question as to the faith and credit due to the record and judicial proceedings in Ohio, was made or determined in the state court, or that that court ever gave any opinion on the question. For aught that appears in the record, some other clause in the Constitution, or some law of Congress may have been relied on, and the mind of the court never called to the clause of the Constitution now assigned as error in this court.

This case cannot be distinguished from the case of Lawler v. Walker and others, 14 How. 149. In that case the state court certified that there was drawn in question the validity of statutes of the State of Ohio, etc., without saying what statutes. And in the opinion of this court dismissing the case for want of jurisdiction, they say: "The statutes complained of in this case should have been stated; without that, the court cannot apply them to the subject matter of litigation to determine 517*] whether or *not they violated the Constitution of the United States." So in the case before us, the clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the state court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the state court.

Upon these grounds we think that this writ of error cannot be maintained, and therefore dismiss it for want of jurisdiction.

MATTHEW WATSON, Plff. in Err.,
v.
COLIN S. TARPLEY.

(See S. C. 18 How. 517-521.)

Question of sufficiency of protest and notice of non-payment is for the court—holder of bill may sue upon non-acceptance—must protest for non-acceptance—need not afterwards for non-payment—state laws do not control United States courts on questions of commercial law—cannot affect jurisdiction or rights of parties in federal courts—Statute of Mississippi held inoperative.

Whether the proceedings as to protest and notice upon the dishonor of a bill for non-payment were regular and legal, is a question of law to be determined by the court upon the evidence, and not for the jury.

The payee or indorsee of a bill, upon its presentment, and upon refusal by the drawee to accept, has the right to sue the drawer immediately.

He need not await the maturity of the bill. The holder is obliged to protest and give notice upon non-acceptance, of the bill; but is under no obligation afterwards to present it for payment.

Having shown protest and notice for non-acceptance, he is not obliged, in order to recover, to show protest and notice for non-payment.

The laws of a state, as rules of decision in trials in courts of the United States, do not apply to questions of a more general nature not at all dependent upon legal statutes or usages, such as construction of contracts or written instruments, or to questions of general commercial law, such as the law respecting commercial instruments.

State laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States, nor destroy or control the rights of parties litigant therein, under the general commercial law.

A statute of Mississippi, so far as it denies or in any degree impairs the right of a non-resident holder of a bill of exchange, immediately after presentment to and refusal to accept by drawee, and after protest and notice, to sue forthwith in the courts of the United States upon such bill, is without authority and inoperative.

A state statute which would render the right of recovery by the holder, after regular presentment and protest and notice of non-acceptance of a bill, dependent upon proof of subsequent presentment and protest and notice for non-payment, is also inoperative.

Such a requisition would be a violation of the general commercial law, which the courts of the United States would be bound to disregard.

Argued May 8, 1856. Decided May 14, 1856.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The case is fully stated by the court.

Messrs. J. M. Carlisle and George E. Badger, for the plaintiff in error:

Presentment for acceptance of all bills, is allowable, even advisable; and if acceptance be refused, the holder may immediately sue the drawer and indorsers.

Chit. Bills, 11 Am. 9th Lond. ed. part 1, ch. 7, p. 272, ch. 8, sec. 1, 7th point, p. 340; Sto. Bills, sec. 321; Byles on Bills, 2 Am. from 5 Lond. ed. ch. 12, p. 158.

Whenever the holder presents for acceptance a bill, not requiring such presentment, all the consequences follow as in the case of other bills.

NOTE.—When necessary to present bill for acceptance and when not. Protest for non-acceptance, when necessary—see note to Brown v. Barry, 1 L. ed. U. S. 640; and note to Wilson v. Lenox, 2 L. ed. U. S. 79.

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Roscow v. Hardy, 12 East. 434; Bank of Washington v. Triplett, 1 Pet. 25; Sto. Bills, secs. 228, 273.

When due notice of non-acceptance has been given, it is not necessary afterwards to present the bill for payment, nor if such presentment be made, to give notice of dishonor.

Chit. p. 342; Sto. Bills, sec. 366.

It is insisted that the Mississippi Law of 1838 does not govern our case, but even if it does, the judge misapplied it. By the general law, our right to sue immediately upon the first protest and notice is clear. The Mississippi Law merely declares that such suit should not be brought until the maturity of the bill; and our action was not brought until after the maturity of the bill.

No counsel appeared for the defendant in error.

Mr. Justice Daniel delivered the opinion of the court:

On the 29th April, 1850, the plaintiff in error, a citizen of Tennessee, brought this action of assumpsit against the defendant, a citizen of Mississippi, in the Circuit Court of the United States for the Southern District of Mississippi, upon a bill of exchange, dated 4th April, 1850, drawn by the defendant upon Messrs. McKee, Bulkely & Co., of New Orleans, Louisiana, for $2,327.49, payable twelve months after date, in favor of James Bankhead, and by him indorsed to the plaintiff, and declared in two counts—one on the non-acceptance and the other on the non-payment of the said bill. Pr. Rec. p. 4. The defendant pleaded "non assumpsit," and on this plea issue was joined (page six), and the action tried on the 11th of January, 518*] 1855, *when a verdict was found for the defendant. On the trial, a bill of exceptions was taken by the plaintiff in error, from which it appears that the plaintiff read in evidence the bill of exchange and proved the presentment thereof to the drawers, at their office in New Orleans, for acceptance on the 27th of April, 1850—the due protest thereof for non-acceptance, and a notification of its dishonor given the same day by letter addressed to the defendant at his residence in Mississippi. See Notarial Protest and Depositions, pp. 17 to 22.

The plaintiff also proved the presentment of the said bill for payment on the 7th April, 1851, the refusal of payment, the due protest thereof, and notice to the defendant. See Notarial Protest and Depositions of H. B. Cenas, A. Commandeur, and Charles F. Barry, pp. 7 to 15.

The defendant then offered to read in evidence a certificate, set out on the 23d page of the Record; and which being read after objection taken thereto by the plaintiff, the judge instructed the jury. Record, p. 23.

"That the plaintiff was not entitled to recover on the count in the declaration on the protest of the bill for non-acceptance, unless due and regular notice was proved, of the protest of the bill for nonpayment, though the jury might be satisfied from the proof that the bill had been regularly protested for non-acceptance, and due notice thereof given to the defendant; that, to entitle the plaintiffs to recover, notwithstanding the proof of protest for *non*-acceptance and due notice thereof, the plaintiff must prove protest for non-payment and due notice thereof, to the defendant; and that the jury were the judges of the testimony, and could give to the witnesses such credit as they thought them entitled to, looking to all the circumstances of the case."

The material questions involved in this case are comprised within a comparatively narrow compass, and present themselves prominently out upon the face of the record. On each of the questions thus deemed material, we think that the Circuit Court has erred.

Upon the relevancy or effect of the certificate of H. B. Cenas, under date of the 7th of April, 1851, and which was under an exception by the plaintiff permitted to be read in evidence with the view of impairing the previous statement of this witness as to the regularity of his proceedings upon the dishonor of the bill, we do not think it necessary to express an opinion. Our views of the law of this case, as applicable to the instruction given by the Circuit Court, are in no degree affected by the character of the statements in that certificate.

We think that the instruction of the court was erroneous in *committing it to the [*519 jury to determine whether the proceedings as to protest and notice upon the dishonor of the bill for non-payment were regular and legal. This is a matter which must, upon the facts given in evidence, be determined by the court as a question of law, and which cannot be regularly submitted to the jury. Such is the doctrine uniformly ruled by this court; we mention the cases of The Bank of Columbia v. Lawrence, 1 Pet. 578; Dickins v. Beale, 10 Pet. 572; Rhett v. Poe, 2 How. 457; Camden v. Doremus et al. 3 How. 515; Harris v. Robinson, 4 How. 336; Lambert v. Ghiselin, 9 How. 552. To the same point might be cited the several English decisions referred to in the case of Rhett v. Poe, already mentioned.

We also hold to be erroneous, the instruction of the court declaring that after presentment of the bill for acceptance, and after regular protest and notice for non-acceptance, an action could not be maintained by the payee or indorsee until after the maturity of the bill, and then only upon proof of demand for payment, and of a regular protest and notice founded upon the refusal to pay.

It is a rule of commercial law, too familiarly known to require the citation of authorities, or to admit of question, that the payee or indorsee of a bill upon its presentment and upon refusal by the drawee to accept, has the right to immediate recourse against the drawer. Upon no principle of reason or justice can he be required to await the maturity of the bill, by the dishonor of which he has been assured that it will not be paid, and with which the drawee has disclaimed all connection. Justice to the drawer, with the view of enabling him to guard himself from injury, imposes upon the holder the obligation of protest and notice upon non-acceptance; but beyond this, he sustains no connection with the drawee of the bill, and is under no obligation afterwards to present the latter for payment; of course, he cannot be rightfully held to protest and notice for non-payment.

In the several compilations of the law of bills and notes by Kyd, Bayley, Chitty, Byles, and

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Story, are collected the decisions by which this doctrine has been settled.

It has been suggested that the instruction by the judge at circuit may have been founded upon a provision in a statute in the State of Mississippi of 1836, contained in a collection of the laws of that State by Howard & Hutchinson, pp. 375, 376, sec. 18, by which, amongst other enactments, it is declared that "no action or suit shall be sustained or commenced on any bill of exchange, until after the maturity thereof;" and this prohibition or postponement of the right of action it is thought may have been interpreted by the judge as requiring after pre-[*520] sentment for *acceptance, and after protest and notice upon non-acceptance, a like presentment and demand for payment upon the maturity of the bill; and upon refusal to pay, a like protest and notice in order to authorize a recovery.

The answer to the above suggestion is this: that if such be a just interpretation of the Statute of Mississippi, that interpretation, and the consequences deducible therefrom, we must regard as wholly inadmissible.

Whilst it will not be denied that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the Constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and Constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation.

In the case of Swift v. Tyson, 16 Pet. 1, this court in giving a construction to the 34th section of the Judiciary Act, which declares "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," has said: "It never has been supposed by us that this section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation; as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract, or what is the just rule furnished by the principles of commercial law to govern the case." Again, in the same case, it is said by this court: "The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. 883, 887, to be in a great measure not the law of a single country only, but of the commercial world."

In the cases of Keary v. The Farmers and Merchants' Bank of Memphis, 16 Pet. 89, and of Dromgoole v. The Farmers' Bank, 2 How. 241, it was ruled by this court, that the courts of the United States themselves can have no authority to adopt any provisions of state laws which are repugnant to, or incompatible *with, the positive enactments of Con- [*521 gress, upon the jurisdiction, or practice, or proceedings of such courts.

The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several States, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation, the effect of which would be to impair the rights thus secured, or to devest the federal courts of cognizance thereof, in their fullest acceptation under the commercial law, must be nugatory and unavailing. The Statute of Mississippi, so far as it may be understood to deny, or in any degree to impair the right of a non-resident holder of a bill of exchange, immediately after presentment to, and refusal to accept by the drawee, and after protest and notice, to resort forthwith to the courts of the United States by suit upon such bill, must be regarded as wholly without authority and inoperative. The same want of authority may be affirmed of a provision in the Statute which would seek to render the right of recovery by the holder, after regular presentment and protest, and notice for non-acceptance, dependent upon proof of subsequent presentment, protest and notice for non-payment.

A requisition like this would be a violation of the general commercial law, which a state would have no power to impose, and which the courts of the United States would be bound to disregard.

We think that the instruction given by the Circuit Court in this case was erroneous: that its decision should be, as it is hereby, reversed; and the cause is remanded to the Circuit Court to be proceeded in upon a venire de novo, in conformity with the principles above ruled.

ROBERT HUDGINS et al., Plffs. in Er.,

v.

WYNDHAM KEMP, Assignee in Bankruptcy of John L. Hudgins.

(See S. C. 18 How. 530-539.)

Motion to dismiss—certificates of clerk inadmissible to impeach record—certiorari—amendment of record—writ of error or appeal, when a supersedeas—security on—order for supersedeas not considered on motion to dismiss—amendment of circuit court order book—clerk may certify appeal without order entered—Virginia decisions and practice cannot affect mode of appeal—it may be made before judge in vacation—when citation necessary—record need not show citation—judge out of court may approve of security—no error of clerk can affect right of appeal.

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Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record as certified and returned by the clerk of the circuit Court, can be received here to impeach its verity or to show that the certificate ought not to have been given.

Certificates of such clerk, outside of the record, and given since it was certified and transmitted to this court, are inadmissible for that purpose.

If the record is defective or incorrect, the errors or omissions should have been suggested in this court, and a certiorari to bring up a correct record.

An amendment of record may be made here by consent. The court will also permit a mere clerical error to be amended here, upon the clerk's certificate, without sending a certiorari.

A motion should have been made to amend the transcript by inserting the said certificates, before a motion to dismiss can be made upon them.

A writ of error or appeal does not operate as a supersedeas unless security is given sufficient to cover the amount recovered, in ten days after judgment or decree.

Yet the party may, upon giving security within five days, sufficient to cover the costs in the appellate court, have his writ of error or appeal; and his omission to give the larger security within ten days is no ground for dismissing the appeal.

Where such security was given and approved after the ten days, the appeal does not operate as a supersedeas. The plaintiff, in such case, had a right to carry his decree into execution, notwithstanding the pendency of the appeal in this court.

If a supersedeas had been improperly awarded, a motion to dismiss the appeal for that reason, is not the proper motion.

The motion should be to discharge the order for a supersedeas, not to dismiss the appeal.

The propriety of an order granting a supersedeas cannot be considered on a motion to dismiss. The order for the supersedeas might be discharged, and the appeal still maintained.

The order book of the Circuit Court may be amended by the judges' direction, by the insertion of the appeal therein, after the term is over.

The clerk can certify that the appeal was made without such an order being previously entered, and it is his duty so to do. The entry of the order is not necessary to give validity to the appeal.

The decisions or practice of the courts of Virginia cannot affect the mode of removing a case from an inferior to an appellate court of the United States.

An appeal may be made before a judge in vacation as well as in court.

The only difference is, that when made in open court during the term in which the decree was made, a citation is unnecessary. When made out of court, a citation is necessary to give the other party notice.

That the record does not show that a citation has been issued and served, is no ground for dismissing the case. It need not appear of record. It may be shown aliunde.

The approval of the bond by the judge out of court is sufficient. It need not be approved by the court.

No entry of the clerk nor any irregularity in his entry can deprive appellant of his legal rights to appeal.

Argued April 25 and May 2, 1856. Decided May 14, 1856.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

Motion to dismiss appeal on certificate of clerk.

The facts are fully stated by the court.

Messrs. Robinson and Patten, for appellees:

This court cannot take jurisdiction of the appeals, as having been allowed by the court, when the record as it stood at the end of the term, and as it was then signed by the presiding judge, shows no allowance of such appeals.

Burch v. White, 3 Rand. 104, cited in 1 Rob. Pr. 642, old ed.

Under the Act of Congress of March 3, 1803, 2 Sto. p. 905, appeals are "subject to the same rules, regulations and restrictions as are prescribed in law in writs of error." One of the rules as to a writ of error is, that it "shall be a supersedeas and stay execution, in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office, where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of."

1 Story, p. 61, sec. 23; Wallen v. Williams, 7 Cranch, 278; Adams v. Law, 16 How. 148.

And it is clear that we are entitled to process to carry these decrees into effect.

S. C. 17 How. 275; The Dos Hermanos, 10 Wheat. 306.

If the appeals could be allowed in vacation, they would be defective for want of citation and notice.

Ex parte Crenshaw, 15 Pet. 119; Villaloboe v. U. S. 6 How. 90; Hogan v. Ross, 9 How. 602.

Messrs. R. Johnson and J. Lyons for appellants.

Mr. Chief Justice Taney delivered the opinion of the court:

This case has been brought up to this court by appeal from the decree of the Circuit Court of the United States from the District of Virginia, and a motion is made on behalf of the appellee to dismiss it, upon the ground that it had not been removed in the manner the law requires, and that, therefore, we have no jurisdiction over it. And certificates and statements of the clerk, outside of the record, and given since it was certified and transmitted to this court, have been filed as evidence of the irregularity of the removal.

This evidence is not admissible upon the present motion. The record transmitted to this court, certified by the clerk of the Circuit Court, states that the appeal was taken in open court. This is sufficient evidence of that fact. And upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record, as certified and returned by the clerk of the Circuit Court, can be received here to impeach its verity, or to show that the certificate ought not to have been given. The case, as therein set forth, is the case before this court. And if, from inadvertence or mistake of the court below, or from any other cause, the record transmitted in this case is defective or incorrect, the errors or omissions should have been suggested in this court, and a certiorari moved for to bring up a correct and true transcript of the proceedings.

It is true an amendment may be made here by consent, as was done in the case of Fletcher v. Peck, 6 Cranch, 87. And so, also, where it appeared by the certificate of the clerk that he had committed a clerical error in the transcript, in the form in which he had entered a judgment, in ejectment, and it was evident from the declaration, that it was a mere clerical error, the court suffered it to be amended here, without sending a certiorari to the Circuit Court to have it corrected. Brown v. Woodward, 13 Pet. 1.

But in the case before us, there is no consent to amend, and the errors alleged are of a very

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different character, from the mere formal error in the case of Brown v. Woodward. And if it were otherwise, still there should have been a motion to amend, by inserting in the transcript the certificates above mentioned of the 535*] *clerk, before the motion was made to dismiss. But no such motion has been made, and the transcript now before the court is the one originally certified, without any amendment here by consent or by order of the court. And the motion is made to dismiss the case, not for any irregularity apparent in the record, but by testimony aliunde, offered to show that the transcript is incorrect. It is very clear that such testimony cannot be received to support this motion. And the record, as it stands when the motion is heard, presents the case which this court is called upon to decide; and nothing outside of it can be introduced to affect the decision.

Neither is it of any importance as concerns this motion whether the appeal does or does not operate as a supersedeas. A writ of error or appeal does not operate as a supersedeas under the Act of Congress, unless security is given sufficient to cover the amount recovered within ten days after the judgment or decree is rendered. And yet, if the party does not give the bond within the ten days, he may, nevertheless, sue out his writ of error or take his appeal, as the case may be, at any time within five years from the date of the decree or judgment, upon giving security sufficient to cover the costs that may be awarded against him in the appellate court. And his omission to give the security in ten days is no ground for dismissing the appeal.

In this case, certainly the appeal did not operate as a supersedeas. The security was given and approved long after the time limited by the Act of Congress. Nor was any supersedeas moved for or awarded by the Circuit Court or the Judge of the Supreme Court, who approved the bonds. Nor could any have been awarded by any court or judge. And, upon the expiration of the ten days, the plaintiff had a right to proceed on his decree and carry it into execution, notwithstanding the pendency of the appeal in this court.

But if a supersedeas had been awarded, this motion could not be sustained. The motion should have been to discharge the order, not to dismiss the appeal. And the propriety or impropriety of an order granting a supersedeas could not be considered on a motion to dismiss. The order for the supersedeas might be discharged, and the appeal still maintained.

The decision of these points dispose of the motion. But in order to avoid any further controversy on the subject, it is proper to add that if the facts offered in evidence were inserted in the record, they would furnish no ground for dismissing the appeal.

They are substantially as follows:

The District Judge had an interest in the issue of the case, and withdrew from the bench, and the Chief Justice of the Supreme Court sat alone at the trial. The decree was passed on 536*] the 27th *of June, 1855, and the appellant on the same day, in open court, appealed to this court, and his appeal was entered by the clerk among the minutes of the proceedings of that day, by order of the court; and on the next day, June 28, the court closed its session, and adjourned to the next term.

It is the practice in the state courts of Virginia, for the clerk to make written minutes of the proceedings in court as they occur during the day; and after the court adjourns for the day, they are all written out in full in what is called the order book, and presented to the court when it meets next morning, and read; and if found to be correct, is signed by the presiding judge, as evidence that the proceedings are therein correctly stated. This practice has been followed by the Circuit Court of the United States when sitting in Virginia; and according to this practice, it seems the clerk supposed that the appeal ought to have been entered in the order book, but omitted it through inadvertence; and did not discover the omission until after the term had closed. The fact was brought to the attention of the Chief Justice by a certificate from the clerk, when the appeal bonds were presented for approval, which was in October, 1855, and when he approved the bonds, he at the same time sent a written direction to the clerk to enter the appeal in the order book, as having been made in open court; and as of the day when it was actually made and entered in the minutes. It may be proper to say, that the penalty of the appeal bond presented for approval was much larger than necessary; because as the appeal could not then operate as a supersedeas, the Act of Congress required such security only as would cover the costs of the appellee in case the decree should be affirmed. But it certainly could be no ground of objection when the bond was offered for approval, that the penalty was larger than it need have been.

These are the material facts, as they appear in the certificates of the clerk, produced and relied on in the argument. And the appellees contend that the order book is the only record of the proceedings of the court; that this record could not lawfully be amended by the order of the judge after the term was over; that the entry of the appeal made by his direction, is not legally a record; and that as there is no record of an appeal in open court on the 27th of June, 1855, the clerk had no legal authority for certifying that such an appeal was made; that his certificate on that account is erroneous; and the case, therefore, is not removed to, and is not in this court, according to law.

The counsel for the appellee, in support of these objections, has referred to a decision of the Court of Appeals of Virginia, and to the practice in the courts of that State in cases of appeal. The answer, however, to this argument is obvious. The power *of mak- [*537 ing amendments, and the mode of removing a case from an inferior to an appellate court of the United States are regulated by Acts of Congress, and do not depend on the laws or practice of the State in which the court may happen to be held. The decisions or practice of the courts of Virginia, cannot, therefore, have any influence in deciding the motion before us.

Neither is it necessary to inquire, whether the entry made in the order book is to be regarded as a part of the record, or merely a memorandum to preserve the history of the

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case, by entering the appeal in the book where it is usually found, and would naturally be looked for by the party interested. In either view this entry was not necessary to give validity to the appeal. In making the appeal the party exercised a legal right. It was made in open court, and the clerk had official knowledge of the fact. And it would have been his duty, even if no written memorandum of it had been made, to certify it to this court, when the security was approved by the judge and the appeal allowed. And his certificate of the fact is all that is required in the appellate tribunal. He does not certify it as a copy from the record. The appeal is made orally, and the entry usually made on the minutes or in the order book, is to preserve the evidence of the act, and is not necessary to give it validity.

The Act of Congress does not require an appeal to be made in open court—or to be in writing—or entered on the minutes of the court —or to be recorded. It is often made before a judge in vacation, when it cannot be recorded in the order book as a part of the proceedings of the court. And the law makes no difference as to the form in which it is to be made, whether it be taken in court or out of court before a judge. In either case it may be made orally or in writing. And the only difference is, that this court has decided that where the appeal is made in open court, during the term at which the decree is passed, no citation is necessary to the adverse party. He is presumed to be in court, and therefore to have notice. But when the appeal is taken out of court, the citation is necessary to give him notice. In all other respects the same rules apply to either mode of taking an appeal. Reilly v. Lamar, 2 Cranch, 344; Lennox v. Yeaton, 7 Pet. 220.

The Act of March 3, 1803, which authorizes the appeals, provides that they shall be subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. And in the case of Innerarity v. Byrne, 5 How. 292, where the record transmitted to this court did not show that a citation had been issued and served, it was held to be no ground for dismissing the case, and that the fact might be proved aliunde. It is not necessary that all of the steps required to give 538*] *this court jurisdiction should even be on file in the court below, and certainly need not appear to be of record in that court. Hunter v. Martin, 1 Wheat. 304.

We think it evident, therefore, that the want of record evidence in the Circuit Court that the appeal was prayed, would be no ground of dismissal; and the certificate of the clerk that it was so prayed, is all that is required in this court.

The objection that the entry on the minutes, and also in the order book, required that the bond should be approved by the court, and that the approval by the judge out of court is, therefore, not sufficient, is equally untenable.

No copy of the order of the judge directing the entry in the order book has been produced. But the clerk states in his certificate that the order directed him to enter the appeal as of the day on which the decree passed; and without doubt he states it correctly. And in executing that order he appears to have followed the form he had adopted in his entry on the minutes. The same form may, perhaps, be used in other circuits, and is in some cases probably borrowed from the formulas used in like cases in the state courts. But the appellant had legal rights, and he cannot be deprived of them by any irregularity in a clerical entry. Strictly speaking, nothing ought to have been entered either in the minutes or on the order book as of the day the decree was passed, except the appeal itself. And this, indeed, would appear to have been all the judge ordered. For the appeal could not have been allowed on that day, because an order of a court, or a judge allowing an appeal, is, in effect, nothing more than an order to send the transcript of the record to the appellate court. It is the clerk's authority for making the return to the superior court. And that order could not be legally given until the security required by law was offered and approved. But when the appeal was taken, the approval of the court could not be made the only condition upon which it should be allowed. He had a right by law to carry up his appeal, if the security he offered was approved by the judge, out of court, in vacation; and no entry of the clerk, and indeed no order of the court could deprive him of this right. Neither could the amount of the security be then prescribed. For he had a right to produce his security within the ten days, if he desired to do so, and thereby supersede the judgment, until the decision of this court was had in the premises. And in order to obtain the supersedeas, the law requires that the security given shall be sufficient to cover the whole amount of the sum recovered against him. But, if he preferred carrying up his case without superseding, the law does not exact security to the amount recovered. Security is required in that case for no greater amount than will cover the *costs that may be re-[*539 covered against him in the superior court. Such were the legal rights of the appellant when he made his appeal; and he cannot be deprived of them by the form adopted by the clerk in entering it. The removal of the security by the judge, as it appears in the certificates offered in evidence, is sufficient, and the objection that it was not approved by the court cannot be maintained.

Upon the whole, we see no ground for dismissing the appeal; and the motion to dismiss is overruled.

ELLIOTT W. HUDGINS et al., Appts,

v.

WYNDHAM KEMP, Assignee in Bankruptcy of John L. Hudgins.

Case same as preceding, and decision the same.

MOTION by appellee to dismiss cause on the certificate of the clerk to the following effect: That the final decree was rendered June 27, 1855; that the term of the court at which the same was rendered, ended on the 28th of that month; that afterwards, in the vacation of said court, on Oct. 16, 1855, there was filed in said clerk's office a writing signed by R. B. Taney, Judge of said court, dated the 13th of said month, whereby it was "ordered that the appeal in this case, which was taken in open court when the decree was pronounced, be

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entered accordingly on the order book of the court of the last Term, to wit: of May Term, 1855;" that in view of this order, the clerk on its being so filed write on the order book of the court, at the foot of the decree of June 27th, 1855, the following words: "and from the foregoing decree the defendants prayed an appeal, which was granted them on giving bond and security to be approved by the court, in double the amount of said decree, conditioned for the prosecution of said appeal." And at the time of filing said vacation order of the judge, there was also filed, in said clerk's office, bond and security approved by said judge.

Messrs. R. Johnson and J. Lyons for appellants.

Messrs. Robinson and Patton for appellee.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is in all respects the same with that of Robert Hudgins v. Kemp, above decided, and for the reasons stated in that case, the motion in this to dismiss is overruled.

570*] *THE STEAMER OREGON, Roger A. Heirn, Master and Part Owner, Appellant,

v.

JOSEPH and FRANCIS ROCCA,

and

THE STEAMER OREGON, Roger A. Heirn, Master and Part Owner, Appellant,

v.

ROBERT TURNER and WILLIAM TWIFORD.

(See S. C. 18 How. 570-576.)

Collision—rule as between steamer and sailing vessel.

When a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precaution to avoid a collision; and if this be not done prima facie the steamer is chargeable with fault.

Argued May 8, 1856. Decided May 14, 1856.

APPEALS from the Circuit Court to the United States for the Southern District of Alabama.

The libels in these cases were filed in the District Court of the United States for the Southern District of Alabama, by the appellees, for the recovery of damages resulting from a collision.

The District Court gave judgment in favor of the libelants, in both cases, for $6,599.64, and $1,989.47, respectively. On appeal the Circuit Court affirmed these decrees pro forma, the presiding judge having been of counsel for the respondent, now appellant.

The cases are now here on appeal.

Previous to the argument on the merits in this court, the court entered the following order in each case:

"It is now here considered by the court, that although it appears from the record that the decree of the Circuit Court in this cause was entered 'pro forma,' yet that this court has jurisdiction to try and determine the case. Whereupon it is now here ordered by the court, that this cause be, and the same is hereby set down for argument next after the case fixed for to-day. Per Mr. Chief Justice Taney."

A further statement appears in the opinion of the court.

Messrs. Nelson and Reverdy Johnson, for the appellants:

First. There was no sufficient evidence to show the extent of the damage done to the cargo of the schooner by the collision, or the ownership thereof by the libelants in the first case. Second. The collision was the result of negligence in navigating the schooner, and even if not the result of negligence in navigating the schooner, it is not attributable to any fault on the part of the steamer.

Mr. P. Phillips, for the appellee:

The steamer was in fault, as she did nothing to prevent the collision.

St. John v. Paine, 10 How. 583; Newton v. Stebbins, 10 How. 607; Genesee Chief, 12 How. 463; The Shannon, 2 Hagg. 173; The Perth, 3 Hagg. 414; The Europa, 2 Eng. Law & Eq. 557.

The steamer was in fault in attempting to cross the bows of the schooner.

St. John v. Paine, 10 How. 584; The Rose, 2 W. Rob. Adm. 5; The Monticello, 17 How. 155.

Though the sailing vessel may have been erroneously steered, it was the duty of the steamer, if possible, to get out of the way.

The Hope, 1 W. Rob. Adm. 154; Hawkins v. Steamboat Co. 2 Wend. 452.

This court will not reverse the decree unless mistake or error be clearly shown.

The Sybil, 4 Wheat. 98; U. S. v. 112 Casks of Sugar, 8 Pet. 278; Hobart v. Drogan, 10 Pet. 119; Cushman v. Ryan, 1 Story, 96.

Mr. Justice McLean delivered the opinion of the court:

These are appeals in admiralty, from the Circuit Court for the Southern District of Alabama.

The first case is an appeal from the decree of the Circuit Court for damages resulting from a collision between the schooner William Ozman and the steamer Oregon, in the Bay of Mobile, on the 8th of September, 1849, whereby one hundred and forty bales of cotton on board said schooner, alleged to belong to the appellees, were injured, and in part destroyed.

A similar libel was filed by the appellees as the owners of the schooner, claiming damages for the injuries done to the vessel. The libels are substantially the same, and they both rest on the same evidence.

The collision took place in the Bay of Mobile, where it is eleven miles wide, and sufficient depth of water for the navigation of vessels. The schooner was sailing down the bay before the wind at the rate of six miles an hour. The Oregon was on her passage from New Orleans

NOTE.—Collision. Rights of steam and sailing vessels with reference to each other and in passing and meeting—see note to St. John v. Paine, 13 L. ed. U. S. 537.

Rules for avoiding collision—see notes, 14 L. ed. U. S. 68; 41 L. ed. U. S. 1053.

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to Mobile, and was running at the rate of eight miles per hour. It was a starlight night, and the moon also shone. The collision occurred before daylight; but the vessels in approaching each other were seen from a mile and a half to two miles. Under such circumstances, it is extraordinary that they should come in contact.

The witnesses on board the Oregon say, that as the vessels approached each other, the schooner suddenly changed her course, which caused the collision; whilst the witnesses on board the schooner state it was occasioned by a change of her course by the steamer. In such a conflict of testimony, where the vessels were both steamers or sailing vessels, and there were no leading facts for discrimination, fault would be chargeable to both vessels. But in the case before us the vessels, in regard to a collision, occupy a very different relation to each other. The steamer, having the propelling power, is under the control of her pilot. Her course may be changed, and her progress checked or arrested. Having this power to avoid a collision 572*] *with a vessel propelled by the wind, she is generally chargeable with fault when such an occurrence happens. The exception to this rule must be clearly established, by strong circumstances, to excuse the steamer.

The vessels in question saw each other at the distance of more than a mile, probably a mile and a half to two miles. The Oregon was steering near a due north course; the course of the schooner was south. Both vessels continued their course until they came within one hundred and fifty yards of each other. As evidence that the steamer changed her course the fact is relied on that the schooner ran into the steamer, a little forward of midships, with her bow. This result might possibly have followed a change of course by the schooner. But, as the movement of the steamer was more rapid than the schooner, such an occurrence would not be so likely to happen, as an attempt by the steamboat to pass the bow of the schooner.

Several experts were examined on both sides to show that the theory of each is wrong, judging from the injury received by the Oregon. The witnesses give their opinions without reserve on this subject. We derive but little light from this part of the examination.

In St. John v. Paine, 18 Curtis, 507, this court say: "As a general rule, therefore, when meeting a sailing vessel, whether close hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her." Practically, when a rule for this purpose is laid down, it is rendered ineffectual by admitting exceptions to it. The mind begins to waver as soon as the danger arises, and the exception rather than the rule becomes a subject of solicitude with the masters of both boats; and this practically annuls the rule, and causes the movements of both vessels to be uncertain. If the rule were absolute, and an insuperable difficulty should prevent one of the boats from observing it, it would be safer and better to slow the vessel or stop it, until the danger shall be past. This would occur so seldom as to be inappreciable, when compared to the safety it would secure. The rule adopted by the Trinity masters, and sanctioned by this court, is the safe one, that when two vessels on opposite tracks are approaching each other, each should turn to the right, passing each other on the larboard side. This rule is too simple to be misunderstood, and if observed, collisions would not occur between moving boats, whether propelled by sails or steam. The rule once established, every deviation from it should be chargeable as a fault.

The rule of this court is, when a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precaution *to avoid a collision; and if this be not [*573 done, prima facie the steamer is chargeable with fault. Whether this rule be regarded or the weight of the testimony, we think, in the present case, the Oregon was in the wrong.

The decrees of the Circuit Court are therefore affirmed.

Mr. Justice Daniel dissenting:

I am constrained, by a sense of duty, to differ with the court in their determination to take cognizance of these causes.

It is my deliberate opinion that these causes in the form in which they are presented to our consideration, fall within no one of the categories, either in the Constitution or the laws of the United States, by which the jurisdiction of this court or that of the circuit courts have been conferred or prescribed.

The first thing to be observed with reference to these cases is the fact that they are cases in which confessedly no decision has been made, no opinion formed or expressed, nor any judicial action had by the Circuit Court; in which the judges by their certificate declare that they have forborne to mature or declare any judgment upon their character, and which they have sent to this court in effect to be molded and settled ab origine by this court.

The true inquiry as to such a proceeding is, can this be done in conformity with the letter, the spirit, or the beneficial ends and design of the Constitution and laws?

In article 3d, sec. 2 of the Constitution, the jurisdiction of this court both original and appellate, is defined. The former is limited to cases affecting ambassadors, other public ministers and consuls. In all the other cases enumerated in this article, the jurisdiction of this court is appellate.

To my mind it would involve a solecism too gross for a moment's consideration, to suppose that by any distortion, the language or objects of this Article of the Constitution could be so interpreted as to invest this court with an appellate power over its own decisions; and yet it is not less an extravagance and a solecism to contend that this court can, by any direct or indirect agency, shape the original decision of any and every case which may be pending in a circuit court, and then recall such decision into this forum for a mere reiteration of what they had already determined and done, under the mere show of an appellate or revising jurisdiction. The framers of the Constitution too well understood the nature of human frailty, the influence of prepossession or vanity, to believe that by such a proceeding, either wisdom or impartiality, or the safety of private right would be promoted.

*They have authorized no such pro- [*574 ceeding; and the expositions of the Constitu-

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tion given in the organization of the courts by the Acts of Congress, conclusively show the conviction of the Legislature as to the importance of restricting the several courts to that sphere within which their functions could be exercised wisely, impartially, and without the danger of bias, or disturbance from foregone conclusions.

Thus in the "Act to establish the judicial courts of the United States," it is provided by the 22d section of that Act, that final judgments and decrees in civil actions and suits in equity in a circuit court, may be re-examined and reversed or affirmed in the Supreme Court.

In the construction of this section the inquiry first suggests itself, what is it which the Act of Congress permits to be affirmed or reversed. The answer is, a judgment or decree. What is a judgment or decree? It is an act or conclusion of the mind founded upon a view of all the facts and circumstances surrounding the subject as to which that conclusion is formed; and it is to be a final judgment, showing still more clearly that all the facts and circumstances have been weighed and appreciated. Such a judgment, it is provided by the Statute, may be re-examined by this court. Can it be rationally contended that such a judgment as the Statute describes can be affirmed of a proceeding which on its face declares that no conclusion upon any fact or circumstance, nor on any question of law connected with it has been formed? That all that has occurred is a mere formality and nothing more, and has been adopted expressly to avoid a judgment. How can that be said to be re-examined, as to which it is admitted there has been no previous examination?

Turning, in the next place, to the law by which divisions of opinion are authorized to be certified to this court, we find the language of the law to be thus: Act of April 29th, 1802, sec. 6—"That whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court. Here, then, is the sole authority by which certificates of division in opinion are permitted or directed: and what does that authority explicitly require? That there shall be pending in the Circuit Court a question or questions upon which the opinions of the judges shall be opposed; that there must be a disagreement between the judges, and that only the point upon which such disagreement shall happen, shall be certified. Can language be possibly plainer than this? I will not so far [*575] offend against common *sense, as to attempt an argument to show that opposition in opinion or disagreement has not existed between persons as to a matter with reference to which they have formed or expressed no opinion whatsoever, and with regard to which they declare that such is the truth of the case.

The cases before us comprise no one requisite prescribed by the Constitution and Act of Congress. Let us for an instant look to the consequences likely to ensue, which indeed must inevitably ensue, from the doctrine now promulged from this court. There are at this time, it is believed, thirty-one States in this Union, besides several Territories; and of these Territories it has been recently stated on the floor of Congress there is space sufficient for the formation of sixty additional States. In a majority of the existing States there have been created more than one district court, invested with circuit court jurisdiction. If this privilege of forcing upon the Supreme Court the original decision of causes instituted in the circuit courts be legitimate, it appertains to every court possessing circuit court jurisdiction existing in the States already members of the confederacy, and must appertain equally to any number however augmented. It cannot be extended to a portion of the courts and denied to the residue.

To those who already feel the burthen of the litigation of this extended country when restricted within the narrowest limits prescribed by the Constitution and laws, it need not be shown what are to be the effects of throwing upon them the entire mass of circuit court duty and cognizance; but beyond those who more immediately experience those effects, it becomes a subject of gravest reflection to every one interested in the regular and effectual administration of the law in the federal courts.

But it has been said that the practice sanctioned by the decision in this case is warranted by the authority of precedent in this court. It is undeniably true, that instances like the present, without having their nature or tendencies brought by argument to the test of examination, have several times occurred. But can the simple fact that such instances have occurred affect their justification in violation of the Constitution and law, and to the absolute destruction of everything like efficiency in the federal courts?

I am fully impressed with the importance of precedent, and would never attempt to impair its influence within the sphere of its legitimate authority; but I can never yield to it my support, much less implicit obedience, when invoked for the purpose either of introducing or hallowing abuses. If the mere existence or prevalence of these can impart to them either authority or sanctity, the cause of justice or morals would indeed be desperate; there could never be reformation. There has perhaps never been a time in which many [*576] abuses in politics, law, morals and religion have not obtained currency; indeed the human imagination can hardly picture an error, a folly, a vice or a crime, which has not had its prototype. But this decision cannot invoke the weight or authority of established precedent in its support. On the contrary, the more recent and well-considered cases determined by this tribunal are in direct opposition thereto. Without entering upon them at large, the cases of White v. Turk et al. 12 Pet. 238; of The U. S. v. Stone, 14 Pet. 524; of Nesmith v. Sheldon et al. 6 How. 41; and of Webster v. Cooper, 10 How. 54, are confidently appealed to in support of this position. These cases so well considered and so recently ruled, are now in effect reversed, for the purpose of reviving a practice unauthorized by the Constitution or by the legislation of Congress: a practice necessarily fruitful of great mischief.

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I object in fine, to the decision in this case, because to me it seems calculated to impair, if not to destroy, that satisfaction and confidence which it is so desirable should everywhere prevail with reference to the proceedings of this tribunal.

With private persons, or in governments, or in public bodies of any description, there is no experiment or course of action more pregnant with danger, than is the exercise or the effort to exercise forbidden or even doubtful powers. Such an assumption rarely fails to react, or to operate reflectively upon those by whom it is essayed; never, indeed, except in instances in which it can be sustained by a power absolute and irresponsible enough to repress opposition, or to silence the expression of public sentiment. In such instances, but in those only, the act or the attempt can be safe. But under our system of polity no immunity was ever designed, much less has one been provided, for anything of this kind. With whatever deference and to whatever extent, therefore, the opinions of this tribunal may be recognized (and by no one will they within their proper bounds be maintained with truer loyalty than by myself), yet when challenged to obedience to those opinions, I am bound to remember that the Constitution is above all and over all, and that public opinion conveyed through its legitimate channel, the legislation of the country will cause itself to be heard and respected.

595*] *WILLIAM C. PEASE, Plff. in Error,
v.
JOHN PECK, Survivor, etc.

(See S. C. 18 How. 595–601.)

Law of state re-enacted from printed copy is good, though it does not conform to original manuscript—when this court will follow state decisions—when not.

A law of Michigan, re-enacted in the words of the printed copy, and so received and acted upon for thirty years, will not be altered to correspond with the manuscript of the original statute which differs from the law so re-enacted.

Where there is a settled construction of the laws of a state by its highest court, courts of the United States receive and adopt it.

But when this court has first decided a question arising under state laws, it is not bound to surrender its convictions on account of a contrary subsequent decision of a state court.

When the decisions of the state court are not consistent, this court is not bound to follow the last if contrary to the opinions of this court.

Nor does this court feel bound in any case where a point is first raised in and decided by the Circuit Court, to reverse that decision, contrary to the convictions of this court, in order to conform to a state decision made in the mean time.

Argued May 7, 1856. Decided May 14, 1856.

IN ERROR to the Circuit Court of the United States for the District of Michigan.

This was an action of debt, brought in the Circuit Court of the United States for the District of Michigan, by the defendant in error, on a certain judgment. The defendant pleaded the Statute of Limitations. The plaintiff replied, absence from the jurisdiction. The court, on demurrer, sustained the replication and gave judgment for the plaintiff. The defendant brought the case here on a writ of error.

A further statement of the case appears in the opinion of the court.

The case is stated by the court.

Messrs. A. H. Lawrence, H. H. Emmons and William Gray, for the plaintiff in error:

The original Act of 1820, the record thereof, the certified transcript sent to the Secretary of Congress, and the original law of Vermont from which it was adopted, all agreed that there was no exception in favor of persons without the state, if not also without the United States. The printer, by the insertion of an "or" never contained in the law, makes that a new class of exceptions.

By the law of 1820, then, the claim of plaintiff was barred.

Whitney v. Goddard, 20 Pick. 304.

The volumes of 1827 and 1833 were merely reprints, and misprints, as to the Act of Limitation of the law of 1820.

In these volumes the Statute of Limitations was published, not as an act of the council, but as a reprint of the law of 1820, and it has always been called and treated as the Act of 1820.

3 McLean, 480.

There has been no case wherein there has been a recovery, in which the statute was pleaded, and the attention of the court called to the original law and the discrepancy between it and the printed copies.

In Hulbert v. Haynes (a case not yet reported), the Supreme Court of Michigan held that the claim was barred under the law of 1820, and that the law of 1820 continued unrepealed and unchanged till 1838.

The question here presented falls within that class of cases, wherein the federal courts adopt the decision of the highest state tribunal.

Green v. Neal, 6 Pet. 262; Hinde v. Vattier, 5 Pet. 401; Jackson v. Chew, 12 Wheat. 153; Shelby v. Guy, 11 Wheat. 361; Burke v. McKay, 2 How. 66; Swift v. Tyson, 16 Pet. 18; 2 Pet. 85.

Messrs. J. M. Carlisle and George E. Badger, for the defendant in error:

In 1825, the legislative council of Michigan appointed commissioners to revise the laws of the Territory, with power to make such alterations and additions as they might deem expedient; and to omit such laws as they might deem unnecessary. These commissioners reported the Act of Limitations in the same terms as in the compilation of 1820. The council accepted the report in 1827, and the Governor, under the authority of the council, published the law so reported to, and accepted by the council. Again, in 1833, the laws were published under the authority of the legislative council, the Act of Limitations being in the same words as in the preceding publications. In all the courts of the Territory, in the courts of the United States for the State, after her admission into the Union, and in the courts of the State, it has been uniformly held, that persons beyond the limits and jurisdiction of Michigan were within the saving of the Act of Limitations, in accordance with the construction given to the words "beyond seas" by this court in Faw v. Roberdeau, 3 Cranch, 174.

NOTE.—In what instances federal courts do not follow state decisions,—see note, 19 L. ed. U. S. 491.

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Murray v. Baker, 3 Wheat. 541; Shelby v. Guy, 11 Wheat. 361; Bank v. Dyer, 14 Pet. 141.

Under all the circumstances of the case, after a settled recognition for thirty years of these words, as a part of the law, by all the authorities of the territorial, state, and national government, it cannot be allowable to question their right to a place in it.

Mr. Justice Grier delivered the opinion of the court:

Peck, the plaintiff below, declared against Pease in an action of debt on a judgment obtained in the Circuit Court of the Territory (now State) of Michigan, at the term of January, 1836. The defendant pleaded the Statute of Limitations of eight years; to which the plaintiff replied that he did not at any time reside in the State of Michigan, but in parts "beyond seas," to wit: in the State of New York.

The defendant demurred to the replication.

The objection to this replication is not to the construction of the Statute which is assumed by the plaintiff to govern the case, or an allegation that, according to the settled construction of the words "beyond seas," the replication is defective. But it is intended to deny that the Statute of Limitations pleaded has any such provision in it. The question is, therefore, not what is the construction of an admitted statute, but what is the statute. For each party admits that if the statute be as claimed by his opponent, his construction of it is correct.

By the ordinance of 1787, "for the government of the territory of the United States northwest of the river Ohio," it is provided "that the Governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time, which laws 596*] shall be in force in the district *until the organization of the General Assembly therein, unless disapproved of by Congress; but afterwards the Legislature shall have authority to alter them, as they shall see fit."

By an Act of Congress of 24th April, 1820, 3 Stat. at L. 565, the laws of Michigan Territory in force were ordered to be printed under the direction of the Secretary of the State, and a competent number distributed to the people of said Territory.

In the volume of the laws so published by authority in that year, is a statute of limitations, which the Governor and judges certify to have been "adopted from the laws of the State of Vermont, as far as necessary and suitable to the circumstances of the Territory of Michigan."

The 8th section of this Act provides that "actions of debt of scire facias on judgment must be brought within eight years after the rendition of the judgment, etc."

The 10th section enacts that "this Act shall not extend to bar any infant, feme covert, person imprisoned, or beyond seas, or without the United States, or non compos mentis, etc."

On the 21st of April, 1825, the Legislature of the Territory, which had been now organized, appointed certain individuals to revise the laws of the Territory. They were required "to examine all the laws then in force, to revise, to consolidate and digest them, making such alterations or additions as they may deem expedient."

On the 27th of December, 1826, the Commissioners report to the Legislature the statutes as revised by them, stating that considerable alterations and some additions had been made by them. These laws received the sanction of the Legislature, and were published, by authority, in 1827. By this it appears that they adopted the Statute of Limitations, and the 10th section thereof, from the published Acts of 1820, and as stated above. Again, in 1833, "the laws of the Territory of Michigan were condensed, arranged, and passed by the fifth legislative council," and were again published under authority of the Legislature. The 10th section is again stated in the same words.

The law, as thus published, has been acknowledged by the people and the courts, and received a harmonious interpretation for thirty years. But it has lately been discovered that the text or original manuscript adopted by the Governor and judges in 1820, differs from the printed statutes, as published by authority, as to the words of this 10th section. It reads as follows: "Persons imprisoned or without the United States," having the words "beyond seas" erased; whereas the printed statutes retain the words "beyond seas," and add or interpolate the word "or."

It is no doubt true, as a general rule, that the mistake of a *transcriber or printer [*597 cannot change the law; and that when the statutes published by authority are found to differ from the original on file among the public archives, that the courts will receive the latter as containing the expressed will of the Legislature in preference to the former. Yet, as the people who are governed by the laws, and the courts who administer them, practically know the law only from the authorized publication of them, the propriety of recurring to ancient, altered and erased manuscripts, for the purpose of changing their construction after a lapse of thirty years, and after their construction has been long settled by the courts, and has entered as an element into the contracts and business of the citizens, may well be doubted. The reception and long acquiescence in them as printed and distributed by authority, by those who had it always in their power to alter or annul them, and did not, may justly be treated as a ratification of them in that form by the sovereign people. The maxim "communis error facit jus," though said to be dangerous in its application, "because it sets up a misconception of the law, for destruction of the law," might here find a safe and proper application, and make it one of the "same cases" in which it is said the law so favors the public good, that it will permit a common error to pass for right. Noy's Maxims, 37; 4 Inst. 240.

But we need not have recourse to any doubtful speculations in order to arrive at a satisfactory solution of this question. The laws reported by the Governor and judges were intended to be temporary, and to remain in force only till the Territory should be fully organized, as provided by the Ordinance. After such organization, "the Legislature is author-

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ted to alter them as they see fit." Accordingly, when the Territory of Michigan was so organized, by the election of such council, Legislature, or "General Assembly," they proceeded at once to have a code or digest of the laws reported for the future government of the Territory, and they adopt, reject, alter, and add to, the former laws "as they saw fit." After the promulgation of their code, that of the Governor and judges is entirely supplanted, and has no longer any force or effect whatever. Those who look for the rule of action which is to govern them, seek it no longer in the code which has been abrogated, and having effected its temporary purpose, has become obsolete and null, but in that which has the sanction of their own Legislature. The declaration of the legislative will is to be sought from documents originating with them, or published by their sanction. The original documents reported by the judges may be the best evidence of what statutes they intended temporarily to adopt, and what was their will and intention, but cannot be received as any evidence of the will and intention of a Legislature ordaining 598*] a new and permanent *system of laws under powers delegated to them by Congress and the people of the Territory. It may well be presumed, that the Legislature had no knowledge of this newly discovered erasure in the original, and supposed interpolation in the printed copy of the laws, reported by the judges in 1820; and that they adopted the law as they found it in the copy—printed by authority, and "distributed to the people of the Territory." They certainly had power to do so, and having done so, it would be folly to say that they intended to adopt some other words as the expression of their will, to be found only in a document reposing in the crypts of the secretary's office, and which they had probably never seen. But if we assume that they had seen this document, and were aware of its discrepancy from the published law, then their adoption of the latter would be conclusive. On either hypothesis, this original document can furnish no evidence of the intention or will of the Legislature. It must be remembered that there is no allegation or pretense, that the Acts published by authority of the Legislature differ from the original reported to them and adopted by them.

That is the only original, if there be any such in existence, by which the printed copy could be corrected or amended. But to correct or amend the declared will of the Legislature, as published under their authority, by the words of a document which did not emanate from them, which it is most probable they never saw, or if seen, they did not see fit to adopt where it differed from the published statutes, would be, in our opinion, judicial legislation and arbitrary assumption.

The only argument which has been urged, which could lead us to doubt the justness of this conclusion, is, that the Supreme Court of Michigan have, it is said, come to a different decision on this question. We entertain the highest respect for that learned court, and in any question affecting the construction of their own laws, where we entertained any doubt, would be glad to be relieved from doubt and responsibility by reposing on their decision. There are, it is true, many dicta to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the state courts on the construction of their own laws. But although this may be a correct, yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a state, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question *arising under state laws, we do not feel [*599 bound to surrender our convictions, on account of a contrary subsequent decision of a state court, as in the case of Rowan v. Runnels, 5 How. 139. When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also, when a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the mean time. Such decisions have not the character of established precedent declarative of the settled law of a state.

Parties who, by the Constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the court. The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different states, has its foundation in the supposition that, possibly, the state tribunal might not be impartial between their own citizens and foreigners.

The question presented in the present case is one in which the interests of citizens of other states come directly in conflict with those of the citizens of Michigan. The territorial law in question had been received and acted upon for thirty years, in the words of the published statute. It had received a settled construction by the courts of the United States as well as those of the State. It had entered as an element into the contracts and business of men. On a sudden, a manuscript statute differing from the known public law, is disinterred from the lumber room of obsolete documents; a new law is promulgated by judicial construction, which, by retroaction, destroys vested rights of property of citizens of other states, while it protects the citizens of Michigan from the payment of admitted debts.

We think that such a case peculiarly calls upon us not to surrender our clear convictions and unbiased judgment to the authority of the new State decision, and to render a judgment in favor of the plaintiff; which we do by affirming the judgment of the Circuit Court.

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Dissenting, Mr. Justice Campbell and Mr. Justice Daniel.

Mr. Justice Campbell, dissenting:

600*] *The decision of this case depends upon the following facts:

The territorial government of Michigan was organized under the Ordinance of 1787, for the government of the Northwest Territory. The Governor and judges of that Territory "were authorized to adopt and publish such of the laws of the States, criminal and civil, as may be necessary and best suited to the circumstances of the Territory, and report them to Congress from time to time; which laws shall remain in force until the organization of the General Assembly therein, unless disapproved by Congress. In 1820, the Statute of Limitations of Vermont was adopted by the council. That Statute contains an exception which reads, "persons imprisoned, or beyond seas, without the United States."

The copy filed by the judges, and now found in the archives of Michigan, reads, "persons imprisoned or without the United States," the words "beyond seas" being erased in that copy. It is apparent that the two statutes are to the same effect.

The copy, as it is now found in the archives of Michigan, was reported to Congress. The printed publication of the laws was as follows: "persons imprisoned or beyond seas, or without the United States." This error has been continued through the various publications of the laws of Michigan until the present time. But I have not been able to find that the Statute, as published, has ever received the sanction of the Legislative Department of the government. The Act, in the various reports and references of the Legislature, has been described as an Act of a particular title, or as included in the general term "of laws in force," without identifying it as the Act published in any of the compilations which have been circulated through the State. I have no evidence of any series of decisions of the courts of Michigan in this subject; none was produced on the argument; and the public opinion that may exist in Michigan as to what makes its statute law, must be a most fallible rule of judgment. The statute laws of a state exist in a permanent form, and are unchangeable, except by public authority, and are not to be ascertained from any popular impression on the subject. If any mischief has arisen from the vicious publications, it belongs to the legislative authority of the State to afford the indemnity. It is admitted that the Statute, as contained in the original roll, will bar the plaintiff's claim, and that he is within the exception contained in the printed laws. The question for the court is, what is the evidence on which it should depend to prove the existence of the statute of a state? The Act of Congress of the 26th of May, 1790, to prescribe the mode in which the public acts, records, and judicial proceedings in each state shall be authenticated, so as to take effect in every other state, provides "that *the [*601 Acts of the Legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto."

This court, in The United States v. Amedy, 11 Wheat. 392, said, "no other or further formality is required; and the seal itself is supposed to import perfect verity. In Patterson v. Winn, 5 Pet. 233, the court said of the exemplification of a grant, that it is admissible in evidence, as being record proof of as high nature as the original. It is a recognition, in the most solemn form, by the government itself, of the validity of its own grant, under its own seal, and imports absolute verity as matter of record." We have before us an exemplified copy of the Act of Michigan, and from that evidence we learn what is preserved in her archives as the Act adopted by the Governor and judges in 1820, and referred to in the subsequent reports and Acts of her Legislature as "An Act for the limitation of suits on penal statutes, criminal prosecutions, and actions at law, adopted May, 15, 1820."

The authorities are explicit to the effect that this evidence is the highest that can be offered of a statute. That the seal of the State, when properly affixed, is conclusive evidence of the existence of a statute, is the result of several state authorities. United States v. Johns, 4 Dall. 412; Henthorn v. Day, 1 Blackf. 157; State v. Carr, 5 N. H. 367. The Supreme Court of Michigan have had this subject under consideration, and after repeated arguments and great deliberation, have decided that this printed statute does not form a part of the laws of that State, but that the original roll must be received as the exact record of the legislative will. The question is so entirely of a domestic character, and belongs so particularly to the constituted authorities of the State to determine, that I cannot bring myself to oppose their conclusion on the subject.

In my opinion the judgment of the Circuit Court is erroneous, and should be reversed.

END OF VOLUME 59.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

DECEMBER TERM, 1856.

Vol. 60.

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REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT, DECEMBER TERM, 1856,

AND REPORTED HEREIN,

VOLUME 60,

AS HAVE ALSO BEEN REPORTED IN

19 HOWARD AND IN 1 MILLER'S DECISIONS.

19 How.	Title.	1 Miller.	Here in.
1	Prevost v. Gresaux,	521	572
6–7	" "		574
8–9	Morgan v. Curtenius,	524	576
9–12	Secombe, *Ex parte*,	525	565
12–16	" "		566
16	Shaffer v. Scudday,	526	592
18–20	" "		593
20–21	" "		594
22	Thomas v. Osborn,	532	534
25–27	" "		536
27–30	" "		537
30–32	" "		538
32–35	" "		539
35–37	" "		540
37–39	" "		541
39–42	" "		542
42–44	" "		543
44–47	" "		544
47–49	" "		545
49–51	" "		546
51–54	" "		547
54–56	" "		548
56	" "		549
56–59	Ure v. Coffman,	565	567
59–61	" "		568
61–63	" "		569
64	Stevens v. Gladding,	570	569
65–66	" "		570
66	Lathrop v. Judson,	571	553
68–69	" "		554
69–71	Moore v. Greene,	572	533
71–72	" "		534
72–73	Betts v. Lewis,	574	576
73	" "		577
73	U. S. v. LeBaron,	575	525
75–76	" "		526
76–79	" "		527
79	" "		528
79	U. S. v. Stewart,	580	528
79–82	Willot v. Sanford,	581	549
82	" "		550

19 How.	Title.	1 Miller.	Here in.
82	Vandewater v. Mills,	583	554
88–90	" "		556
90–92	" "		557
92	U. S. v. Brig Neptune,	586	531
94–95	" "		532
95–96	" "		533
96	Seymour v. McCormick,	589	567
105–106	" "		568
107	" "		569
108	Rogers v. Steamer St. Charles,	592	563
109–112	" "		564
112–113	" "		565
113–115	Coiron v. Millaudon,	596	575
115	" "		576
116	Long v. O'Fallon,	599	550
124	" "		552
124–125	" "		553
126	Baker v. Nachtrieb,	601	528
126–127	" "		529
127–129	" "		530
129–130	" "		531
130	Meegan v. Boyle,	606	577
143–145	" "		581
145–148	" "		582
148–150	" "		583
150	Post v. Jones,	612	618
156–158	" "		621
158–161	" "		622
161	" "		623
162	Dupont v. Vance,	619	584
165–168	" "		585
168–170	" "		586
170–172	" "		587
172–175	" "		588
175–177	" "		589
177–180	" "		590
180–182	" "		591
182	Steamer Virginia v. West,	626	554
182–183	" "		555
183	Brown v. Duchesne,	627	559

Digitized by Google

19 How.	Title.	1 Miller.	Here in.
193	Brown v. Duchesne,		598
193–196	" "		599
196–198	" "		600
198–199	" "		601
199–201	Mordecai v. Lindsay,	643	624
201–202	" "		625
202	Cousin v. Labatut,	645	601
206–209	" "		604
209–211	" "		605
211	Hartshorn v. Day,	650	605
217–218	" "		609
218–220	" "		610
220–222	" "		611
222–224	" "		612
224	Slater v. Emerson,	653	626
233–234	" "		630
234–236	" "		631
236–239	" "		632
239	" "		633
239	Schuchardt v. Babbidge,	664	625
240–241	" "		626
241	N. Y. & Va. S. S. Co. v. Calderwood,	666	612
245–246	" " "		613
246	" " "		614
246	Williams v. Hill,	667	570
249–250	" "		571
250–252	" "		572
252	Bell v. Hearne,	670	614
259–260	" "		616
260–262	" "		617
262–263	" "		618
263	Richardson v. City of Boston,	675	639
266–268	" "		641
268–271	" "		642
271	Hipp v. Babin,	679	633
276–277	" "		634
277–279	" "		635
279	" "		636
280–281	Wolfe v. Lewis,	682	643
282–283	" "		644
283–285	Beebe v. Russell,	686	668
285–287	" "		669
287	" "		670
288–289	Farrelly v. Woodfolk,	690	670
289	Babcock v. Wyman,	691	644
293–295	" "		646
295–297	" "		647
297–299	" "		648
299–302	" "		649
302–303	" "		650
303–304	Byers v. Surget,	702	670
304–306	" "		671
306–309	" "		672
309–311	" "		673
311–312	" "		674
312–314	Garrison v. Memphis Ins. Co.,	711	656
314–316	" "		657
316–318	" "		658
318	Com'l Mut. Ins. Co. v. Union Mut. Ins. Co.,	716	636
318–321	" "		637
321–323	" "		638
323	Field v. Seabury,	721	650
324–326	" "		651
326–328	" "		652
328–330	Field v. Seabury,		653
330–333	" "		654
333	" "		655
334–335	Bryan v. Forsyth,	731	674
335–337	" "		675
337–340	" "		676
340–342	" "		677
342	" "		678
342–343	Ballance v. Papin,	740	678
343	U. S. v. Peralta,	741	678
345–346	" "		679
346–348	" "		680
348–349	" "		681
349	McCullough v. Roots,	746	681
350–352	" "		682
352–354	" "		683
355	Walton v. Cotton,	751	658
355–357	" "		659
357–359	" "		660
359	Pratt v. Reed,	756	660
360–362	" "		661
362	" "		662
362	Tod v. Pratt,	758	662
363	U. S. v. Sutherland,	759	666
363–365	" "		667
365–366	" "		668
366–368	Fellows v. Blacksmith,	762	684
368–370	" "		685
370–373	" "		686
373–375	Roberts v. Cooper,	769	687
375	" "		688
376–377	McRea v. Branch Bank of Alabama,	772	686
377–378	" "		689
378–379	Mich. Central R. R. Co. v. Mich. So. R. R. Co.,	774	689
379–381	" "		689
382	Ballard v. Thomas,	778	689
382–383	" "		691
384–385	Platt v. Jerome,	780	622
385	" "		624
385–386	U. S. v. City Bank of Columbus,	781	622
386–388	" "		623
388–390	Burke v. Gaines,	784	655
390	Bulkley v. Honold,	786	663
391–392	" "		665
393	Sturgis v. Honold,		666
393	Dred Scott v. Sandford,	1	691
399–400	" "		698
400–403	" "		699
403–405	" "		700
405–407	" "		701
407–410	" "		702
410–412	" "		703
412–415	" "		704
415–417	" "		705
417–419	" "		706
419–422	" "		707
422–424	" "		708
424–427	" "		709
427–429	" "		710
429–431	" "		711
431–434	" "		712
434–436	" "		713
436–439	" "		714
439–441	" "		715
441–444	" "		716

Digitized by Google

19 How.	Title.	2 Miller.	Here in.	19 How.	Title.	2 Miller.	Here in.
444–446	Dred Scott v. Sandford,		717	540–542	Dred Scott v. Sandford,		757
446–448	" "		718	542–545	" "		758
448–451	" "		719	545–547	" "		759
451–453	" "		720	547–549	" "		760
453–456	" "		721	549–552	" "		761
456–458	" "		722	552–554	" "		762
458–460	" "		723	554–557	" "		763
460–463	" "		724	557–559	" "		764
463–465	" "		725	559–562	" "		765
465–468	" "		726	562–564	" "		766
468–470	" "		727	564–566	" "		767
470–472	" "		728	566–569	" "		768
472–475	" "		729	569–571	" "		769
475–477	" "		730	571–574	" "		770
477–480	" "		731	574–576	" "		771
480–482	" "		732	576–578	" "		772
482–485	" "		733	578–581	" "		773
485–487	" "		734	581–583	" "		774
487–489	" "		735	583–586	" "		775
489–492	" "		736	586–588	" "		776
492–494	" "		737	588–591	" "		777
494–497	" "		738	591–593	" "		778
497–499	" "		739	593–595	" "		779
499–501	" "		740	595–598	" "		780
501–504	" "		741	598–600	" "		781
504–506	" "		742	600–603	" "		782
506–509	" "		743	603–605	" "		783
509–511	" "		744	605–607	" "		784
511–513	" "		745	607–610	" "		785
513–516	" "		746	610–612	" "		786
516–518	" "		747	612–615	" "		787
518–521	" "		748	615–617	" "		788
521–523	" "		749	617–620	" "		789
523–525	" "		750	620–622	" "		790
525–528	" "		751	622–624	" "		791
528–530	" "		752	624–627	" "		792
530–533	" "		753	627–629	" "		793
533–535	" "		754	629–632	" "		794
535–537	" "		755	632–633	" "		795
537–540	" "		756				

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

DECEMBER TERM, 1856.

THE UNITED STATES, Plff. in Er.,
v.
CHARLES LE BARON.
(See S. C. 19 How. 73–79.)

Delivery of deed presumed made at its date—this presumption may be removed—when delivered on subsequent day, deed speaks on such day—postmaster's bond speaks from day accepted—construction of bond—evidence to contradict bond inadmissible—when postmaster's appointment is complete—transmission to him not essential—conditions.

The delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day.

When a delivery on some subsequent day is shown, the deed speaks on that subsequent day, and not on the day of its date.

Postmaster's bond speaks only from the time when it reaches the Postmaster-General, and is accepted by him.

Until that time it is only an offer, or proposal of an obligation, which became complete and effectual by acceptance.

At the time the bond in this case was accepted by the Postmaster-General, Beers, who had been previously appointed, had been nominated and confirmed as deputy-postmaster; he had given the bond, and had taken the oath of office, and a certificate thereof had been filed. Upon this state of facts, his holding under the first appointment had been superseded by his holding under the second appointment.

When the bond says, "is now postmaster," it refers to such holding under the second appointment, and is a security for the faithful discharge of his duties under the second appointment.

When it has thus been ascertained that he then held under the second appointment, evidence to show that the bond was not intended to apply to that appointment, would directly contradict the bond.

When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete.

Congress may provide that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. When the person has performed such required conditions, his title to enter on the possession of the office is complete.

The transmission of the commission to the officer is not essential to his investiture of the office.

When the commission of a postmaster has been signed and sealed, and placed in the hands of the Postmaster-General to be transmitted to the officer, so far as the execution is concerned, it is a completed act.

The subsequent death of the President, by whom nothing remained to be done, can have no effect on that completed act.

To the benefit of that complete action the officer is entitled, when he fulfills the conditions on his part, imposed by law.

(Mr. Justice CAMPBELL, having been of counsel, did not sit in this cause.)

Argued Dec. 3, 1856. Decided Dec. 16, 1856.

IN ERROR to the Circuit Court of the United States for the Southern District of Alabama.

The action was brought in the Circuit Court of the United States for the Southern District of Alabama, upon the official bond of O. S. Beers, as postmaster at Mobile, to recover the penalty alleged to be forfeited by reason of defalcation on the part of said Beers.

The court below charged the jury, that the recital in the bond sued upon, "whereas Oliver S. Beers is deputy-postmaster at Mobile," showed that the bond was not designed to apply to a term of office not then commenced, and that he was not in office under the second appointment, and therefore they must find for the defendant. The plaintiffs excepted. The court refused to charge the jury that it was for them to determine to which term of office the said bond related.

A further statement appears in the opinion of the court.

Mr. C. Cushing, Atty-Gen., for the United States:

It was a question of fact for the jury to determine to which appointment the bond was intended to apply.

Jewell v. Jewell, 1 How. 219; Bank v. Guttschlick, 14 Pet. 19.

The plaintiffs were entitled to explain by parol evidence, to which appointment the bond in question was intended to apply.

Bradley v. Washington, etc., Co. 13 Pet. 89; Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326.

The term of office under the second appointment commenced at the date of the giving the bond and taking the oath.

Bowerbank v. Morris, Wall. C. C. 118–123.

An office may be said to commence when the party appointed is authorized to act and perform its duties. By the regulations of the department, a postmaster is authorized to act and is entitled to his compensation, when he has taken the oath of office and executed the bond with sureties.

Messrs. George N. Stewart and E. S. Dargan, for the appellee:

NOTE.—Presumption as to time of delivery of deed.—see note, 12 L.R.A. 176.

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The effort of the plaintiff is to show by parol proof that the bond did not apply to the subject in esse, that perfect office then in being, but to a subject matter not then in existence, to a term of office not then begun.

To do this, would be to make the bond speak from its approval or acceptance, and not from its date. This the law will not tolerate.

Baker v. Dewey, 1 Barn. & C. 704; Williams v. Jones, 5 Barn. & C. 108; Lightbody v. North Amer. Ins. Co. 23 Wend. 24; Rickman v. Carstairs, 5 Barn. & Ad. 651; Bronson v. Fitzhugh, 1 Hill. 185.

The new appointment could take effect only from the time the bond and oath of office were received and filed in the Postoffice Department.

5 U. S. Stat. 103; 5 U. S. Stat. 87.

If the new appointment had been of some third party, the old appointment would have terminated only when notice of the new appointment had been given to the incumbent.

Bowerbank v. Morris, Wall C. C. 118; People v. Carrique, 2 Hill, 93.

The same principle applies here.

U. S. v. Irving, 1 How. 250; U. S. v. Kirkpatrick, 9 Wheat. 734; U. S. v. Eckford, 1 How. 259.

The conclusion is, that on July 1st, 1850, there was an office then existing, perfect and complete, of which Beers was the incumbent. To this the bond applied. It cannot be made to apply to a term of office not then existing, and which was to commence in the future, and which possibly Beers might never fill, and for which there is good reason to believe an entirely different bond was executed.

Mr. Justice Curtis delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Southern District of Alabama, in an action of debt, founded on an official bond of Oliver S. Beers, as deputy postmaster at Mobile, the defendant being one of his sureties.

It appeared, on the trial in the Circuit Court, that Beers was appointed to that office by the President of the United States, during the recess of the Senate, and received a commission, bearing date in April, 1849, to continue in force until the end of the next session of the Senate, which terminated on the 30th day of September, 1850.

It also appeared, that in April, 1850, Beers was nominated by the President to the Senate, as deputy-postmaster at Mobile, and the nomination having been duly confirmed, a commission was made out and signed by President Taylor, bearing date on the 22d day of April, 1850; but it had not been transmitted to Beers on the 1st day of July, 1850, when the bond declared on bears date. Beers took charge of the postoffice at Mobile before his second appointment, and continued to act, without intermission, until he was removed from office in February, 1853. The default, assigned as a breach of the bond, was admitted to have occurred under his second appointment; and the principal question upon this writ of error is, whether the bond declared on secures the faithful performance of the duties of the office under the first or under the second appointment.

The condition of the bond recites: "Whereas the said Oliver S. Beers is deputy-postmaster at Mobile aforesaid," etc.

The first inquiry is, to what date is this recital to be referred. The District Judge, who presided at the trial, ruled that it referred to the office held by Beers when the bond was signed. The delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day; and when a delivery on some subsequent day is shown, the deed speaks on that subsequent day, and not on the day of its date.

In Clayton's case, 5 Co. 1, a lease bearing date on the 26th of May, to hold for three years "from henceforth," was *delivered on the [*76 20th of June. It was resolved, that "from henceforth" should be accounted from the day of delivery of the indentures, and not from the day of their date; for the words of an indenture are not of any effect until delivery—traditio loqui facit chartam.

So in Oshey v. Hicks, Cro. Jac. 263, by a charter-party, under seal, bearing date on the 8th of September, it was agreed that the defendant should pay for a moiety of the corn which then was, or afterwards should be, laden on board a certain vessel. The defendant pleaded that the deed was not delivered until the 28th of October, and that on and after that day there was no corn on board; and on demurrer, it was held a good plea, because the word "then" was to be referred to the time of the delivery of the deed, and not to its date.

And the modern case of Steele v. Mart, 4 B. & C. 272, is to the same point. A lease purported on its face to have been made on the 25th of March, 1783, habendum from the 25th of March now last past. It was proved that the delivery was made after the day of the date, and the Court of King's Bench held that the word "now" referred to the time of delivery, and not to the date of the indenture.

At the trial in the Circuit Court, it appeared that on the day after the date of the bond, Beers, in obedience to instructions from the Postmaster-General, deposited it, together with a certificate of his oath of office under his last appointment, in the mail, addressed to the Postmaster-General at Washington.

In Broome v. The United States, 15 How. 143, it was held that a collector's bond might be deemed to be delivered when it was put in a course of transmission to the Comptroller of the Treasury, whose duty it is to examine and approve or reject such bonds. But this decision proceeded upon the ground that the Act of Congress requiring these bonds, and their approval, had allowed the collector to exercise his office for three months without a bond; and that consequently the approval and delivery were not necessarily simultaneous acts, nor need the approval precede the delivery; and the distinction between bonds of collectors and those of postmasters is there adverted to. The former may take and hold office for three months without a bond. The latter must give bond, with approved security, on their appointment; and there is no time allowed them, after entering on their offices, to comply with this requirement. The bond must, therefore, be accepted by the Postmaster-General, as sufficient in point of amount and security, before it can have any effect as a contract. Other-

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wise the postmaster might enter on the office 77*] merely on giving *a bond, which, on its presentation, the Postmaster-General might reject as insufficient.

In other words, the person appointed might act without any operative bond, which, we think, was not intended by Congress. It is like the case of Bruce et al. v. The State of Maryland, 11 Gill and John. 382, where it was held that the bond of a sheriff took effect only when approved by the County Court; because it was only on such approval that the sheriff was authorized to act.

The purpose of the obligee was to become security for one legally authorized to exercise the office; not for one who enters on it unlawfully, because he failed to comply with the requirement to furnish an approved bond; and this purpose can be accomplished only by holding that the appointee cannot act, and the bond cannot take effect, until it is approved. Our opinion is, therefore, that this bond speaks only from the time when it reached the Postmaster-General, and was accepted by him; that until that time it was only an offer, or proposal of an obligation, which became complete and effectual by acceptance; and that, unlike the case of a collector's bond, which is not a condition precedent to his taking office, and which may be intended to have a retrospective operation, the bond of a postmaster, given on his appointment, cannot be intended to relate back to any earlier date than the time of its acceptance, because it is only after its acceptance that there can be any such holding of the office as the bond was meant to apply to.

Now, at the time when this bond was accepted by the Postmaster-General, Beers had been nominated and confirmed as deputy-postmaster; he had given bond in such a penalty, and with such security, as was satisfactory to the Postmaster-General; he had taken the oath of office, and there was evidence that a certificate thereof had been filed in the general post-office.

Upon this state of facts, we are of opinion that at that time his holding under the first appointment had been superseded by his holding under the second appointment; and when the bonds says "is now postmaster," it refers to such holding under the second appointment, and is a security for the faithful discharge of his duties under the second appointment.

It was suggested at the argument, that this bond was not, in point of fact, taken in reference to the new appointment, but was a new bond, called for by the Postmaster-General under the authority conferred on him by the Act of July 2, 1836. 5 Stat. at L. 88, sec. 37.

To this there are several answers. No such ground appears to have been taken at the trial, 78*] and the rulings of the court, *which were excepted to by the plaintiffs in error, precluded any such inquiry. These rulings were, that the holding to which the bond referred was a holding on the first day of July, and that Beers was in office on that day under the first appointment, and not under the second. This put an end to the claim, and rendered a verdict for the defendant inevitable.

But if this were otherwise, parol or extraneous evidence that the bond was not intended to apply to the holding under the second appointment, because it was a new bond taken to supersede an old one, would open to the objections which the defendants in error have so strenuously urged.

There is no ambiguity in the bond. It refers to a holding at some particular date. The law determines that date to be the time when the bond took effect. Nothing remains but to determine upon the facts; under which appointment Beers then held; this also the law settles, and when it has thus been ascertained that he then held under the second appointment, evidence to show that the bond was not intended to apply to that appointment would directly contradict the bond, for it would show it was not intended to apply to the appointment which Beers then held, while the bond declares it was so intended. The defendant in error further insists that Beers was not in office, under the second appointment, at the time this bond took effect, because the commission sent to him was signed by President Taylor, and was not transmitted until after his death.

When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete.

The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody. It is but evidence of those acts of appointment and qualification which constitute his title, and which may be proved by other evidence, *where the rule of law requiring the best [*79 evidence does not prevent.

It follows from the premises, that when the commission of a postmaster has been signed and sealed, and placed in the hands of the Postmaster-General to be transmitted to the officer, so far as the execution is concerned, it is a completed act. The officer has then been commissioned by the President pursuant to the Constitution; and the subsequent death of the President, by whom nothing remained to be done, can have no effect on that completed act. It is of no importance that the person commissioned must give a bond and take an oath, before he possesses the office under the commission; nor that it is the duty of the Postmaster-General to transmit the commission to the officer when he shall have done so. These are acts of third persons. The President has previously acted to the full extent which he is required or enabled by the Constitution and laws to act in appointing and commissioning the officer; and to the benefit of that complete action the officer is

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entitled, when he fulfills the conditions on his part, imposed by law.

We are of opinion, therefore, that Beers was duly commissioned under his second appointment.

For these reasons, we hold the judgment of the Circuit Court to have been erroneous, and it must be reversed, and the cause remanded, with directions to award a venire facias de novo.

THE UNITED STATES, Plffs. in Err.,
v.
GEORGE N. STEWART.

(See S. C. 19 How. 79.)

This case is governed by the preceding case, and is decided in conformity with that.

(Mr. Justice CAMPBELL, having been of counsel, did not sit in this case.)

Argued Dec. 3, 1856. Decided Dec. 16, 1856.

IN ERROR to the Circuit Court of the United States for the Southern District of Alabama.

Mr. C. Cushing, Atty-Gen., for plaintiffs in error.

Messrs. George N. Stewart and E. S. Dargan for defendant in error.

Mr. Justice Curtis delivered the opinion of the court:

The opinion of the court in the preceding case determines this, and the judgment of the Circuit Court must be reversed, in conformity with that opinion.

126*] *ROMELIUS L. BAKER et al., Appts.,
v.
JOSHUA NACHTRIEB.

(See S. C. 19 How. 126-130.)

Voluntary society, withdrawal therefrom—contract of withdrawal cannot be varied by parol evidence—requisites of bill.

When a member withdraws from a voluntary society and executes a writing stating his withdrawal, containing a receipt for moneys from the leader, agreeably to contract, such writing must be considered as the contract of dissolution between the plaintiff and the society, of their mutual obligations and engagements to each other.

No evidence of prior declarations or conduct is admissible to contradict or vary it.

To enable plaintiff to show that the rule of the leader was austere, oppressive or tyrannical, etc., it was necessary that his bill should have been so framed as to exhibit such aspects of the internal arrangements and economy of the association.

Argued Dec. 5, 1856. Decided Dec. 16, 1856.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The bill in this case was filed by the appellee in the Circuit Court of the United States for the Western District of Pennsylvania, against the trustees and elders of the "Harmony Society," praying for an accounting of the property and effects of said Society, and the award to him of his share in the same. A decree was rendered in the court below in favor of the complainant, for $3,890 and costs; whereupon this appeal was taken.

A further statement of the case appears in the opinion of the court.

Messrs. A. W. Loomis and Stanbury, for the appellants:

The execution by the complainant of the receipt of June 18, 1846, constituted a complete defense to the complainant's bill under art. 3, of the agreement of Oct. 31, 1836, which is as follows:

"Should any individual withdraw from the society or depart this life, neither he in the one case, nor his representatives in the other, shall be entitled to demand an account of said contributions, whether in land, goods, money or labor, or to claim anything from the society as matter of right, but it shall be left altogether to the discretion of the superintendent to decide whether any, and if any, what allowance shall be made to such member or his representatives, as a donation."

James v. McKernon, 6 Johns. 558; Patton v. Taylor, 7 How. 159; Woodcock v. Bennett, 1 Cow. 734; Harrison v. Nixon, 9 Pet. 503; Boone v. Chiles, 10 Pet. 208; Vattier v. Hinde, 7 Pet. 274; Very v. Levy, 13 How. 361; Crocket v. Lee, 7 Wheat. 525; 14 How. 602.

It is manifest from complainant's bill, that all his rights sprang from the articles of agreement. He is not, therefore, entitled to compensation for his labor. This is also manifest from the provisions of the agreement. Were the material allegations contained in the com-

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NOTE.—Receipts, their effect and conclusiveness. The mere acknowledgment of payment is not treated in law as binding or conclusive in any high degree. So far as a simple acknowledgment of payment or delivery is concerned, it is presumptive evidence only. 1 Pet. C. C. 181; 1 Rich. 32; 1 Harr. 5; 3 Harr. 317; 4 Harr. 206; Southwick v. Hayden, 7 Cow. 334; McCrea v. Purmort, 16 Wend. 460; 16 Me. 475; 5 Ark. 61; 11 Mass. 3, 363; Weed v. Snow, 3 McLean, 265; 6 B. Mon. 199. Murray v. Gouverneur, 2 Johns. Cas. 438; Skaife v. Jackson, 3 Barn. & Cres. 421; 8 Gill. 179; 3 Jones, 501.

It is, in general, open to explanation, and is an exception to the rule that parol evidence is inadmissible to contradict or vary a written instrument. House v. Low, 2 Johns. 378; Johnson v. Weed, 9 Johns. 310; 6 Ala. 811; 8 Ala. N. S. 59; 4 Vt. 308; 21 Vt. 222; Weed v. Snow, 3 McLean, 265; Laurence v. Schuylkill Nav. Co. 4 McLean, 502; Thomas v. Austin, 4 Barb. 265; 5 J. J. Marsh. 79; 5 Mich. 171; Beebee v. Moore, 3 McLean, 387; Tobey v. Barber, 5 Johns. 68; Brooks v. White, 2 Metc. 283; Lingan v. Henderson, 1 Bland, 249; Harden v. Gordon, 2 Mason, 541; Rollins v. Dyer, 4 Shefley, 475; Ensign v. Webster, 1 Johns. Cas. 145; Keller v. Lieb, 1 Pa. 220; Dutton v. Tilden, 1 Harr. 46; Walrath v. Norton, 6 Gilm. 437; Driker v. Hudspeth, 16 Ala. 348; Cole v. Taylor, 2 Zab. 59.

The circumstances under which it was given, a fraud, mistake, or that no money was, in fact, paid, or that it was rescinded by agreement of the parties, may be shown. Putnam v. Lee, 8 Johns. 389; Wright, 764; 4 Harr. & McH. 219; Egleston v. Nickerbacker, 6 Barb. 458; 3 Dana, 427; 2 Strob. 390; Davis v. Allen, 3 N. Y. 168; 10 Vt. 96; but see 1 J. J. Marsh. 583; Van Nest v. Talmadge, 17 Abb. 99.

When a receipt is "in full," "in full of all accounts," or of "all demands," it is evidence of a compromise and mutual settlement of the rights of the parties. The law infers, from such acknowledgment, an adjustment of the amount due, after consideration of the claims of each party, and a payment of the specified sum, as a final satisfaction. 10 Vt. 491; 2 Dev. 247; Wright, 764; 2 N. H. 85.

In general, a receipt in full is conclusive when given with a knowledge of the circumstances, and when the party giving it cannot complain of any misapprehension as to the compromise he was making, or of any fraud. 5 Vt. 520; Bristow v.

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plainant's bill susceptible of satisfactory proof, the appropriate remedy would be by petition for, and the rendering of, a decree of restoration to full enjoyment of his rights as a member of the Society.

Commonwealth v. St. Patrick Benevolent Society, 2 Binn. 441.

Mr. Edwin M. Stanton, for appellees:

The power to make by-laws, etc., vested in the society, was to be exercised reasonably, in accordance with the happiness of the members and the intent of the association.

Angell & Ames on Corp. 288; 1 Ld. Raym. 113; 5 Bing. 15 E. C. L. 371.

A member of a corporation, or quasi corporation, cannot be expelled for any threat or hostile intention against the association or its members, not carried into effect or action; and even then only on open trial and defense.

Angell & Ames on Corp. 351, 360; Bagg's case, 11 Coke, 98; 4 Com. Dig. Franchise, F. 33, p. 502.

The payment of $200 was made, not on the footing of any just account rendered, or from settlement made; the receipt was obtained by the hardship and oppression of his condition, and in undue advantage of his necessities, and not in the exercise of full knowledge and free will.

1 Story, Eq. sec. 251; Hill on Trustees, 156; Chesterfield v. Janssen, 2 Ves. Sr. 155.

Mr. Justice Campbell delivered the opinion of the court:

The appellee, who describes himself as a member in the common and joint stock association for mutual benefit and advantage, and for the mutual acquisition and enjoyment of property, called the "Harmony Society," filed a bill in the Circuit Court against the appellants as the trustees and managers of its business and estate. The object of the bill is to obtain for the plaintiff a decree for the amount of the share to which he is entitled in the property of the Society, or compensation for his labor and service during the time he was a member.

In 1819, he became associated with George Rapp and others, in the Harmony Society in Indiana, and remained with them there, or at Economy, in Beaver County, Pennsylvania, till 1846. He devoted his time, skill, attention and care during that period to the increase of the wealth and the promotion of the interest of the Society.

*These facts are admitted in the plead- [*127
ings of either party.

The bill avers, that in 1846, the plaintiff being then 48 years old, and worn out with years and labor for said Association, was wrongfully and unjustly excluded from it, and deprived of any share in its property, benefits or advantages, by the combination and covin of George Rapp and his associates; that at the time of his exclusion he was entitled to a large sum of money, which those persons unjustly and illegally appropriated to their own use; that George Rapp was the leader and trustee of the Association, invested with the title to its property; and that, since his death, the defendants have acquired the control and management of its business and affairs and the possession of its effects. The plaintiff calls for the production of the Articles of Association, which from time to time have regulated this Society, and prays for an account and distribution of its property, or a compensation for his labor.

The defendants produce a series of articles, by which the Association has been governed since its organization in 1805.

They admit that from small beginnings the Society have become independent in their circumstances, being the owners of lands ample for the supply of their subsistence, warm and comfortable houses for the members and en-

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Eastman, 1 Esp. 173; Alner v. George, 1 Camp. 392; 2 Strob. 203. It is a waiver of interest, and prohibits the enforcement of any further demand. Cutler v. Mayer, 12 Week. Dig. 296.

Receipts of this character are not wholly exempt from explanation. Fraud or misrepresentation may be proved, and so may any such mistake as enters into and vitiates the compromise of the demand admitted. Brayt. 75; Houston v. Shindler, 11 Babb. 36; Jason v. Capron, 64 Barb. 598; Alner v. George, 1 Camp. 394, n.; Coxe, 48; 2 Brev. 223; 4 Harr. & McH. 219; Thomas v. Austin, 4 Barb. 265; 2 Harr. 392; Riley v. White, 6 Leg. Obs. 272; Dibdin v. Morris, 2 C. & P. 44; McDougal v. Cooper, 31 N. Y. 498; or when, there being no dispute as to the amount due, less than the full amount is paid, the receipt, though in full, may be explained or contradicted. Foersh v. Blackwell, 14 Barb. 607; Thomas v. McDaniel, 14 Johns. 185; Storey v. Rourke, 4 E. D. Smith, 524. A receipt which embodies a contract is not open to explanation or contradiction by parol evidence, like a simple receipt. 4 Gray, 186; 5 Ind. 109; Kellogg v. Richards, 14 Wend. 116; 12 Pick. 40; 12 Pick. 562; 15 Pick. 347; Coon v. Knapp, 4 Seld. 402.

A receipt for rent is presumptive evidence that all rent accruing previous to that receipted for, had been paid. Decker v. Livingston, 15 Johns. 479.

Parol evidence is admissible to show for what purpose a receipt was given, to what fund it referred, and to inquire into the consideration. Colburn v. Lansing, 46 Barb. 37.

Receipts upon the faith of which others have acted, cannot be gainsaid. Union B'k v. Sollee, 2 Strob. 390, 407.

A receipt of payment for a bill of goods unexplained or uncontradicted, is conclusive against a recovery for the goods. Lambert v. Seely, 17 How. Pr. 432.

A party is not precluded by a receipt in full of all demands up to a certain date, from showing that there were demands existing at the date of such receipt, which were unsettled and unpaid, although not then due. Churchill v. Bradley, 43 N. Y. Supr. Ct. 170.

A receipt embodied in a promissory note, given upon a settlement between the parties, is open to explanation by parol, as to what was settled, the same as if it were in a separate instrument. Smith v. Holland, 61 N. Y. 635.

A receipt unexplained is conclusive. Moore v. The Fashion, Newb. 49; S. C. 8 Law Rep. N. S. 50; Moore v. Newbury, 6 McLean, 472.

In Conn., a receipt in full, is, in the absence of fraud, mistake, accident or surprise, a good defense in bar. It will operate like a discharge to defeat any further claim by the party giving it. Beam v. Barnum, 21 Conn. 200; Fuller v. Crittenden, 9 Conn. 401; Tucker v. Baldwin, 13 Conn. 137; Hurd v. Blackman, 19 Conn. 136.

A receipt given by an authorized agent is conclusive upon his principal for the amount actually received, but no further. Dyer v. Girard, 2 Root, 55; see Pate v. U. S. 4 Ct. of Cl. 523; see, also, as to effect of receipts in particular cases. U. S. v. Gear, 3 McLean, 571; 7 Op. Atty-Gen. 40; Michoud v. Girod, 4 How. 503; Butler v. The Arrow, Newb. 59; S. C. 6 McLean, 470; Jackson v. Hale, 14 How. 525; The May Paulina, 1 Sprague, 45; Leak v. Isaacson, Abb. Adm. 41; Jackson v. White, 1 Pet. Adm. 179; The Neptune, 1 Pet. Adm. 180; The Rajah, 1 Sprague, 199; 5 C. 5, Law Rep. N. S. 208; Bntes v. Seabury, 1 Sprague, 433; S. C. 11 Law Rep. N. S. 666; Payne v. Allen, 1 Sprague, 304; Whitney v. Eager, Crabbe, 422; Piehl v. Balchen, Olcott, 24.

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gines and machinery to diminish and cheapen their labors. They affirm that the plaintiff participated in all the individual, social and religious benefits which were enjoyed by his fellows, under their contract, until he became possessed by a spirit of discontent and disaffection, a short time before his membership terminated. They deny that the plaintiff was wrongfully excluded from the Association, or deprived of a share or participation in the property and effects, by the combination or covin of George Rapp and his associates; but assert, that voluntarily, and of his own accord, he separated himself from the Society. They deny that he had a title to any compensation for labor and service while he was a member, other than that which was expended for his support, maintenance and instruction, and that which he derived during the time from the spiritual and social advantages he enjoyed. To support this averment, they epitomize the history of the Harmony Society, and the agreements which, from time to time, have been the basis of its organization.

The Society was composed at first of Germans, who emigrated to the United States in 1805, under the leadership of George Rapp. The members were associated and combined by the common belief that the government of the patriarchal age, united to the community of property, adopted in the days of the Apostles, would conduce to promote their temporal and 128*] *eternal happiness. The founders of the Society surrendered up their property to the Association for the common benefit. The Society was settled originally in Pennsylvania, was removed in 1814 and 1815 to Indiana, and again in 1825 to Economy, in Pennsylvania.

The organic law of the Society, in regard to their property, is contained in sections of the Articles of Association, adopted in 1827 by the associates, of whom the plaintiff was one. They are as follows: "All the property of the Society, real, personal and mixed, in law or equity, and howsoever contributed and acquired, shall be deemed, now and forever, joint and indivisible stock; each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money or labor, and the same rule shall apply to all future contributions whatever they may be.

"Should any individual withdraw from the Society, or depart this life, neither he, in the one case, nor his representatives in the latter, shall be entitled to demand an account of said contributions, whether in land, goods, money or labor; or to claim anything from the Society as matter of right. But it shall be left altogether to the discretion of the Superintendent to decide whether any, and, if any, what allowance shall be made to such member, or his representatives, as a donation."

The defendants, admitting, as we have seen, that the plaintiff, until 1846, was a contented member of the Association, answer and say, that during that year he became disaffected; used violent threats against the associates; made repeated declarations of his intentions to leave the Society, and in that year fulfilled his design by a voluntary withdrawal and separation from the Society, receiving at the same *time from* George Rapp $200 as a donation. They exhibit as a part of the answer, a writing, signed by the plaintiff, to the following effect:

"To-day I have withdrawn myself from the Harmony Society, and ceased to be a member thereof; I have also received of George Rapp two hundred dollars as a donation, agreeably to contract. Joshua Nachtrieb.

Economy, June 18, 1846."

This statement of the pleadings shows that no issue was made in them upon the merit of the doctrines, social or religious, which form the basis of this Association; nor any question in reference to the religious instruction and ministration, or the domestic economy or physical discipline which their leader and the other managers have adopted and enforced. *Nor do they suggest any inquiry into [*129 the condition of the members, and whether they have experienced hardship, oppression, or undue mortification, from the ambition, avarice, or fanaticism of their guides and administrators.

The bill depends on the averments, that the plaintiff approved the constitution of the Society; submitted to its government; obeyed its regulations, and prized the advantage of being a member. The burden of his complaint is, that he was wrongfully, and without any fault or consent on his part, deprived of his station through the combination of the leader and his assistants. And the defendants concede the character the plaintiff claims for himself; they concede that the plaintiff was an approved and blameless member of the Association, and was entitled to whatever its constitution and order provided for the temporal good or the eternal felicity of the members, and assert that he enjoyed them until he became disaffected and repining, and finally surrendered to a spirit of discontent, which moved him to abandon his condition and privileges. As an evidence of this, they produce a writing, signed by him, in which he acknowledges a voluntary secession from the Society, and claims that the case has arisen to authorize him to make an appeal to the bounty of the Superintendent, and that the Superintendent has answered that appeal by a donation. The value of this writing is now to be considered. The power of the Superintendent to subtract from the otherwise "joint and indivisible stock" of the Society a portion for the individual use of a seceding member, depends upon the concession that the member has withdrawn voluntarily. He cannot supply one who is the victim of covin or combination. The evidence shows that the mind of the plaintiff, in June, 1846, was disquieted in consequence of his connection with the Association, and that he contemplated a change in his condition; that he made inquiries upon the expediency of a removal from Economy, and made some preparations for his departure; that the leader of the Society, suspecting his discontent, and discovering some deviation by him from the rules of the Society, rebuked him with harshness, and menaced him with a sentence of expulsion. Some of the witnesses testify to such a sentence, while the testimony of others reduces the expressions to an admonition and menace. But two days after the occurrence of the last of these scenes, and before any removal had taken place, the writing in the record was executed by him, em-

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bodying his decision to leave the Society, and to accept the bounty the constitution permitted the Superintendent to bestow. This writing would have much probative force, if we were simply to treat it as an admission of the 130*] statements it contains, when *considered in connection with other evidence in the record. But, we think, this writing is something more than an admission, and stands in a different light from an ordinary receipt. The writing must be treated as the contract of dissolution, between the plaintiff and the Society, of their mutual obligations and engagements to each other. No evidence of prior declarations or antecedent conduct is admissible to contradict or to vary it.

It was prepared to preserve the remembrance of what the parties had prescribed to themselves to do, and expresses their intention in their own language; that such was its object, is corroborated by the fact that for three years there is no evidence of a contrary sentiment. Treating this writing as an instrument of evidence of this class, it is clear that the bill has not made a case in which its validity can be impeached. To enable the plaintiff to show that the rule of the leader (Rapp), instead of being patriarchal, was austere, oppressive, or tyrannical, his discipline vexatious and cruel; his instructions fanatical, and, upon occasions, impious; his system repugnant to public order, and the domestic happiness of its members; his management of their revenues and estate rapacious, selfish, or dishonest; and that the condition of his subjects was servile, ignorant and degraded, so that none of them were responsible for their contracts or engagements to him, from a defect of capacity and freedom, as has been attempted by him in the testimony collected in this cause, it was a necessary prerequisite that his bill should have been so framed as to exhibit such aspects of the internal arrangements and social and religious economy of the Association. This was not done; and for this cause the evidence cannot be considered. The authorities cited from the decisions of this court are decisive. Very v. Levy, 13 How. 345, 361; Patton v. Taylor, 7 How. 157; Crockett v. Lee, 7 Wheat. 525.

Decree reversed—Bill dismissed.

THE UNITED STATES, Appellant,
v.
THE BRIG "NEUREA," Her Tackle, etc., William Kohler, Claimant.

(See S. C. 19 How. 92-96.)

Libel in words of Act creating offense, sufficient.

If a libel sets forth the offense in the words of the Statute which creates it, with sufficient certainty as to the time and place of its commission, it is all that is necessary to put the claimant on his defense.

Other particulars are matters of evidence which need not be averred.

Argued Dec. 2, 1856. Decided Dec. 17, 1856.

APPEAL from the District Court of the United States for the Northern District of California.

On September 2, 1854, the following libel was filed in the District Court of the United States for the Northern District of California, by S. W. Inge, Esq., U. S. Dist. Atty., in behalf of the U. S., against the brig Neurea, her tackle, etc.

The libel of Samuel W. Inge, Attorney of the United States for the Northern District of California, who prosecutes on behalf of the said United States against the brig Neurea, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as follows:

1. That Richard P. Hammond, Esq., Collector of the Customs for the District of San Francisco, heretofore, to wit: on the thirty-first day of August, in the year of our Lord eighteen hundred and fifty four, at the port of San Francisco, and within the Northern District of California, on waters that are navigable from the sea by vessels of ten or more tons burthen, seized as forfeited to the use of the said United States, the said brig Neurea, being the property of some person or persons to the said attorney unknown.

2. That one Kohler, master of the said brig Neurea, which is a vessel owned wholly or in part by a subject or subjects of the kingdom of Sweden, did on the first day of June, in the year of our Lord eighteen hundred and fifty-four, at the foreign port of Hong Kong, in China, take on board said vessel two hundred and sixty-three passengers, which was a greater number of passengers than in the following proportion to the space occupied by them and appropriated for their use on board said vessel, and occupied by stores or other goods not being the personal luggage of such passengers; that is to say, on the lower deck or platform, one passenger for every fourteen clear superficial feet of deck, with intent to bring said passengers to the United States of America, and did leave said port with the same; and afterwards, to wit: on the twenty-sixth day of August, in the year of our Lord eighteen hundred and fifty four, did bring the said passengers, being two hundred and sixty-three in number, on board the said vessel to the said port of San Francisco, within the jurisdiction of the United States, and that the said passengers so taken on board of said vessel and brought into the United States as aforesaid, did exceed the number which could be lawfully taken on board, and brought into the United States as aforesaid, as limited by the 1st section of the Act of Congress approved Feb. 22, 1847, entitled, "An Act to regulate the carriage of passengers in merchant vessels," to the number of twenty in the whole, in violation of the Act of Congress of the United States in such cases made and provided, and that by force and virtue of the said Acts of Congress in such cases made and provided, the said vessel became and is forfeited to the use of the United States.

And the said attorney saith, that by reason of all and singular the premises aforesaid, and by force of the Statute in such cases made and provided, the aforementioned vessel became and is forfeited to the use of the said United States.

Lastly. That all and singular the premises aforesaid are true, and within the admiralty and maritime jurisdiction of the United States, and of this court.

Wherefore, the said attorney prays the usual

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process and monition of this court in this behalf to be made, and that all persons interested in the said vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said vessel may be, for the causes aforesaid, and other appearing, condemned by the definitive sentence and decree of this court, as forfeited to the use of the said United States, according to the form of the Statute of the United States in such cases made and provided.

S. W. Inge, U. S. Dist. Atty.
Pr. John A. Godfrey.

The defendant having answered, subsequently withdrew his answer and filed a demurrer, alleging the following grounds:

1. That the said libel states no sufficient cause of condemnation of said ship.

2. Because said libel states no offense against the laws of the United States.

3. Because the said libel does not aver that the excess of passengers carried or imported on said ship were so carried or imported on the lower deck of said brig, or orlop deck thereof.

4. Because the facts stated in said libel do not constitute a violation of the Passenger Act of the United States, passed in 1847, or any other law of the United States.

The District Judge sustained the demurrer and dismissed the libel; whereupon the libelants took an appeal to this court.

Mr. C. Cushing, Atty-Gen., for the plaintiffs in error.

No counsel appeared for the appellee.

Mr. Justice Grier delivered the opinion of the court:

The Swedish brig Neurea was seized by the Collector of Customs at San Francisco, as forfeited to the United States under the Passenger Act of 1847. The record in this case exhibits the libel for information, filed on behalf of the United States, a demurrer thereto by the claimant, and a decree of the court below dismissing the libel. The appeal, therefore, brings under review the question of the sufficiency of the libel.

The claimant sets forth the following grounds of demurrer:

1. That the said libel states no sufficient cause of condemnation of said ship.

2. Because the said libel states no offense against the laws of the United States.

3. Because the said libel does not aver that the excess of passengers carried or imported on said ship were so carried and imported on the lower deck of said brig, or the orlop deck thereof.

4. Because the facts stated in said libel do not constitute a violation of the Passenger Act of the United States of 1847, or any other law of the United States.

The first, second and fourth are but different forms of the same general assertion, "that the libel states no offense."

The third, which is more specific, objects to the libel for want of an averment that the passengers were carried on the lower deck.

An information for forfeiture of a vessel need not be more technical in its language, or specific in its description of the offense, than an indictment. As a general rule, an indictment for a statute offense is sufficient, if it describe the offense in the very words of the Statute. The exceptions to this rule are, where the offenses created by statute are analogous to certain common law felonies or misdemeanors, where the precedents require certain technical language, or where special averments are necessary in the description of the particular offense, in order that the defendant may afterwards protect himself under the plea of autrefois acquit or convict. See on this subject, United States v. Gooding, 12 Wheat. 474.

The offense created by the Statute on which this libel is founded, has no analogy to any particular common law crime. If, therefore, the libel sets forth the offense in the words of *the Statute which creates it, with suffi- [*95 cient certainty as to the time and place of its commission, it is all that is necessary to put the claimant on his defense.

The object of the Act in question is the protection of the health and lives of passengers from becoming a prey to the avarice of ship owners. In order to test the sufficiency of the libel, it will be necessary to set forth at length the two sections under which it was framed:

The 1st section provides that no master "shall take on board such vessel, at any foreign port or place, a greater number of passengers than in the following proportion to the space occupied by them and appropriated to their use, and unoccupied by stores or other goods not being the personal baggage of such passengers, that is to say, on the lower deck or platform, one passenger for every fourteen clear superficial feet of deck, if such vessel is not to pass within the tropics during such voyage; but if such vessel is to pass within the tropics during such voyage, then one passenger for every twenty such clear superficial feet of deck; and on the orlop deck (if any), one passenger for every thirty such superficial feet in all cases, with intent to bring such passengers into the United States of America, and shall leave such port or place with the same, and bring the same, or any number thereof, within the jurisdiction of the United States aforesaid, or if any such master of vessel shall take on board of his vessel, at any port or place within the jurisdiction of the United States aforesaid, any greater number of passengers than the proportions aforesaid admit, with the intent to carry the same to any foreign port or place, every such master shall be deemed guilty of a misdemeanor, and upon conviction thereof before any circuit or district court of the United States aforesaid, shall, for each passenger taken on board beyond the above proportions, be fined in the sum of fifty dollars, and may also be imprisoned for any term not exceeding one year: Provided that this Act shall not be construed to permit any ship or vessel to carry more than two passengers to every five tons of such ship or vessel."

"Sec. 2. That if the passengers so taken on board such vessel, and brought into, or transported from, the United States aforesaid, shall exceed the number limited by the last section, to the number of twenty in the whole, such vessel shall be forfeited to the United States aforesaid, and be prosecuted and distributed as forfeitures are under the Act to regulate duties on imports and tonnage."

Now, the libel conforms strictly to the requirements of this Act.

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It avers that the master took on board the 96*] Neurea at *Hong Kong in China, on the 1st of June, 1854, two hundred and sixty-three passengers. That this was a greater number than in proportion to the space occupied by them, viz.: "on the lower deck or platform" one passenger for every fourteen clear superficial feet, with intent to bring said passengers to the United States. That he afterwards, viz.: on the 26th day of August, did bring them on said vessel to the port of San Francisco. That the passengers so taken on board and brought into the United States did exceed the number which could be lawfully taken, to the number of twenty in the whole, etc.

The Act does not require an averment that the passengers "were carried or imported on the lower deck or the orlop deck."

The libel sets forth every averment of time, place, numbers, intention, and act, in the very words of the Statute. It was not necessary to specify the precise measurement of the deck, or to show by a mathematical calculation its incapacity; nor to state the sex, age, color or nation of the passengers; nor how many more than twenty their number exceeded the required area on deck. All these particulars were matters of evidence which required no special averment of them, to constitute a complete and technical description of the offense.

The decree of the District Court is, therefore, reversed, and record remitted for further proceedings.

ELIZABETH MOORE, Complainant and Appellant,

v.

RAY GREENE and Benjamin W. Hawkins.

(See S. C. 19 How. 69–72.)

Adverse possession of over eighty years, not disturbed—Statute of Limitations does not begin to run till the fraud is discovered—the fraud must be stated and the time it was discovered— burden of proof is on him who alleges that administrator's sale is void.

An adverse possession of over eighty years, relief against which is barred by the Statute of Limitations, will not be disturbed.

Where fraud is alleged as a ground to set aside title, the Statute does not begin to run till the fraud is discovered.

But in such case, the bill must state the facts and circumstances making the fraud, and the time it was discovered.

The burden of proof that an administrator's sale was illegal and void, falls on him who attempts to disturb a possession of ages, transmitted and enjoyed under the forms of law.

Submitted Dec. 8, 1856. Decided Dec. 24, 1856.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The bill in this case was filed in the Circuit Court of the United States for the District of Rhode Island, by the appellant, to set aside certain titles on the ground of fraud.

The court below having dismissed the bill, the case is now here on appeal.

A further statement appears in the opinion of the court.

Mr. Randall for appellant.

Messrs. Tillinghast, Bradley and Albert C. Green for appellee.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in chancery from the Circuit Court for the District of Rhode Island.

The bill was filed to set aside certain titles for frauds alleged to have been committed in the year 1767, by a father against his own children, for the benefit of strangers. The frauds are stated to have been investigated and sanctioned, directly or indirectly, by the Court of Probate, by referees chosen by the parties to determine their matter of controversy, and by the highest courts of the State.

*The legal history of the case com- [*71 mences in July, 1767, by the execution of a deed by the administrator of John Manton to Waterman and Pearce. From this period a series of events are detailed, genealogical and historical, sweeping over near a century. Acts are stated in the bill, as it would seem, from mere vague reports, and sometimes resting on conjectures. And many of the facts set forth, if proved, and were of modern occurrence, would not be sufficient to avoid the titles enumerated; but the facts are denied generally by the anwers, and not sufficiently proved by the evidence.

The lands when sold were comparatively of little value, but, by the progress of time and the advance of improvements, they are now covered with large manufacturing establishments and flourishing villages. Generation after generation has arisen up and passed away, of individuals connected with these titles, who increased the value of the property by their large expenditures; and the property, by deed or will, or by the law of descents, has been transmitted through the generations that have passed, without doubt as to the legal ownership.

The bill was filed in 1851; its averments of facts, by which the lapse of time and the Statute of Limitations are sought to be avoided, are loose and unsatisfactory. The adverse entry is alleged to have been made, under the deed of the administrator of Manton, in 1767; and it appears that Betty Waterman, the complainant's grandmother, through whom the title is claimed to have descended, was born in 1756. She was of age in 1777, and in ten years afterward her right was barred by the Statute. It is true the date of her coverture does not appear, but as she was only 11 years of age in 1767, she could not then have been married; and if her marriage occurred subsequently, it was a cumulative disability, which is not allowed by the Statute of Rhode Island. The complainant became of age, as it appears, in 1815, and her 10 years expired in 1825. Her disability of coverture, and it was cumulative, expired in 1840, more than ten years before the bill was filed.

The complainant avers that from the death of John Manton, in 1767, to 1822, 1823 and 1824, his estates were the subject of legal controversy and litigation in courts of law; and that ever since, renewed and continued claims and demands, by the heirs of Lydia Thornton

NOTE.—Statute of Limitations in cases of fraud in equity—see note to Stearns v. Page, 12 L. ed. U. S. 928.

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and Betty Carpenter, for their proportion of said estates, as his rightful heirs at law, upon the assignees of the Manton estate, and upon all persons deriving title under them, have been continuously prosecuted. But prosecutions to stop the operations of the Statute must be successful and lead to a change in the possession.

72*] *When fraud is alleged as a ground to set aside a title, the Statute does not begin to run until the fraud is discovered; and this is the ground on which the complainant asks relief. But, in such a case, the bill must be specific in stating the facts and circumstances which constitute the fraud; and also as to the time it was discovered. This is necessary to enable the defendants to meet the fraud, and the alleged time of its discovery. In these respects, the bill is defective and the evidence is still more so.

The complainant's counsel seem to suppose, that as the defendants in their answer admit the property, at least in part, was originally acquired under a sale of Manton's administrator, they are bound to show the proceedings were not only comformable to law, but they must go further, and prove the debts for which it was sold were due and owing by the deceased. So far from this being the legal rule, under the circumstances of this case, the presumptions are in favor of the present occupants, and the complainants must show that the administrator's sale was illegal and void. After an adverse possession of more than eighty years, when the facts have passed from the memory, and, as in this case, the papers are not to be found in the Probate Court, no court can require of the defendants proof in regard to such sale. The burden of proof falls upon him who attempts to disturb a possession of ages, transmitted and enjoyed under the forms of law.

Whether we consider the great lapse of time, and the change in the value of the property, or the Statutes of Limitation, the right of the complainant is barred.

The decree of the Circuit Court is affirmed.

Aff'g 2 Curt. C. C. 202.

22*] *WILLIAM THOMAS, Southworth Barnes, Nathaniel Russell et al., owners of the Barque Laura, Appellants,

v.

JAMES W. OSBORN.

(See S. C. 19 How. 22-56.)

Master may bind vessel in foreign port for repairs and supplies, and for money loaned therefor, without express hypothecation or bottomry bond—owner pro hac vice in command may do so, but only in case of necessity—where lender aids master to divert freight money to other objects, he gets no lien.

By the maritime law of the United States, the master of a vessel, being in a foreign port, has power, in a case of necessity, to hypothecate the vessel, and also to bind himself and the owners personally for repairs and supplies, to the furnishers thereof, or to one who lends money to pay such furnishers, and the master does so, without any express hypothecation, when in a case of necessity he obtains them on the credit of the vessel without a bottomry bond.

An owner pro hac vice, such as one who has received the vessel on what is termed a "lay," in command of the vessel, has the same power to bind the vessel.

But a case of necessity is uniformly required. Where the freight money earned by the vessel was sufficient to pay for all needful repairs and supplies, if it had not been wrongfully diverted, and the persons giving the credit knew this, and aided the master to divert the freight money to other objects, they obtained no lien on the vessel for their advances to pay for repairs and supplies.

Argued Apr. 11, 1855. Decided Dec. 29, 1856.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The libel in this case was filed in the District Court of Maryland, by the appellee, as agent and assignee of Loring & Co., a merchantile house of Valparaiso, to recover against the barque Laura, of Massachusetts. A bill for repairs and supplies furnished to said barque in Valparaiso; and another bill of two items, the one for bread furnished to said barque by the above merchantile house at Valparaiso, and the other for the amount of a draft on the said house, and paid by them for the barque's expenses.

The District Court slightly reduced the latter item, and rendered a decree for the libelants. This decree was affirmed by the Circuit Court.

The case further appears in the opinion of the court.

Messrs. George W. Brown and F. W. Brune, for the appellants:

The appellants will contend that the decree of the Circuit Court should be reversed for the following reasons:

1. No lien on The Laura was created for the expenses paid and supplies furnished by Loring & Co., Phineas Leach, on whose order or request they were paid and furnished, not then being the master of the barque. No one but the master can creat an implied lien on a vessel.

Conk. Adm. 59; Flander's Ship. 181; Flander's Mar. Law, 174, 175, 186; Story, Agency, secs. 116-124; Curt. Merch. Seamen, 76, 165-185; The St. Jago de Cuba, 9 Wheat. 409-416; The Phebe, 1 Ware, 2785; Sarchet v. Sloop Davis, Crabbe, 199-201; Jones v. Blum, 2 Rich., 475-479; Thorn v. Hicks, 7 Cow. 700; James v. Bixby, 11 Mass. 37, 38, 40, 41; Sproat v. Donnell, 26 Me. 187; Thompson v. Snow, 4 Me. 268; Urann v. Fletcher, 1 Gray, 128; Webb v. Peirce, 1 Curt. C. C. 105-113; Reeve v. Davis, 1 Ad. & E. 311; Minturn v. Maynard, 17 How. 477; The Aurora, 1 Wheat. 103; Greenway v. Turner, 4 Md. 296, 303; Young v. Brander, 8 East, 12; Frazer v. Marsh, 13 East, 238; Bogart v. The John Jay, 17 How. 401; Abb. Ship. 128; 1 Bell's Com. 506; The Jane, 1 Dod. 461; 2 Starr's Inst. 953-955, 962-966; Harper v. The New Brig Gilpin, 543.

2. And the facts which came to the knowledge of Loring & Co. were sufficient to have put them on the inquiry as to the legality of the right which Leach claimed to exercise over The Laura, and such an inquiry would have enabled them to ascertain that he had no such

NOTE.—Lien on ships for repairs, necessaries, supplies, etc. Proceedings in rem for—see note to The General Smith, 4 L. ed. U. S. 609, and note to Blaine v. The Charles Carter, 2 L. ed. U. S. 636.

What contracts will support maritime lien—see note, 70 L.R.A. 353.

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right. They had therefore constructive notice of all the facts to which such an inquiry might have led.

Curt. on Seamen, 151-153; Carr v. Hilton, 1 Curt. C. C. 393, and cases there cited; Ringgold v. Bryant, 3 Md. Ch. 493; Magruder v. Peter, 11 G. & J. 243; Baynard v. Norris, 5 Gill, 468; Oliver v. Piatt, 3 How. 379-395; Harrison v. Vose, 9 How. 372.

3. The credit in the case was not given to the vessel, nor is the captain nor the owners of the vessel liable. In the accounts current, in evidence, the charges are to Leach personally.

The Amstel, Blatchf. & H. 217; James v. Bixby, 11 Mass. 36; Thorn v. Hicks, 7 Cow. 700; Zane v. Brig President, 4 Wash. 459; The American Ins. Co. v. Coster, 3 Paige, 331; Leland v. The Medora, 2 W. & M. 97.

4. If any lien existed, it was waived by Loring & Co.

Blaine v. The Charles Carter, 4 Cranch, 331; The Utility, 1 Blatchf. & H. 222; The Boston, 1 Blatchf. & H. 326; The Aurora, 1 Wheat. 104; Packard v. The Louisa, 2 W. & M. 56.

5. The rule of law is, that the credits in an account current are to be applied, in the order of time, to the items constituting the debits in the account. If this rule be applied to this case, the claim of the appellee is more than paid.

U. S. v. Kirkpatrick, 9 Wheat. 737; Jones v. The U. S. 7 How. 691; Tayloe v. Sandiford, 7 Wheat. 20; Whetmore v. Murdock, 3 W. & M. 395; Gass v. Stimson, 3 Sumn. 112; U. S. v. Wardwell, 5 Mass. 87; McDowell v. Blackstone Canal Co. 5 Mass. 12; Pattison v. Hull, 9 Cow. 770; Allen v. Culver, 3 Den. 293; Miller v. Miller, 23 Me. 24; Bodenham v. Purchas, 2 B. & Ald. 46; Smith v. Wigley, 3 Moo. & Sc. 174.

6. If the above rules should not be sustained, the appellants contend that the remittance from Garrison & Fritz, being the proceeds of the cargo shipped by Loring & Co., should be applied ratably to the different items constituting the balance of the account.

Perris v. Roberts, 1 Vern. 34; Waller v. Lacy, 1 Man. & G. 54, 39; E. C. L. 349 to 360;. Blackstone Bank v. Hill, 10 Pick. 129; Commercial Bank v. Cunningham, 24 Pick. 270, 271; Cage v. Iler, 5 Sm. & Mar. 410.

Messrs. S. T. Wallis and J. H. Thomas, for the appellee:

The proctors of the appellee will contend:

1. Whether Leach, by the terms of the contract under which he navigated the barque, was or was not to be regarded as her temporary owner, at the time when the repairs and supplies in controversy were furnished, and whether the general owners were or were not bound personally by his contracts for necessaries, he was at all events master of the barque and imposed a lien in rem by ordering and receiving such repairs and supplies for her, in a foreign port. His relation to the vessel was not altered by his having temporarily intrusted Easton, his mate, with her navigation, nor was the responsibility of the vessel herself to Loring & Co., for repairs and supplies, at all affected by the secret agreement between Leach and the owners, of which Loring & Co. were ignorant.

The General Smith, 4 Wheat. 438; The Nestor, 1 Sumn. 78; The Tribune, 3 Sumn. 149; Arthur v. The Cassius, 2 Story, 92-94; The Chusan, 2 Story, 467; The William and Emeline, 1 Blatchf. & How. 71; Webb v. Pierce, 1 Curt. C. C. 110; Arthur v. Barton, 6 Mees. & W. 142; The St. Jago de Cuba, 9 Wheat. 409; Rich v. Coe, Cow. 636; Reeve v. Davis, 1 Ad. & E. 315; Sarchet v. The Davis, Crabbe, 201; Story, Agency, secs. 36, 120; North v. The Eagle, Bee, 78; Skolfield v. Potter, Daveis, 397; L'Arina v. The Exchange, Bee, 198; The Virgin, 8 Pet. 552; 1 Bell's Com. 525; Hays v. Pacific Steam Co. 17 How. 598; Peyroux v. Howard, 7 Pet. 341; Revens v. Lewis, 2 Paine C. C. 207.

Even if Easton is to be regarded as master, the fact that the repairs and supplies were furnished with his knowledge and consent and under his superintendence, is sufficient to charge the barque with the usual maritime lien.

Stewart v. Hall, 2 Dow. 32; Voorhees v. The Eureka, 14 Mo. 56.

The onus of showing a waiver of the customary maritime lien by giving credit to Leach, rests on the appellants, and they must not only show that such credit was given, but that it was exclusive, and with the intent to forego all recourse in rem.

The circumstances of the transaction, the mode of making the charges, and the certificates required from Leach to the validity of the accounts against the "barque and owners," all establish affirmatively that the credit of the vessel was especially looked to, and the usual remedy against her, particularly reserved.

Ex parte Bland, 2 Rose, 92; Stewart v. Hall, 2 Dow. 29-37; The Chusan, 2 Story, 468; Peyroux v. Howard, 7 Pet. 344; The Nestor, 1 Sumn. 75; North v. The Eagle, Bee, 78.

Even if the relation of Leach to the vessel was not such as necessarily to raise an implication of lien from his mere contract for repairs and supplies, he had the right to pledge the vessel expressly. The proof shows that he did this, and the lien thus expressly imposed, being of a maritime nature, became proprio vigore, enforceable in admiralty.

Alexander v. Ghiselin, 5 Gill, 182; Sullivan v. Tuck, 1 Md. Ch. 62; The Nestor, 1 Sumn. 78; The Marion, 1 Story, 73; The Hilarity, 1 Blatchf. & H. 92; Bogart v. The John Jay, 17 How. 401; The Draco, 2 Sumn. 177.

5. That Mr. Atherton, the partner of the old firm of Loring & Co., who was seen by Weston at Valparaiso, had no right to disavow or waive the lien of the firm on The Laura, after the partnership dissolved, and that even if he had, there was nothing in his intercourse with Weston or his omission to insist at that time, on the payment of the present claim, from which any such disavowal or waiver could be inferred.

6. That there was no concealment on the part of Loring & Co., of their claim of lien, and no laches or delay in ascertaining it. No rights of third parties had intervened, nor had any settlement previously taken place between Capt. Leach and his owners.

Stewart v. Hall, 2 Dow. 29; The Nestor, 1 Sumn. 83; The Chusan, 2 Story, 468.

7. That no appropriation was made by Capt. Leach of the Panama remittance, to the pay-

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ment of the claim in controversy here. If any appropriation of it was made at all, it was by Loring & Co., to Leach's private account, but even if this be not regarded as an appropriation, the court will appropriate the credit, not necessarily to the first item of indebtedness, but according to equity, to the most precarious debt, or more properly still, to the payment of advances on the very cargo which produced the remittance.

The Mayor, etc. v. Patten, 4 Cranch, 317; Field v. Holland, 6 Cranch, 8; The U. S. v. Kirkpatrick, 9 Wheat. 720; Thompson v. Phelan, 2 Foster (N. H.) 350; Green v. Whittiker, 1 H. & J. 755; Cremer v. Higginson, 1 Mass. 338.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court of the United States for the District of Maryland, sitting in admiralty. A libel was filed for the District Court by the appellee, as assignee of Loring & Co., merchants in Valparaiso, asserting a lien on the barque Laura, of Plymouth, in the State of Massachusetts, for the cost of repairs and supplies furnished to that vessel at Valparaiso. The District Court decreed for the lien, the Circuit Court affirmed that decree, and the claimants have brought the cause here by appeal.

It appears that in January, 1849, Phineas Leach, who had previously been in command of the barque, contracted with her owner to take her on what is termed "a lay." There does not appear to have been any written con- [*26] tract of affreightment *between them, nor are the terms of their agreement fully described by any witness. But this mode of employing vessels is so common, and its terms and legal effect so well settled by long usage, it has been so often before the courts and the subject of adjudication, that no embarrassment is felt by us concerning the terms and conditions on which Leach took the vessel.

We understand from his testimony, as well as from known usage, ascertained and adjudicated on in the courts, that the master had the entire possession, command and navigation of the vessel; that he was to employ her in such freighting voyages as he saw fit; that he was to victual and man the vessel at his own expense; that the owners were to keep the vessel in repair; that from the gross earnings were to be deducted all port charges, and the residue was to be divided into two equal parts, one of which was to belong to the owners, the other to the master; and that this agreement could be terminated by the restoration of the vessel to the owners by the master, or by their intervention to displace him, at the end of any voyage, but not while conducting any one which he had undertaken.

Having possession and command of the vessel under such a contract, Leach sailed from New Orleans in January, 1849, and after making a voyage to Rio de Janeiro, he sailed for and arrived at Valparaiso in November, 1849.

It is necessary to state with some particularity the voyages made after his arrival at Valparaiso. He sailed thence in December, 1849, with a cargo of Chili produce, on a freight amounting to about $7,000, for San Francisco, where he arrived and delivered the cargo. He went thence to Talcuhana in ballast; and, having an intention to buy a cargo there on his own account, he wrote to Loring & Co., from San Francisco, to obtain from them a credit, on which to raise money to pay for the balance of the cost of this cargo, after appropriating towards it the freight money in his hands. Loring & Co. granted him a credit for $3,000, to be re-imbursed by Leach's draft on himself at San Francisco, at five per cent. premium. At Talcuhana, Leach drew on Loring & Co. for $7,000, and bought doubloons; but not being able to procure a cargo there, or at Maule, he sailed to Valparaiso, where he arrived in July, 1850. He handed over to Loring & Co. the doubloons and the proceeds of his freight money, which was in gold dust, and they supplied the vessel and purchased a cargo for Leach's account, charging a guaranty commission of five per cent. on their advances, and also a commission of two and a half per cent. on their purchases. They rendered Leach *an ac- [*27] count, in which he is charged with the supplies of the barque and the cost of the cargo, and their commissions, and credited with the moneys received from him.

Leach carried this cargo to San Francisco; and, having sold it, made an arrangement with the mercantile house of Flint, Peabody & Co., established at San Francisco, that he would go to Valparaiso, and ship cargoes thence to them on their and his joint account, drawing on them for the cost. This arrangement was not limited to cargoes by The Laura, but was to extend to such other vessels as Leach might take up for the purpose.

From San Francisco Leach sailed in The Laura to Talcuhana, where he saw one of the firm of Loring & Co., who gave him a credit for $10,000 to buy a cargo there. He purchased part of a cargo; but, not being able to complete it, went to Valparaiso, where he arrived in May, 1851. He then informed Loring & Co. of his arrangement with Flint, Peabody & Co., and they agreed to advance him funds, to enable him to carry the arrangement into effect—to be reimbursed by remittances from San Francisco, with five per cent. commission, and one per cent. a month for interest. He accordingly left the vessel, putting Easton, his mate, in command; and Loring & Co. purchased the residue of the cargo for The Laura, charging its cost to the joint account of Leach, and Flint, Peabody & Co., and The Laura sailed in May, 1851, for San Francisco. She returned in ballast to Valparaiso in March, 1852; and at that time the principal bills for repairs and supplies, claimed in this case, were incurred. In March, 1852, The Laura again sailed, under Easton's command, for San Francisco, via Peyta, where she touched to complete her cargo, and Easton there drew a bill on Loring & Co. to reimburse advances made to him in that port—partly to pay for cargo purchased there, and partly to pay for supplies and port charges.

The Laura returned to San Francisco in September, 1852, where she was taken possession of by Captain Weston, who had been sent there by the owners to bring her home. The owners gave no consent to the above-described proceedings of Leach in respect to the use and employment of the barque. From the time when Leach left the command of The Laura in May,

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1851, he remained in Valparaiso, and by means of funds furnished by Loring & Co., and with their assistance, he purchased and made six shipments of cargoes by vessels other than The Laura, under his arrangement with Flint, Peabody & Co., and Loring & Co. He had a desk in the counting-house of Loring & Co., and there transacted his business.

Setting aside all the special facts of this 28*] case, and viewing it only as an ordinary transaction, by which the master of an American vessel procured repairs and supplies, and advances of money to pay for repairs and supplies, in a foreign port, the first question which arises is, whether he had power to hypothecate the vessel as a security for their payment, otherwise than by a bottomry bond, which must make the payment dependent on the arrival of the vessel, and creates no personal liability of the owners.

We understand it to be definitely settled by the cases of Stainbank v. Fenning, 6 Eng. L. & Eq. 412, decided by the Court of Common Pleas in 1851, and Stainbank v. Shephard, 20 Eng. L. & Eq. 547, on writ of error in the Exchequer Chamber, so late as 1853, that by the law of England the master of a ship has not power to create a lien on the vessel as security for the payment for repairs and supplies obtained in a foreign port, save by a bottomry bond; that he can only pledge his own credit and that of his owners, but cannot, by any act of his, give the creditor security on the vessel; while, at the same time, the personal liability of the owners continues. Neither of those learned courts considered—perhaps there was no occasion for them to consider (Pope v. Nickerson, 3 Story, 465), what should be the effect in an English tribunal, of the law of the place where the repairs and supplies were obtained, if that law tacitly created a lien on the vessel. See Story's Con. of Laws, sec. 322 b, 401-403. These decisions rest merely upon the want of authority in the master, according to the law of England, to create, by his own act, an absolute hypothecation of the vessel as security for a loan. But the maritime law of the United States is settled otherwise—in harmony with the ancient and general maritime law of the commercial world. The master of a vessel of the United States, being in a foreign port, has power, in a case of necessity, to hypothecate the vessel, and also to bind himself and the owners, personally, for repairs and supplies; and he does so without any express hypothecation, when, in a case of necessity, he obtains them on the credit of the vessel without a bottomry bond.

The Ship General Smith, 4 Wheat. 438; Peyroux v. Howard, 7 Pet. 324, 341; The Virgin, 8 Pet. 538; The Nestor, 1 Sumn. 73; The Chusan, 2 Story, 455; The Phœbe, 1 Ware, 263; Davis v. Child, Daveis, 71; The William and Emeline, 1 Blatchf. & H. 66; Davis v. A New Brig, Gilpin, 487; Sarchet v. The Davis, Crabbe, 185.

It is not material whether the hypothecation is made directly to the furnishers of repairs and supplies, or to one who lends money on the credit of the vessel in a case of necessity, to pay such furnishers. "Through all time," 29*] says Valin, "by the *use and custom of the seas, it has been allowable for the master to borrow money, on bottomry or otherwise, upon the hull and keel of the vessel, for repairs, provisions, and other necessaries, to enable him to continue the voyage," Com. on Art. 19 Ord. of 1681; and this assertion rests upon sufficient authority. The Roman law, de exercitoria actione, D, 14, 1, authorized a simple loan, and does not confine the master to borrow on bottomry. The Consulate del Mare, ch. 104, 105, 236, the Laws of Wisby, art. 13, the Laws of Oleron, art. 1, Le Guidon, ch. 5, art. 33, the French Ordinance of 1681, art. 19, as well as the present French Code de Commerce, art. 234, concur in allowing the master to contract a simple loan, in a case of necessity, binding on the vessel. A difference of opinion exists between Valin and Emerigon, concerning the power of the master also to bind the owner to accept bills of exchange for the sum borrowed; but they concur in opinion that the master has power to contract a loan to pay for repairs and supplies, and to give what we term a lien on the ship as security, in case of necessity. See Valin's Com. art. 19; Emerigon's Con. à la Grope, ch. 4, sec. 11; Vol. II. p. 484, etc. In another place, ch. 12, sec. 4, Emerigon observes: "It matters little whether one has lent money or furnished materials." The older as well as the more recent commentators are of the same opinion. Kuricke, 765; Loccenius, lib. 3, ch. 7, n. 6; Stypmannus, 417, n. 107; Boulay Paty Cours de Droit. Com. tit. 1, sec. 2, Vol. I. p. 39, and tit. 4, sec. 14, Vol. 1. pp. 151-153; Pardessus Droit Com. Vol. III. n. 631, 644, 660; Pardessus Col. Vol. II. p. 225, note. The subject has been elaborately examined by Judge Ware, in Davis v. Child, Daveis, 75, and we are satisfied he arrived at the correct result.

Nor do we think the fact that the master was charterer and pro hac vice necessarily deprived him of this power. It is true it does not exist in a place where the owner is present. The St. Jago de Cuba, 9 Wheat. 409. But this doctrine cannot be safely extended to the case of an owner pro hac vice in command of the vessel. Practically, this special ownership leaves the enterprise subject to the same necessities as if the master were master merely, and not charterer, and the maritime law gives him the same power to borrow to meet that necessity, as if he were not charterer. The Consulat de la Mer, ch. 289, 2 Par. Col. 337, has provided for the very case, for it makes the interest of the general owner responsible for the contracts of the master who has received the vessel "en commande;" and one species of this contract was what we should term "a lay"—that is, a participation in profits. Vide 2 *Par. Col. 186, note 3; 52, note 1; 49, [*30 note 4; and the chapters there referred to.

It is true the master cannot bind the general owners personally for supplies which he, as charterer, was to furnish. Webb v. Pierce, 1 Curt. 110. Neither could he bind them beyond the value of their shares in the vessel under the ancient maritime law. Consulat, ch. 34. 239, and Pardessus' note, Vol. II. p. 225. Emerigon is of opinion that the effect of the French ordinance is the same. Con. à la Grope, ch. 4, sec. 11. In our law, if the master is the agent of the owners, his contracts are obligatory on them personally. When he acts on his own

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account, he does not create any obligation on them. But it does not follow that he may not bind the vessel. In Freeman v. Buckingham, 18 How. 182, it was held that contracts of affreightment entered into by the master, within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel; and whether the master be the agent of the general or special owner—and this upon the principle that the general owner must be presumed to consent, when he lets the vessel, that the master may make such contracts, which operate as a tacit hypothecation of the vessel. And so in this case, we think, the general owners must be taken to have consented that, if a case of necessity should arise in the course of any voyages which the master was carrying on for the benefit of themselves and himself, he might obtain, on the credit of the vessel, such supplies and repairs as should be needful to enable him to continue the joint adventure. This presumption of consent by the general owner is entertained by the law from the actual circumstances of the case, and from considerations of the convenience and necessities of the commercial world.

But the limitation of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender or furnisher should see to it, that apparently such a case of necessity exists, are as ancient and well established as the authority itself.

In some of the old sea laws, they are declared in express terms, as they were in the Roman law: Aliquam diligentiam in ea re creditorem debere præstare, D. 14, 1, 7; navis in ea causa fuisset ut refici deberet, D. 14, 1, 7. And in the Consulat del Mare, ch. 107. "But the merchant should assure himself that what he lends is destined for the use of the ship, and that it is necessary for that object."

A reference to the other codes cited above will show that a case of necessity was uniform-
31*] ly required; and the commentators *all agree, that if one lend money to a master, knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the owner. Valin, art. 19; Emerigon, Con à la Grope, ch. 4, sec. 8, and the older commentators cited by him. Boulay Paty Cours de Droit Com. tit. I. sec. 2, tit. IV. sec. 14; and see the authorities cited by him in note 1, p. 153.

To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them. If the master has funds of his own, which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners, which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel.

We now come to the application of these principles to the case at bar.

The freight money earned by The Laura was applicable, and ought to have been applied, by the master, to the necessities of the vessel; the one half (after deducting port charges), which belonged to himself, should have been applied to pay the wages of the crew, and obtain supplies for the vessel; the other half, which belonged to the owners, to pay for necessary repairs.

The amount of this freight money actually earned and received was about $12,000. Besides this, The Laura had made two voyages to San Francisco, with cargoes belonging to Leach and to him, and Flint, Peabody & Co., before the bills now in question were incurred. We hesitate to declare that a master, who takes a vessel on "a lay," can use it to carry cargoes of his own. The practical difference to the owners is, that there can be no agreed rates of freight and no such security on the cargo for its payment, as the marine law ordinarily provides, and as the owners may be reasonably considered to contemplate when they let the vessel. Gracie v. Palmer, 8 Wheat. 605. But this point has not been adjudicated on by the courts, nor does this case furnish any evidence of what the usage is in this particular. Waiving a decision of this question, it is, at all events, clear the vessel earns for the owners a reasonable freight by carrying cargo of the master; and, according to the evidence in this case, that reasonable freight must have been *set [*32 down for each of the two voyages on which the cargo of the master was carried, at the sum of $7,000, that being the sum earned on the preceding voyage between the same ports, and there being no evidence before us of a change in the price of freights in the intermediate periods; so that when these expenses, now in question, were incurred, the master had received in money, as freight, $12,000, and must be taken to have received, in the enhanced value of his own merchandise, through its carriage to San Francisco $14,000 more. The amount previously expended by him for repairs and supplies, at Valparaiso, does not appear to have exceeded $3,000. The amount expended at San Francisco does not appear, but there is no reason to suppose it was considerable.

In July, 1850, Loring & Co. received from Leach his funds, supplied him with credit, and purchased a cargo for him. In May, 1851, they made themselves parties to an arrangement, under which Leach was to quit the command of the vessel, and become a merchant, resident at Valparaiso. Whether they did or did not know Leach had the vessel on a lay, this was obviously wrong as respected the owners; for though, under a lay, the master is owner pro hac vice, yet there is a personal confidence reposed in him as master, which he cannot delegate to another, except in case of necessity. Before the credit now in question was given by Loring & Co., they not only had notice that Leach had wrongfully deserted the command of the vessel, and had diverted the freight which the vessel had earned and ought to have earned, into his business as a merchant, but they had actually assisted him to do so, by receiving freight money, and mingling it with other funds in their hands, out of which and

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their own funds they made advances to enable him to pay for cargoes; and they acted as his agents in their purchase; and they had, moreover, profited largely by so doing, charging high rates of interests, as well as commissions.

It should be added, that the owners have received nothing for their part of the earnings of their vessel, during all these voyages; for though, since his return to this country, Leach has rendered his accounts to the owners, they refused to settle them, as rendered, and Leach testifies he has not the means to pay any balance due to them.

In such a state of facts, we are of opinion Loring & Co. had no right to lend Leach money, or furnish him with supplies on the credit of the ship, and cannot be taken to have done so.

Our opinion is, that inasmuch as the freight money earned by the vessel was sufficient to pay for all the needful repairs and supplies, and might have been commanded for that use if they had not been wrongfully diverted, no 33*] case of actual *necessity to incumber the vessel existed; and as Loring & Co. not only knew this, but aided Leach to divert the freight money to other objects, they obtained no lien on the vessel for their advances.

The cause must be remanded, with directions to dismiss the libel, with costs.

Dissenting, Mr. Chief Justice **Taney**, Mr. Justice **McLean** and Mr. Justice **Wayne**.

Mr. Chief Justice **Taney**, dissenting:

I dissent from the judgment of the court in this case, and adhere to the opinion I gave at the circuit.

The principal question is, whether certain repairs and supplies furnished to the barque Laura, of Plymouth, in the State of Massachusetts, while she was in the port of Valparaiso, in Chili, in February and March, 1852, are a lien upon the vessel.

The appellants are citizens of Massachusetts, and, at the time of making and furnishing these repairs and supplies, and until and after this libel was filed, were the owners of the barque. She was built for them at Newburyport, under the superintendence of a certain Phineas Leach, who was by profession a mariner. After the vessel was completed she was placed under his command, as master; and in the year 1847, he and the appellants agreeing that he should sail the vessel on what, in the New England ship owning States, is familiarly called "a lay"—that is to say, he was to victual and man her, pay one half the port charges, and be entitled to one half of the freights or earnings. This is the contract, as stated by Leach in his testimony. No written contract is produced. Indeed, contracts of this description, it would seem, are so well known and understood in the States above mentioned, that they are often made orally, and not in writing. And when the owners agree with a mariner that he shall sail the vessel on "a lay," both parties understand that the mariner is to take the command of her as master, to victual and man her, and pay half the port charges; the owner to keep the vessel in repair, and the freight and earnings to be equally divided between them. Upon a contract of this kind, the vessel, during its continuance, is under the exclusive control of the master, as respects her voyages and employment. He alone has the right to determine what voyages he will undertake—what cargo he will carry—upon what terms—and to *what ports he will sail in [*34 search of freight. His share of the earnings of the vessel are his wages, and he receives no other compensation for his services as master.

Before I proceed to state the facts out of which this controversy has arisen, it is proper to say that Leach states in his testimony that, in addition to the contract above mentioned, it was agreed, between the appellants and himself, that he should have the right to become a part owner of the vessel, to the amount of one eighth, whenever he paid for it. But he never paid anything on this account, and never, therefore, had any interest as part owner; and upon his return to Plymouth, in 1852, as hereinafter mentioned, when his connection with The Laura ceased, this contract was canceled. It was a written contract; but whether it was a part of his contract to sail the vessel upon "a lay," is not stated in the testimony.

As Leach never became part owner, his authority over the vessel was derived altogether from his contract to sail her upon the terms above mentioned. That contract, as stated by him, was indefinite as to its duration. No particular time was fixed for its termination, nor the happening of any particular event. And it was during the continuance of this contract that the voyages were made, and the acts done which have given rise to this controversy.

The material facts in the case are derived mainly from the testimony of Leach, who was produced as a witness by the owners, who are the appellants; and it requires a close and careful scrutiny to understand the bearing of different portions of his testimony upon the different points raised in the argument. The examination itself, under the commission to take testimony, which was executed at Boston, is singularly involved and confused; and the answers, I regret to say, often show a disposition to prevaricate, and a desire to make the best case the witness could for the owners and against the libelants.

His testimony begins by describing several voyages which he made in the year 1849, which are not material to the matter in issue, until he comes to the one from Rio to Valparaiso. This was his first voyage to the Pacific, and he arrived at Valparaiso in November, 1849, with a cargo consigned to Loring & Co., the libelants. This Company was composed of citizens of Massachusetts, domiciled at Valparaiso for the purposes of commerce. In December, 1849, he sailed from Valparaiso to San Francisco, with a cargo on freight; the freight amounting to about seven thousand dollars. Being unable to procure a cargo on freight at San Francisco, he sailed for Talcahuana *in ballast, and, no freight offering [*35 at that place, he sailed for Maule in ballast, but was prevented from entering the port by bad weather and a bad bar, and proceeded to Valparaiso. He arrived there early in July, 1850. While there he obtained advances from Loring & Co., which enabled him to purchase a cargo for The Laura on his own account, with which he sailed for San Francisco, where he arrived in November, 1850.

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While he was in San Francisco, he made an arrangement with Flint, Peabody & Co., of that place, by which, upon his return to Chili, he was to purchase cargoes on joint account, and ship or consign them to that house at San Francisco. He was to purchase cargoes by means of bills drawn on them, and they were to honor his drafts. There was no limit as to the time; but this agreement was conditional, and was to depend upon the ability of Leach to make arrangements in Chili, by which he could raise money on those drafts to purchase the cargoes; and if he succeeded in making those arrangements, he was to remain in Chili to make the purchases. The arrangement was not confined to cargoes by The Laura, but he was to buy and ship according to his judgment.

When he left San Francisco, he again proceeded to Talcahuana in ballast, where he arrived in February, 1851. He met there Mr. Bowen, one of the firm of Loring & Co., and told him that he wanted another cargo, but had no money to buy it, and Mr. Bowen thereupon gave him a letter of credit upon his house at Valparaiso, by which he was authorized to draw on them for ten thousand dollars, payable eight days after sight. Being unable to complete his cargo at Talcahuana, he proceeded to Valparaiso, where he arrived in the month of April or May following, and obtained the balance of his cargo by the aid of further advances from Loring & Co. He then mentioned to them his arrangement with Flint, Peabody & Co., and asked if Loring & Co. would give him facilities in the way of funds to carry out this arrangement. They agreed to advance the funds, upon an interest account with him, charging five per cent. for advances, and one per cent. a month for interest, and they were to be paid by remittances from San Francisco without drawing bills. Leach acceded to this arrangement, and directed them to charge the cargo then on board The Laura at Valparaiso to the joint account of Flint, Peabody & Co., and himself, Leach. He then, as he says, "put the mate, Reuben S. Easton, in as master," and sent him to San Francisco, Leach remaining at Valparaiso. This was in May, 1851, and he remained there until March, 1852, carrying on and superintending those transactions.

36*] *During this period, he engaged extensively in mercantile business, shipping cargoes by other vessels, as well as the one by The Laura, and obtaining the means of purchasing them by the arrangements he had made with Loring & Co., as hereinbefore stated; and he had a desk in their counting-house at which he transacted his business.

The Laura did not return again to Valparaiso until February, 1852. It was then found that she needed repairs and supplies to a large amount to fit her for another voyage; and Leach also wanted funds to purchase another cargo for her. He had at that time, it seems, determined to return to Plymouth; but before he did so, he wished to dispatch The Laura, under the command of Easton, on a voyage to Peyta and Panama, with a cargo purchased on his own account. He had no funds for either purpose. He states that he had but $500, and this, it appears, he needed for his personal expenses; and the repairs were made and the supplies furnished for the vessel by Loring & Co., at his request, to the amount of $2,707.69. Leach states that they were necessary, and made and furnished with economy; that he was himself on board, superintending and directing them; that Easton was also on board assisting him, but had nothing to do with ordering or directing them. He merely executed Leach's orders. The cargo was likewise purchased and paid for by Loring & Co. for Leach, and at his request.

The repairs were made and the supplies furnished in the latter part of February and early part of March, 1852, and the cargo put on board immediately afterwards. The invoice is dated Valparaiso, March 18th, and is headed, "Invoice of sundries purchased and shipped by Loring & Co., on board the barque Laura, for Peyta and Panama, on account and risk of Capt. Phineas Leach, consigned to his order, for sales and returns to Loring & Co."—the aggregate amount being $5,779.81. The vessel sailed, as soon as the cargo was on board, under the command of Easton. And on the 20th of March, two accounts were stated by Loring & Co.; one for the repairs and supplies to The Laura, and the other their private or personal account against Leach; both of which were signed by Leach on that day with a written admission that they were correct.

The first mentioned of these accounts is headed, "Barque Laura and owners to Loring & Co., Dr.," and states that particular items of repairs and supplies, amounting, as before mentioned, in the aggregate, to $2,707.69. This account is the matter now in dispute. The other is headed, "Dr., Capt. P. Leach in account with Loring & Co. to 20th March, 1852," showing a balance due from Leach of $8,527.69. Among other *items, he is charged, in [*37 this account, with the amount of the account for repairs and supplies, and this item is charged thus—"our ac. with barque Laura"—and he is also charged with the amount of the invoice above mentioned thus: "our invoice sundries for Laura due April 12, 1852"—showing that the charge for the repairs and supplies was always kept separate and distinct from Leach's personal account.

On the day these two separate accounts were adjusted and signed by the parties, or in a day or two afterwards, Leach left Valparaiso for Panama, and from thence proceeded home. He states that he arrived at Boston on the 20th of April following, and it appears, by the documents in evidence, that, on the 9th of July next after his return, the appellants agreed with Francis H. Weston that he should proceed to Panama, or wherever the vessel was lying, and assume the command of her as master; and after fulfilling any engagement she might be under, should proceed with her for a load of guano freight, or any other freight that could be obtained, to an Atlantic port. Weston proceeded accordingly, and arrived at Valparaiso in September. The Laura arrived there about a fortnight afterwards, when he assumed the command, and Easton left her.

In the execution of his orders from the owners, Weston proceeded on the voyage directed by them, and then brought the vessel and cargo to Baltimore, where he arrived in June, 1853; and immediately after his arrival she was

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arrested upon the libel now under consideration.

This narrative of the facts in the case are necessary in order to understand how the questions discussed at the bar have arisen. There are other circumstances in evidence, relating to different points, which it will be material to advert to more particularly hereafter.

As I have already said, the principal matter in dispute is, whether the repairs and supplies furnished to the barque in the port of Valparaiso, as hereinbefore mentioned, in February and March, 1852, were a lien upon the vessel at the time this libel was filed.

In deciding this question, the first point to be considered is, in what relation did Leach stand to the vessel, while he was sailing her under this contract. Was he the owner for the time? And in determining the legal effect and operation of contracts made by him, are they to be regarded as the contracts of the owner, or the contracts of the master?

This is a question of the highest importance to the commercial interests of this country. It is well known that almost the whole of our immense coasting trade is carried on by vessels owned in the northeastern States of the Union; 38*] and the far *greater part of them are sailing under contracts like this. And upon our coast, stormy and dangerous as it is at certain seasons of the year, very serious damage is often sustained by these vessels, and heavy amounts frequently required and obtained in the ports of other States for repairs and supplies to enable them to proceed on their voyages,

Now, if Leach is to be regarded as owner for the time when he was sailing The Laura under the agreement, then by the maritime law the repairs and supplies furnished at his request are presumed to have been furnished upon his personal credit, unless the contrary appears; and in that view of the subject, Loring & Co. have not, and never had, any lien upon the vessel; and the libel against her cannot be maintained. But if, on the contrary, Leach is to be regarded as master, and as making the contract by virtue of his authority over the barque in that character, then these repairs and supplies in a foreign port, if necessary to enable the vessel to proceed, are presumed to have been made on the credit of the vessel, unless the contrary appears, as well as on the credit of the owners and Leach; and in this aspect of the case, Loring & Co. had a lien upon her, which they may enforce in this proceeding unless it has been waived or discharged.

These are the established principles of maritime law in this country, as heretofore recognized and administered in the courts of the United States. And I do not deem it necessary to refer to English cases, or to the decrees or doctrines in the different nations on the continent of Europe, which have been cited in the argument, because I consider the rule, as I have stated it, to be conclusively settled in this country by an unbroken series of decisions in this court and at the circuits. The case of The General Smith, 4 Wheat. 443; The St. Jago de Cuba, 9 Wheat. 416; and the case of Ramsey v. Allegre, 12 Wheat. 611, explained and commented on in the case of Andrews v. Wall et al. 3 How. 573, may be regarded as the leading cases on this subject.

The case before us is one of the more interest because it is the first in which the construction and legal effect of these contracts for sailing on a "lay" has come up for decision in this court. They are, as I have said, peculiar to a particular portion of the Union, and are scarcely ever to be found in the maritime contracts of any other part of the commercial world. They are, also, comparatively modern in their use. And if it is held that a person furnishing necessary repairs and supplies in a foreign port, to a vessel sailing under a contract of this kind, has not a remedy against the owner, and also a lien on the vessel for such provisions and supplies, as well as for repairs *to the ves- [*39 sel—although they are both furnished at the request of a master who is without funds, and has no other means of obtaining them—then this class of cases will form an exception to the General Maritime Code of the United States, to which vessels belonging to the port of other States, and sailing under the usual contract with the master, for certain wages, are subjected; and the parties making the repairs or furnishing the supplies will be deprived of the securities to which they have heretofore supposed themselves entitled, and upon which they have mainly relied; for the personal responsibility of the master, after he is suffered to leave the port, is most commonly of very little value. And it would exempt the ship owners, in one portion of the United States, from the liabilities and burdens imposed upon those of other States, merely upon the ground that in the one the owner compensates his captain by allowing him a share of the net amount of the freight earned by the vessel, and in the other by fixed and certain wages. For this, in truth, is the only difference between vessels sailing under a "lay" and those sailing under the usual and customary contract between the owner and master.

In making the inquiry whether Leach was owner while sailing under this contract, we shall find few if any cases in the English decisions to assist us. For contracts of this kind, as I have already said, are hardly if ever used there. And I can find no case where the question arose as to who was owner for the voyage in which the contract is not clearly distinguishable from the one before us. And in all of the cases in which it has been held that the general owners were not responsible, it will be found that, by the terms of the contract the entire and exclusive possession and control of the vessel was transferred for a certain time, or a particular voyage or voyages, and where the general owner, during the time stipulated, had no right to exercise any act of ownership over her. In other words, they are cases in which the court held, that the vessel was let or demised to the party for the time, so as to vest the right of property in the charterer, leaving in the general owners a reversionary interest, subject to the particular interest so let or demised. And whether this is the case or not, and whether there is a special and exclusive property in the charterer, does not depend upon any particular form of words or any particular facts. The general rule in relation to the construction of such contracts is laid down in Abb. on Ship. 61 (7th Am. ed.), in the following words, as the result of the various de-

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cisions to which he refers: "From these cases (he says) it appears that the question whether or not the possession of a vessel passes out of the owner or charterer depends upon no single 40*] fact or *expression, but upon the whole of the language of the contract, as applicable to its attendant circumstances."

But although we find no case in the English reports that can be regarded as in point, contracts like the one before us, and indeed in the same words, have, on several occasions, been brought before the Circuit Court of the United States in the first circuit, where they have been carefully and deliberately considered by the learned judge who recently presided in that circuit. And it has been uniformly held in that court, by Mr. Justice Story, that the master sailing a vessel under such a contract as this is not the exclusive owner for the voyage; and, if regarded as owner at all, is a qualified and limited one; and his character and authority, and duty as master, is not merged in it; and that his contracts for repairs and supplies in a foreign port are made in that character, and are a lien upon the vessel.

One of these contracts came before him in the case of The Nestor, reported in 1 Sumn. 73, and was decided in 1831. The claim was for a cable furnished to the vessel at Alexandria, in the District of Columbia, at the request of the master. The vessel belonged to Portland, in the State of Maine. And the court held that the vessel was liable, unless it was shown that the credit was exclusively given to the master. It is true that the article furnished in that case was for the use of the brig, which the owner was bound to keep in repair. But the principle decided applies directly to the case before us—that is, that the master, under one of these contracts, is not owner for the voyage, so far as to exclude his character and authority as captain. And that his contracts for repairs and supplies are presumed to be made in the latter character, and to create the usual maritime lien upon the vessel, and the usual liability of the owner, unless the presumption is repelled by proof that the credit was given to him. The whole subject is fully discussed in this case, and such will be found, upon a careful examination, the result of the opinion.

The case of The Cassius, 2 Story, 81, was a contract of the same description, between the master and owners; and in that case the rights of the master and the responsibility of the owners for his acts in a foreign port were fully considered; and the decision turned upon the question whether, under one of these contracts, the master was the owner for the time. And the learned judge, speaking of the case of Taggart v. Loring, 16 Mass. 336, says: "That case is distinguishable, in its actual circumstances, from the present. The argument in that case does not appear from the statements of the report to have been identical with the present. And if it were, I must say that I should have some difficulty in acceding to the authority 41*] of that *case, if it meant to establish that the master had an exclusive special ownership in the ship for the voyage. I should rather incline to the opinion, that if he had any ownership at all for the voyage, it was in common with the general owners." The contract in that case, upon which the libel was filed, was executed by him as master, and the court held that it bound the vessel.

Indeed, I do not see how, upon any fair interpretation of the terms of these contracts, a different construction could be given to them. There are no words in them which import that it is the intention of the owners to transfer the exclusive right of property in the vessel to the master for the time, nor anything in the character of the contract from which it can be implied—on the contrary, the right of possession remains necessarily in the owners. For they are to keep the ship in repair, and the master is only to man and victual her. The owners have, therefore, the right, while the contract continues, to take exclusive possession of her, from time to time, for the purpose of putting her in proper repair, and to have her properly equipped, so that she may always be seaworthy, and their property not be imprudently exposed to danger. And whatever Leach did, or was authorized to do, in this respect, was necessarily done as master, holding the possession for the time the repairs were making, not as owner of the vessel, but as agent for the owners, by virtue of his authority as master. And the owners, in a case like this, may, as in the case of an ordinary captain upon certain wages, displace him from the command whenever they think proper—being bound, however, in like manner, to fulfill the engagements into which he had lawfully entered.

Moreover, he had no connection with the vessel, except under his contract to sail her in the character of captain or master. He had no authority over her, or any right of possession, nor any power to direct her voyages or movements, except in this character. All of his rights were inseparably connected with his official relation to the vessel, and dependent upon it. The inducement to the contract was the confidence which the owners reposed in his seamanship, integrity, and capacity for business. It was a personal trust which he could not delegate or assign to another. It was to be executed by himself; and the moment he ceased to be master, all right of possession, and all right to control her voyages and movements, ceased also. And if his right to the possession of the barque, and to man and victual her, and contract for freights, and to receive half her earnings, were all inseparably connected with his official relation to the vessel as master, and dependent upon it, I cannot understand *how his contract for repairs [*42 and supplies can be said to be made in any other character.

His relation to the vessel, and his rights in and over her, differ in no material respect, in a contract of this kind, from that of a master sailing in the ordinary mode, upon fixed and certain wages, from one port to another, under the direction of the owner, to carry or seek for freight. The only difference is, that a larger discretion as to the voyages to be undertaken is given to the master, and he receives half the earnings, instead of certain and fixed wages. And I cannot perceive how these two circumstances can give him any ownership of the vessel, or why the master's contracts for repairs and supplies in a foreign port shall be a lien upon the vessel in one case, and not in the other. The fact that he is to victual and man

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the vessel cannot of itself give a right of property in her. It is, undoubtedly a circumstance to be considered in expounding these contracts, but nothing more. For the exclusive right for the voyage may as well and legally be transferred where the owners man and victual her, as where it is done by the charterer, provided the contract taken altogether shows that such was the intention of the parties. It does not, as I have already shown, depend upon any particular fact, but upon the entire agreement. And I can see nothing in agreements of this kind, as was said by Mr. Justice Story in the case of The Cassius, which indicates an intention to make the master the exclusive owner during the voyages he might make, or that would justify the court in giving it such a construction.

I am aware, that in some or all of the States where these contracts are usually made, there are cases in the state courts in which it has been held, that in these contracts the master is the owner, and that his contracts made in the port of another state are made in the character of owner and not of master, and that an action cannot be maintained upon them against the general owners.

I shall not stop to examine these cases, because the question here is not whether an action can be maintained against the owners for these repairs and supplies, but whether they were a lien upon the barque. I admit that I can perceive no distinction in principle between the personal liability of the general owners and the liability of the vessel. For whatever may be the rights and liabilities of the masters and owners, as between themselves, upon their private contract, they cannot affect the rights of third parties dealing with him in his character of master, and furnishing necessary repairs and supplies in a foreign port at his request. They know him only as master, and deal with him in that character. 43*] And it is the rule of the *maritime law, as settled, in my judgment, by the decisions in the courts of this country, that in a case of that kind the owners personally, as well as the vessel, are liable for the amount. But if the owner is present, and they are furnished to him, it is equally well established that the credit is presumed to have been given to him personally, and no lien on the vessel is implied. The decisions in the state courts cannot therefore, it would seem, be reconciled to the decisions of the Circuit Court of the United States, hereinbefore referred to.

But however this may be, the implied lien on the vessel in cases like the one before us has been maintained in the Circuit Court. And as the question of maritime lien, with which we are now dealing, belongs peculiarly to the admiralty courts, and the paramount jurisdiction in such cases is vested in them by the Constitution of the United States, it necessarily follows, that it must rest with them to interpret the contract, and to determine whether it created a lien or not, and how, and when, and against whom, it can be enforced.

In the case of the Barque Chusan, 2 Story, 462, he says: "The Constitution of the United States has declared that the judicial power of the national government shall extend to all cases of admiralty and maritime jurisdiction; and it is not competent for the States, by local legislation, to enlarge or limit or narrow it. In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof by the general principles of maritime law. The States have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer."

The opinions of the state tribunals to which I have referred, are certainly entitled to very high respect, upon any question of law that may come before them; yet the question before us is not one of state law. It is a contract for maritime service, and belongs to the admiralty courts of the United States. And the state decisions, therefore, however highly we respect them, carry with them no binding judicial authority, when in conflict with the decisions of the courts of the United States upon questions belonging to the federal courts. And I the more firmly adhere to the doctrines of the Circuit Court hereinbefore stated, because, as I have already said, I can see nothing in the terms of the contract, or in its character and objects, that would justify a different construction. In my opinion, therefore, Leach had no ownership in The Laura, and in the contract in question exercised the powers of master, and nothing more.

Such being, in my judgment, the meaning and legal effect *of the contract between [*44 the owners and Leach, the next question to be considered is, was he still master when these repairs and supplies were furnished.

The appellants contend, that if he was not owner, but only master, while he was sailing the barque, he yet ceased to be master when he remained at Valparaiso, and placed the vessel under the command of Easton, and that from that time Easton was the master and the contract of Leach for repairs and supplies would therefore create no lien. Undoubtedly, the conduct of Leach in this respect was a violation of his duty to the owners, if he acted without their consent. He was to sail the vessel himself, and this personal trust and confidence could not be transferred by him to another. Such a transfer would be a breach of his contract, and of his duty under it. But that is a question between him and his owners, and they might displace him or not, as they saw proper. The point here is, did his official relation as master cease when he engaged in commercial pursuits, and remained on shore at Valparaiso.

Certainly, the misconduct of a captain, while on a voyage or in a foreign port, does not, ipso facto, deprive him of his office. It would be a sufficient reason for the owners to dismiss him; but in this case it is not pretended that he was dismissed or suspended by them. No other person was appointed to the command until after he had voluntarily surrendered it to the owners, after his return to Massachusetts in the spring of 1852. And these supplies had been furnished, at his request, months before the new master was appointed.

Nor did he abandon his official relation to the vessel while he remained at Valparaiso; but on the contrary, continued to hold possession in person or by his agent, and to exercise

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the rights and authority of master, according to the terms of his contract with the owners. He continued to man and victual her, direct her voyages, and receive the freights. Easton was paid by him, and not by the owners; he acted under the direction of Leach, as his agent and subordinate, and not under the direction of the owners. He was not even allowed to receive the freight; and when the supplies in question were furnished, Leach was actually on board, in actual command, and Easton acting as his subordinate, under his orders. And as Leach had no ownership whatever in the vessel, all of this must have been done by him as master, and could have been done in no other character; for if he had abandoned that official position, and Easton was master, he had no authority over Easton, nor any more right to interfere with him on the vessel than any other stranger.

Nor is his absence from the vessel by any 45*] means incompatible *with this official relation and authority. It is not necessary for the existence of such a relation, and the exercise of such an authority, that he should always be on her deck. He may be absent for a longer or shorter time, and at a greater or lesser distance, without forfeiting his authority; and when once appointed master by the owners, he continues master until displaced by them, or he himself surrenders the office. As respects a dismissal by the owners, Mr. Justice Story says, in the case of The Tribune, 3 Sumn. 149: "Being once master, he must be deemed still to continue to hold that characacter until some overt act or declaration of the owners displaced him from the station." And certainly there was no such act or declaration while Leach continued in the counting-house of Loring & Co. And as to Leach himself, it is obvious from the facts above stated, that he had not resigned or surrendered the command.

It is said that Easton was master. By what authority was he master? He was not agent of the owners; he was not appointed by them, nor authorized by them to exercise any control over the ship. Nor would they have been bound by his contracts if he had made any, nor responsible for his acts. There were none of the relations and trusts which exist between owners and master, for they had not confided the ship to him, and were not even responsible for his wages; and if Leach was not master, and authorized to bind the vessel and owners by his contract, the vessel was sailing without one, and without any lawful authority from those to whom she belonged. It is true, Leach says he appointed him master; but that does not clothe him with the authority which the maritime law annexes to that character, unless Leach had lawful power to appoint him. He might, no doubt, have properly sent him on the voyage, and placed the vessel under his command while he remained on shore, if the interest of the owners required or would justify it. And he might, if he pleased, call him master or captain; but by whatever name he chose to call him, he would be nothing more than his subordinate and agent. He would not, in respect to the owners or third persons, possess the authority of master.

The cases of L'Arina v. The Brig Exchange, Bee, 198, and The Same v. Manwaring, 199, are directly in point on this head. There the party was appointed by the master as captain, and cleared the vessel as such at Havana; yet this appointment was held by the court not to give him the legal relation of captain to the vessel, nor displace the master appointed by the owners; and it was held that the contract of the latter, within the scope of his authority as master, was still binding upon the owners. The fact, therefore, that Leach remained *on [*46 shore, and sent the vessel upon different voyages under the command of an agent appointed by him, did not of itself displace him; and he was still master of the barque, with all the powers and responsibilities which are attached to that character. And if the fact that he remained on shore did not deprive him of his official character, the circumstance that he was engaged during that time in commercial pursuits cannot alter the case. It cannot make any difference, in this respect, whether he remained idle or employed himself in any particular pursuit.

But it is said that Leach was not only absent from the barque, but he was employing her in violation of the orders of the owners, who disapproved of his conduct, and had directed him to bring the vessel home, and that Loring & Co. knew it and yet encouraged and enabled him to go on in the violation of his duty, by large advances of money. And it is insisted, that as Loring & Co. were aiding and encouraging him in this breach of duty, and the supplies in question were furnished to enable him to persevere in it, they were furnished in bad faith to the owners; and in a court of admiralty, acting upon equitable principles, can create no obligation upon them, nor any lien upon their vessel.

If the facts assumed were established by the testimony, I should not dispute the law as above stated. But I think the fact that the owners disapproved of his remaining on shore, and engaging in mercantile pursuits, is not only not established, but, on the contrary, the weight of the testimony is on the other side, and, notwithstanding the evasive and ambiguous answers of Leach, tends strongly to prove that his conduct in this respect met their approbation.

In examining the testimony in relation to this question of fact, it is necessary, in order to see the force to which it is entitled, to state it more minutely than I have done in the preceding part of this opinion, and to note particularly the dates as given by the witness.

The disapproval of the appellants is brought out by the following question, put by the appellants, the owners:

"Was your remaining in the Pacific and trading with The Laura done with the consent and approval of the owners."

To this question Leach simply answers, "No, sir."

Upon the cross-examination upon behalf of the libelants, the following interrogatories were put to him, to which he gave the following answers:

Question. "When was their (the owners) dissent made known to you?"

*Answer. "I think it was the second [*47

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time I was at Valparaiso, which, I think, was in the latter part of 1849."

Question. "At what period did the owners take efficient steps to displace you?—at any period before Captain Weston was sent out?"

Answer. "They did not take any efficient steps, any further than to request me to come home."

These answers constitute the entire proof of disapproval and dissent of the owners, of which so much has been said in the argument, and which has been so confidently assumed as a fact proved.

It will be observed that the question put by the owners does not point, and clearly was not intended to point, to any disapproval on their part of his remaining on shore, or engaging in trade at Valparaiso. It relates altogether to the employment of the barque in the Pacific, instead of the Atlantic. In fact, it could not have related to his remaining on shore, or engaging in trade, because the notice of disapproval appears to have been given but once, and was given and received while Leach was still sailing the vessel under the "lay," and seeking and carrying freights, and before he had purchased a single cargo for himself, or absented himself from her for a single voyage. It was never repeated, although he remained nearly two years afterwards, engaged in commerce, and on shore in the counting-house of the libelants nearly half the time.

The fact is clearly established by Leach's answers to the cross-interrogatories above given.

It will be observed that in these answers he says he thinks their disapprobation was made known to him the second time he was at Valparaiso, which he thinks was in the latter part of 1849. Now, in the preceding part of his examination he had stated positively that he arrived at Valparaiso from Rio with a cargo on freight, consigned to Loring & Co., in November, 1849, and arrived there the second time in July, 1850. Without stopping to comment upon the hesitating language, and the vagueness and uncertainty of this answer in relation to a fact which it is obvious, from the preceding part of his testimony, was perfectly in his recollection, it is sufficient to say, that, give him either date, it is evident that the disapproval of the owners had no connection with his mercantile pursuits, and pointed merely to the employment of The Laura in freighting voyages on the Pacific instead of the Atlantic; for if the notice was received by him in 1849, it was before he had engaged in that coasting trade, and must have been written by the owners in consequence of information given them by Leach from Rio, concerning the freight he had obtained there for Valparaiso, and of his in- 48 | tention to seek *freights on that coast; for this was his first voyage in The Laura to the Pacific. He had not then engaged in the coasting trade on that ocean, and had done nothing in that respect for the owners to disapprove of. And if he did receive the notice, as he says, in 1849, upon his arrival at Valparaiso, it must have been a disapproval of what he informed them he proposed to do; not of what he was doing or had done. Certainly it had no relation to his trading on his own account, for there is not the slightest evidence that he had any such design at that time, nor for nearly a year afterwards.

And if we take the other date, the argument is equally strong; for if he received it on that occasion, it must have been written some time before. And it was on his second visit to Valparaiso, in July, 1850, that he for the first time engaged in mercantile pursuits on his own account, and obtained advances for that purpose from Loring & Co. If the notice reached him at that time, and before he commenced his commercial speculations, the dissent must have applied to the place at which he had been seeking freights, and not to his private speculations. Indeed, taking this as the date of the receipt of the notice, the inference is almost irresistible, that the owners must have been apprised of his intention to purchase cargoes on his own account, and approved of it; for he had been engaged, when he received this notice, in seeking freights in the Pacific for about nine months. He had not, it appears, been successful; and after his first cargo from Valparaiso to San Francisco, he sailed most commonly from port to port in ballast, or with very inconsiderable cargoes; and as Leach was in constant correspondence with the owners, they were of course apprised of his want of success, and would very naturally disapprove of his remaining in the Pacific, where the earnings of the vessel would give them very little for their share of the freights. But this notice, as I have said, does not appear to have been repeated. Leach does not pretend that any complaints of his conduct were subsequently made by the owners; and the natural inference is, that having confidence in Leach's prudence and judgment, when, in reply to this communication, they were apprised by him of his determination to purchase cargoes on his own account for The Laura, and thus insure constant employment for her and full freights, they were willing he should remain and carry out his plan. And this conclusion is strengthened by the circumstance that no measures were afterwards taken by the owners to compel or induce him to return, and that he remained, without further complaint, engaged in these pursuits until he himself found them unprofitable, and determined to return home.

*He is asked in one of the interroga- [*49
tories: "At what period did the owners take efficient steps to displace you?—at any period before Captain Weston was sent out?" And he answers: "They did not take any efficient steps, any further than to request me to come home." And in answer to another interrogatory he says he did not yield to their wishes, because he thought he had a right to remain there if he chose. There was no order, therefore; no charge of misconduct; no notice that they would put an end to the contract; nothing more than a request which Leach did not comply with, because he thought that while the owners suffered the contract to continue, he had a right to select the theater of his operations, and to act upon his own judgment. And undoubtedly he was right in this respect, unless the owners put an end to the contract, which they might have done at any moment, if they supposed him to be no longer acting in the line of his duty. But whatever might have been their opinion as to the soundness of his judg-

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ment in selecting the Pacific instead of the Atlantic for the employment of the vessel, when they requested him to return, they undoubtedly acquiesced in his opinion when they received his answer declining to return, and continued for nearly two years afterwards to sanction his conduct, by suffering him to remain there, receiving remittances from him, and paying his drafts, and settling his account, without making the slightest objection to allow him one half of the freights, according to the contract, for his services as master. And the charge of taking the vessel to the Pacific and illegally detaining her there for his own benefit and advantage, was never heard of until payment for the repairs and supplies furnished to their barque was made by the libelants. And if such a defense had been founded in fact, it would have been easy for the owners to prove it conclusively, by producing the correspondence between them and Leach. But no part of it has been offered in evidence. The fair inference from the testimony, therefore, is, that they assented to his proceedings, and approved of his remaining, after receiving his answer to the request for his return.

But if the case were otherwise in this particular, and it had been proved that Leach illegally and against their orders detained The Laura in the Pacific, I do not see how that would affect the claim of the libelants, unless in furnishing those supplies they knowingly aided and abetted him in his breach of duty to the owners. The argument is, that they did knowingly aid and abet him. But it would be a sufficient answer to it to say, that no such charge is made against them in the answer. It is made against Leach; but there is not the slightest intimation that Loring & Co. had any 50*] knowledge of it. *And as this defense is not taken in the answer, it cannot be relied on here, even if there was evidence in the record which would justify it.

But there is not the slightest evidence to prove it. On the contrary, it appears by Leach's testimony, that when he arrived at Valparaiso, with the cargo consigned to Loring & Co. he told them upon what terms he was sailing the vessel, and the deep interest he had in her earnings; and thinks it probable he mentioned the contingent right he had of purchasing one eighth of the vessel, if he could raise the money to pay for it. The fact that he had been trusted with so much power over such a vessel as The Laura, and would even be received as a partner if he could raise the money, naturally induced Loring & Co. to think him worthy of confidence. And they appear to have aided him in procuring freights while he confined himself to that business. They evidently had no knowledge of any dissatisfaction on the part of the owners, for Leach states positively that nobody but himself knew of it. And when, therefore, he proposed to purchase cargoes on his own account, which would give The Laura constant employment and full freights, they could have had no reason to suppose that his owners disapproved of it. And when these supplies were furnished, they had strong grounds for believing that his conduct in this respect was known to the owners, and met their approbation; for they had then seen him for nearly two years engaged in this business, during all that time in correspondence with his owners, and occasionally making remittances to them, and drawing bills on them (as Leach himself states), which appear to have been duly honored, and without the slightest token of disapproval, as far as Loring & Co. had an opportunity of seeing. There was nothing to create suspicion or put them on inquiry. The advances made to him were made in the regular course of their business, and at the usual rates for interest and commission in that quarter of the world; and they had every reason to believe that they were promoting the objects and advancing the interests of the owners, as the advances made to Leach enabled him to keep The Laura constantly employed with full cargoes, thereby earning large freights, of which the owners were entitled to the one half. Loring & Co. had no knowledge of the state of his accounts with the owners; and no reason even for suspecting that he did not remit to them their share of the freights, or that he improperly used or withheld it.

The case, then, upon the points already examined, may be summed up as follows:

1st. At the time these repairs were made and supplies furnished, *Leach was in full [*51 possession of the barque, exercising his authority as master, under his contract with the owners hereinbefore stated. 2d. He was recognized and paid as such by the owners. 3d. He was dealt with as such by Loring & Co., in good faith, without the slightest grounds for suspecting that the owners disapproved of his conduct, or had requested him to bring the vessel home. 4th. The repairs and supplies were necessary to enable her to go to sea, and she must have remained idle in the port if they had not been furnished; and they were made and furnished with prudence and economy, under Leach's own direction. 5th. He had no money except the $500 hereinbefore mentioned, which he needed for his personal expenses, and had no funds either of his own or the owners within his reach, with which he could make these repairs or obtain the necessary supplies. These facts appear to me to be conclusively established by Leach's own testimony. And as it is admitted, on all hands, that the repairs were made and the supplies furnished at his request and by his order, it follows, from the decisions in this court, and at the circuits to which I have already referred, that, by the maritime code of the United States, Loring & Co. obtained an implied lien on the vessel for the amount, unless it can be shown that they were furnished on the personal credit of Leach or some other person.

An attempt was made to offer such proof, and to show that the supplies were furnished upon the personal credit of Leach. But it is an obvious failure. He is asked by them whether the repairs and supplies were furnished upon his responsibility, or the credit of the vessel, or how otherwise. He answers, "I presume they were furnished on my responsibility." And this is the whole and only evidence offered by the appellants to show that they were furnished on the personal credit of Leach, and not on that of the vessel or owners. Certainly, such evidence can hardly be sufficient to remove the implied lien given by law.

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Whether the credit was given to him was a question of fact. If the fact was so, he must have known it, and could have sworn to it in direct terms. But instead of this, he merely expresses an opinion in general terms, and gives no reason for that opinion, and states no fact from which it might be inferred that this opinion was well founded. The answer is, in truth, no evidence; it is but the opinion or conjecture of the witness, and even if there was no evidence in the record to contradict it, would leave the case upon the implied lien which the law creates.

But it is directly in conflict with the written instruments signed by the witness himself at 52*] the time of the transaction. *The account for those repairs and supplies is headed, as I have already said, "Barque Laura and owners, to Loring & Co., Dr." It is signed by Leach, and admitted by him, in writing, to be correct. He of course read the account, and was undoubtedly a man of sufficient intelligence to understand the meaning of words. And how could the barque and owners be debtors for those supplies, if they were furnished exclusively on the credit of Leach? How could they be debtors to Loring & Co., unless they were furnished on their credit?

It is true Leach says he signed the account only for the purpose of verifying the items. But this is evidently an after-thought; for he admits by his signature, not only the correctness of his items, but the account itself—that is, the charge against the barque and owners, as well as the things charged.

Besides, if his signature was intended merely to verify the items, there was no necessity for this account. The items ought to have been inserted in the other account, signed by him at the same time, which contains the charges for which he was personally liable; and his admission of that account would have been quite sufficient to verify these items. And the fact that two accounts were stated, and signed and admitted by him on the same day, the one charging the repairs and supplies to the barque and owners, and the other charging him as "Captain Phineas Leach," for other articles properly chargeable to himself, shows that both parties understood what they were about; and, to avoid future cavil, stated their accounts against the respective debtors, according to their mutual understanding at the time. And the insertion of the aggregate amount for repairs and supplies, in the account against Leach, coupled with the account against the barque and owners, proves conclusively that the parties intended to make no special contract with Leach for those repairs and supplies, nor to take any special hypothecation or bottomry on the vessel, but dealt with one another upon the established rules of maritime law, which in the absence of any special contract, made the barque and owners, and Leach himself, responsible for the amount.

In order to give some color to his statement, that he presumes they were furnished on his credit, he says that his credit was at that time good. If he had shown that it was in fact good, it would be no reason for presuming that Loring & Co. relied upon it, and waived the other securities to which they were entitled. But the record shows that it was not good, and that Loring & Co., in the advances they made to him at the same time for the purchase of cargo on his private individual account, did not think it prudent to rely altogether upon *his credit. For the heading of the in- [*53 voice of the cargo purchased upon that occasion, which I have already set forth in full, expressly required that the sales and returns should be made by the consignee to Loring & Co. And Leach admits that the cargo was to be insured, and the loss, if any, to be paid to Loring & Co. And from his own testimony, as well as the invoice, it is evident that it was understood by the parties that the proceeds of the cargo were to be remitted from Panama by the consignees to Loring & Co. For he is asked by the libelants, "Was there not an understanding that the proceeds should be remitted by your consignees to Loring & Co.?" and he answers, "I don't know that there was." But he is again pressed by the inquiry: "Will you reflect and see if you cannot answer that question directly that there was?" and he then answers, "There was no such understanding; it might be understood; there was nothing promised." I give the words of the witness: but I cannot be convinced by this nice casuistry of Captain Leach, in distinguishing an understanding between the parties from a promise, that his credit was still good with Loring & Co., notwithstanding the evidence to the contrary in the agreement in the heading of the invoice, and in the admitted agreement in relation to the insurance. It certainly does not prove it so high as to create a presumption that all other securities were waived, from their confidence in the personal responsibility of Leach; nor did his subsequent conduct show that he merited even the confidence they did repose in him. For he went to Panama and procured advances to himself, on account of the cargo, to the amount of $2,100, and authorized large disbursements to be made by his consignee to his agent, Easton, for the use of The Laura, and proceeded to Massachusetts without returning to Valparaiso; and after he came home, he drew on his consignees for $375 more to pay Weston's expenses, who was sent out by the owners, and during all that time rendered no account to Loring & Co., and left them under the impression that the proceeds would, in good time, be remitted to them. It seems they were not aware of the distinction which Leach took between the mutual understanding between them and an actual and formal promise.

The point, therefore, taken by the owners, that the repairs and supplies were furnished on the personal credit of Leach, cannot, in my judgment, be maintained. And, undoubtedly, the justice of the case is clearly with the libelants. The captain was without funds, and his owners had none in Valparaiso; and the barque must have remained in port a wasting hulk if the means had not been furnished by Loring & Co., which enabled *her to sail. The [*54 owners have since received her, and now hold her in their possession, increased in value by those repairs, which enabled her to come home, and which were made by the money of Loring & Co. And they have also received the freights which those repairs enabled her afterwards to earn under the command of Weston. Justice,

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as well as the principles of the law, would seem to require that those who have reaped the profit of the advances should repay the party to whom they are indebted for their gains.

It remains to inquire whether the lien has been waived, by the delay in prosecuting it, or the debt been satisfied in any other way.

I shall dispose of those questions very briefly. For I am sensible that the great importance and delicacy of the points hereinbefore discussed, have compelled me to extend this discussion beyond the limits of an ordinary opinion in this court.

In relation to the alleged waiver by the delay, the mere statement of the evidence is an answer to the objection, and the evidence is this: The repairs were made and the supplies furnished in the spring of 1852. The barque returned to Valparaiso in the November following, when Weston immediately assumed the command. He was ordered by the owners to procure, if he could, a cargo of guano, and to bring the vessel to an Atlantic port. He did so; and he arrived in Baltimore in the June following, and the vessel was arrested on this libel a few days after her arrival.

The barque still belongs to the same owners. When Weston arrived at Valparaiso to take the command, he had no money, and was obliged to raise what he needed by a bill on his owners. At that time, Loring & Co. had no reason to suppose that the owners would refuse to pay this claim; and if they had then arrested the vessel, it would have broken up the voyage upon which she was destined, and subjected the owners to heavy losses by her detention. And it certainly ought not to be a matter of complaint on their part, that, under such circumstances, he did not arrest her, and took no measures to enforce his claim until he found that payment was refused; and it is unnecessary to cite cases to prove that the omission to arrest her at Valparaiso under such circumstances cannot be regarded as a waiver of their lien, upon any principle of law. There was no unreasonable delay in notifying the owners of the claim, nor in filing the libel when they disputed it. The Laura in the intervening time remained in the possession and employment of the owners; no third party had become interested, and the owners were greatly bene-
55*] fited *by the commission to arrest her, until she arrived in the United States.

It is said that Weston proves that nothing was said to him about their account, and hence it is inferred that nothing was due on it, or that it was not supposed by Loring & Co. to be a charge on The Laura. But it must be remembered that the house of Loring & Co., with whom Leach dealt, had dissolved partnership in the June preceding Weston's arrival, and a new one, with new partners in it, established under the same name. It is true that Mr. Atherton, a partner in the first firm, remained there, and was attending to their business. But the transactions of Weston were with the new firm, and it would have been useless for Atherton to present this claim to Weston, unless he had determined to libel the vessel. For, as I have said, Weston had no money but what he obtained from the new house of Loring & Co., for his bill on his owners, and this Atherton knew. Besides, the proceeds of her cargo shipped to Peyta and Panama, as hereinbefore mentioned, at the time these repairs and supplies were furnished, were to be paid to Loring & Co.; and when Weston was at Valparaiso, the account of these proceeds had not been received. It was, most probably, supposed, by Loring & Co., that they might prove sufficient to pay their claim against Leach, including these supplies. And this, it appears, would have been the case if Leach had not improperly converted a large portion of them to his own use, and to satisfy the claims of his owners against him. Justice, therefore, required Loring & Co. to await the result. They did wait, and did receive some money from this source, but not enough to pay even the advances for the cargo itself.

This is admitted in the argument. But it is said the money received should be first applied to extinguish the lien; first, because there was a security bound for that item—that is, the vessel; and second, because it is the first item in the account.

Now, the conclusive answer to this objection is, that if no specific application was made by either party at the time of payment, the law appropriates it according to the principles of equity. And as the money received from Panama was the proceeds of goods purchased with the money advanced by Loring & Co. for that purpose, equity will apply it in the first place to the payment of that debt.

Indeed, there is enough in the invoice and the testimony of Leach to show that the proceeds were to be so applied by the agreement between Leach and Loring & Co. when the advances were made. And they were accordingly so applied, as *far as they would [*56 go, when the money was received by them. The fact that the claim now in question was secured by a lien on The Laura, can surely be no reason for applying the money in the first place to discharge it. On the contrary, it would be a sufficient reason against such an application, and would be a good ground for postponing it until all the claims for which the creditor had no security were first satisfied.

I do not comprehend how the argument that it is the first item in the account can apply. In point of fact, however, it is not the first or oldest item in the account, as I understand the transaction. And if the lien on the vessel was originally valid, it is evident that it has never been discharged, or waived, or forfeited by unreasonable delay.

Some other items for necessaries furnished at Peyta, on the last voyage of The Laura to that port, and also a small charge for bread at Valparaiso, and which are not included in the account signed by Leach, were allowed by the Circuit Court, and are included in the amount decreed. These items, the counsel for the respondents insist, ought not to be allowed, even if those in the account are sustained. I think, when the whole testimony is examined, it will be evident that these charges stand on the same principles with those of which I have already spoken. But I forbear to extend this opinion by discussing that question; because as the court have determined that the repairs and supplies furnished, at the request of Leach, are not a lien on the vessel, it is useless to

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examine particular items, when the opinion of the court goes to the whole.

From that opinion I respectfully dissent. And after carefully reviewing the case in all of its bearings, and scrutinizing the evidence, I adhere to the opinion I held in the Circuit Court.

SEBASTIAN WILLOT, John McDonald, and Joseph Hunn, Plffs. in Er.,

v.

JOHN F. A. SANDFORD.

(See S. C. 19 How. 79-82.)

Where there are two confirmations for the same land, the elder must hold it.

The Act of 1811, reserving lands from sale, etc. has no application to this case.

Argued Dec. 2, 1856. Submitted Dec. 8, 1856. Decided Dec. 29, 1856.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This was an action of ejectment brought in the Circuit Court by the defendants in error, to recover a tract of land lying on Spencer's Run, St. Charles County, Missouri.

The case appears in the opinion of the court.

Mr. M. Blair, for the plaintiff in error:

The land in controversy had been surveyed, etc., and was thus passed out of the government when the Act of 1836 became law. Even without the proviso in the second section, that Act could not have devested the title already passed by previous confirmation and survey, but, out of an abundant caution, a saving clause is put into the second section to prevent such action of the Statute, and this court declares, in Les Bois v. Bramell, 4 How. 449, and re-asserts in various other cases, particularly in Landis v. Brant, 10 How. 348, that this section applies to cases like the present.

Locations made by public surveyors are conclusive.

West v. Cochran, 17 How. 403; Kissell v. Public Schools, 18 How. 19.

Messrs. A. H. Lawrence and Samuel T. Glover, for the defendant in error:

The survey of 1817, on the confirmation of 1816, and patent of 1850, in satisfaction of a claim of 800 arpents in right of Antoine Gautier were incompetent to affect the plaintiffs right to recover in his ejectment.

1. Because the said survey and patent, in so far as they were made to include lands lying on the west side of Spencer and within the survey of Lamarche, were contrary to law and void.

Stoddard v. Chambers, 2 How. 318; Bissell v. Penrose, 8 How. 333; Mills v. Stoddard, 8 How. 364; Pick. C. C. 513; McMin v. Stafford, 2 Bibb. 487; Miller v. Kerr, 7 Wheat. 6; Boyce v. Papin, 11 Mo. 25; McGill v. Somers, 15 Mo. 80; Joyal v. Rippey, 19 Mo. 665; Menard v. Massey, 8 How. 312.

2. The plaintiff below showed the oldest legal title. The defendants below took no legal title till the emanation of their patent in 1851. The Act of July 4, 1836, had passed the legal title to all the land in the Lamarche survey to the claimant.

Ewing v. Burnet, 11 Pet. 51; Stoddard v. Chambers, 2 How. 317.

Mr. Justice Catron delivered the opinion of the court:

Peter Chouteau, claiming under one Dissonet, laid before Recorder Bates a claim for 800 arpents of land, situated in St. *Charles County, Missouri. The evidence [*81 presented to the Recorder was a certificate of a private survey embracing the claim as set up, with proof that Dissonet had inhabited and cultivated the land from 1798 to 1805. The Recorder pronounced the claim valid as a settlement right to the extent of 640 acres, and declared that it ought to be surveyed as nearly in a square as might be, so as to include Dissonet's improvements; and furthermore, that the land should be surveyed at the expense of the United States.

This report was confirmed by Congress, by the Act of April 29, 1816. The land was surveyed in 1817, by authority of the United States. A patent certificate was forwarded to the General Land Office by the Recorder of Land Titles at St. Louis, in 1823, and a patent issued on it in 1850. Protection is claimed by the defendants, under the survey and patent.

The jury was instructed by the Circuit Court, that the survey and patent were not conclusive evidence that the land they embraced was correctly located and surveyed according to the confirmation; and if they believed that the land sued for was not within the confirmation of the legal representatives of Dissonet, although it may be within the survey and patent, then the survey and patent would not protect the defendants.

Exceptions were taken to this ruling. The jury found that the official survey did not correspond to the confirmation, but that it was illegally extended so as to interfere with the claim on which the plaintiff relies. His claim is this: In 1805 Antoine Lamarche caused a private survey to be made by Harvey for 750 arpents of land, which he claimed by right of settlement. Lamarche laid his claim before the Board of Commissioners, but produced no evidence of inhabitation and cultivation; indeed, no evidence at all, except the surveyor's certificate. On coming before the Board, in 1811, the claim was of course rejected; and thus it lay until 1833, when the Board of Commissioners organized under the Act of July 9, 1832, took evidence which established the fact to their satisfaction, that Lamarche had inhabited and cultivated the land, and was entitled to a confirmation; and in 1835 they recommended to Congress that the claim ought to be confirmed according to Harvey's survey of 1805; and it was thus confirmed by the Act of July 4, 1836.

Harvey's survey covers the land in dispute, which is overlapped on its eastern boundary by the survey and calls of the patent to Dissonet; and within this interference the defendants hold possession.

Up to the date of the confirmation of Lamarche's claim, in *1836, it had no stand- [*82 ing in a court of justice. So this court has uniformly held.

Les Bois v. Bramell, 4 How. 449.

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In the next place, the United States reserved the power to survey and grant claims to lands in the situation that these contending claims were when confirmed; nor have the courts of justice any authority to disregard surveys and patents, when dealing with them in actions of ejectment. This court so held in the case of West v. Cochran, 17 How. 403, and will not repeat here what is there said.

When the survey of 1817 for Dissonet's land was recognized at the Surveyor-General's office as properly executed, which was certainly as early as 1823, then Dissonet had a title that he could enforce by the laws of Missouri, and which was the elder and better; it being settled that where there are two confirmations for the same land, the elder must hold it. A more prominent instance to this effect could hardly occur, than that of rejecting a younger confirmation in the case of Les Bois v. Bramell, above cited.

The Act of 1811, reserving lands from sale which had been claimed before the Board of Commissioners, has no application to such a case as this one. It was so declared in the case of Menard v. Massey, 8 How. 309, 310.

It is ordered that the judgment of the Circuit Court be reversed and a venire de novo awarded.

116*] *REUBEN L. LONG, John S. Pemrise, and Amelia Pemrise, his Wife, and Alice Pemrise, by her Guardian John S. Pemrise, Complainants and Appellants,

v.

JOHN O'FALLON.

(See S. C. 19 How. 116-125.)

Sale of land by administrator, vendee takes it exempt from claims of heirs, unless fraud or collusion.

On sale of land by administrator in the legitimate exercise of his powers, as trustee, his vendee is not obliged to look to the application of the purchase money.

His failure to account is a devastavit for which he and his sureties are liable on their official bond at law.

In the present instance, defendant being a purchaser in good faith is entitled to hold the property exempt from the claims of heirs.

The heirs are not entitled to pursue their claim against a purchaser for value who has not been guilty of fraud or collusion.

Argued Dec. 11, 1856. Decided Dec. 29, 1856.

APPEAL from the Circuit Court of the United States for the District of Missouri.

The bill in this case was filed in the Circuit Court of the United States for the District of Missouri, by the appellant, to obtain a conveyance from the appellee, of a certain tract of land near the City of St. Louis, and an accounting for the rents and profits thereof. The court below having dismissed the bill, the case is now here on appeal.

A further statement of the case appears in the opinion of the court.

Mr. S. T. Glover, for appellants:

1. The case of the appellants rests upon the doctrine of resulting trust, aided by that of fiduciary relation. An administrator who purchases land under a judgment in favor of the intestate, holds it as a trustee for the heirs, and the cestui que trust may take the land at his election.

Fellows v. Fellows, 4 Cow. 698, 704, 706.

One Hedden purchased at an executor's sale part of the property sold, for the separate use of the executor's wife. The purchase was at public auction and for a fair price.

Held, that no fraud or unfairness need be shown, but that the sale was void at the pleasure of the persons interested; and if they said so, the sale must be set aside.

Davoue v. Fanning, 2 Johns. Ch. 252.

We have been unable to find any one well-considered case to sustain the right of an executor to become the purchaser of property which he represents, or any portion of it, even at a fair price at public sale, without fraud.

Michoud v. Girod, 4 How. 557. This case states all the reasons of the rule.

Where lands in the hands of a party stand affected with a trust, and the person in whose hands they so stood has sold them to a third person, the cestui que trust has a right to follow the lands into the hands of anyone but an innocent purchaser, and the trustee cannot deprive him of this right.

Oliver v. Piatt, 3 How. 401.

Meyer conveyed his property in trust to pay debts. Part of it was sold under an execution in the control of the trustee, and bought by him.

Held, that the purchaser took in trust for the beneficiary.

NOTE.—Executors and administrators, when individually liable—see note to Taylor v. Benham, 12 L. ed. U. S. 130.

NOTE.—Devastavit, what is; responsibility for.

A devastavit is a mismanagement of the estate and effects of the deceased; a wasting of the goods of the deceased; a breach of trust or misappropriation of the assets, by which a loss occurs. Off. of Exec. 156; Godolph. 203; Bro. Law Dict.; Bouvier's Law Dict.; Tallaferro v. Bassett, 3 Ala. 670.

Devastavit may occur from such acts of negligence and wrong administration as will disappoint creditors of their debts. Alden v. Park, 5 Dowl. P. C. 16; as selling goods at an under value, if he might have gotten more, or if it was for his own advantage. Kelw. 59, 62; 3 Leon. 143; 6 Mod. 181.

So it is a devastavit to release a debt due the testator for less than its value, or to release a cause of action, or to pay an usurious bond or a bond exturpe causa. Hob. 66. 138. 167; And. 138; Cro. & Eliz. 43; 4 Leon. 102; Godb. 29; Browni. 33; Noy. 129; 1 Ves. 254; De Diemar v. Van Wagenen, 7 Johns. 404; 9 Mass. 352; or to surrender a lease at less than its value. People v. Pleas, 2 Johns. Cas. 376; 3 P. Wms. 360; or to delay bringing action for debt due testator till debtor can protect himself under plea of Statute of Limitations, per Holt, Ch. J., 12 Mod. 573; Long's Estate, 6 Watts, 46.

If an executor sues in trover, where there is a right to recover, and agrees to take a sum payable at a future day, and the party fails, this is a devastavit. Norden v. Levit, 2 Sr. T. Jons 88; S. C. 6 Mod. 94; Vern. 474.

The payment by an administrator of claims not due, or owing, or out of their order, or of legacies before all the debts are satisfied, is a devastavit. 4 Serg. & R. 394; 5 Rawle, 266; Off. of Ex. 26; Dyer, 254; Keiln. 128.

An administrator who fails to collect debts of the estate he represents, as they become due, or collects the same in illegal or worthless funds, is guilty of a devastavit. Ogelsby v. Howard, 43 Ala. 144; Siegleman v. Marshall, 17 Md. 550; Mitchell v. Lutn, 4 Mass. 653; Moore's Est. 1 Tuck. 41; 64 N. C. 702.

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Harrison, Administrator, v. Monk, 10 Ala. 165.

If an agent discovers a defect in the title to the land of his principal, he cannot misuse it to acquire a title to himself.

Ringo v. Binns, 10 Pet. 281.

Where the trustee aliens the land pendente lite, the cestui que trust may elect to take the land or the money it sold for.

Murray v. Lylburn, 2 Johns. Ch. 441.

The cestui que trust may affirm the sale and take the property, or have a resale.

Thorp v. McCullum, 1 Gilm. (Ill.), 614.

It seems the beneficiary has three courses he may pursue in his election. (1) He may set aside the purchase and have a resale. (2) He may affirm it and take the property as his own. (3) He may take the money.

This shows that he owns the property.

O'Fallon knew that McAllister held the property in trust for the persons interested in the estate of Gabriel Long; they having paid the purchase money, is manifest from the title papers themselves.

The article of agreement between O'Fallon and McAllister, dated Aug. 12, 1828, was valid to show a sale to O'Fallon on the 12th, but not evidence of the recited matter against the appellants.

On the sale to McAllister in 1824, the property in dispute was held by him in trust. On the 10th Aug. 1828, after the release of Mrs. Dodge, the property was held by him in trust; and if he did, as recited in the instrument of Aug. 12, 1828, sell to O'Fallon the interest gotten of Mrs. Dodge on the 10th, he had no power to devest the title of Long's heirs thereby.

The entries of McAllister in Jan. 1828, were in fraud of the rights of the heirs of Long, and inured to their benefit.

It is impossible to conceive the ground on which the Circuit Court dismissed the bill as to these entries. McAllister, who held the property as administrator, and who in this way learned of the defects in the title, went into the market and purchased upon his own mere motion, an outstanding title to the trust estate.

See DeBevoise v. Sandford, Hoffm. Ch. 195; 5 Ves. 678; 3 Mer. 200; 14 Ves. 601.

The property when vested in McAllister, being in equity, the property of Long's heirs could only be sold by proceedings in the Probate Court, in conformity to the statute law.

See Rev. Code of Mo. 1825, Vol. I. p. 106, p. 40, 41.

The Statute of Limitations is not applicable to the case, or if it was, did not begin to run till the deed to O'Fallon in 1833, which was the first repudiation of the trust by McAllister.

Mr. H. S. Geyer, for appellee:

On the part of the appellee, it is submitted, that upon the case made at the hearing, the bill of the appellants was properly dismissed.

1. The sale in Aug. 1824, under the decree of the St. Louis Circuit Court, was not a sale of any property belonging to the estate of Gabriel Long, nor was it a sale made by the administrator, nor under his direction or control; and therefore the purchase by the administrator was not a breach of any trust, nor did he become, in fact or in law, a trustee for the heirs of Gabriel Long.

According to the laws of Missouri, Gabriel Long had no estate in the land embraced by the mortgage deed. The land was held as security for the debt, and could be subject to sale only as the property of the mortgagor, and in the mode adopted by the administrator—by decree of a court—the sale to be made by the sheriff.

An administrator may buy goods for his intestate at sheriff's sale (Haddix v. Haddix, 5 Litt. 204); and so at an open and public sale, without fraud, an executor may purchase the property of his testator.

Drayton v. Drayton, 1 Desaus. 567; Anderson v. Fox, 2 Hen. & M. 245; McKey v. Young, 4 Hen. & M. 430; Hudson v. Hudson, 5 Munf, 180.

A person who had married a widow and administratrix, and was acting guardian of the minor heirs, was held to have a right to purchase the estate at full price at public sale directed by the court for the purpose of partition.

McGuire v. McGowen, 4 Desaus. 486.

The case of Fellows v. Fellows, 4 Cow. 698, 704, 706, has been cited as authority to sustain the position of the appellant, that an administrator who purchases land under a judgment in favor of the intestate, holds as a trustee for their heirs, and cannot devest himself of the trust; and there is a marginal note to that effect, but it is not warranted by the opinion. In that case, the complainants sued as administrators, and set up the interest in the property as such, against persons not heirs, who demurred to the bill on the ground that the com-

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It is a devastavit not to plead the Statute of Limitations. Thompson v. Brown, 16 Mass. 172; Woods v. Elliott, 49 Miss. 168; or to pay debts of an inferior degree where the assets retained are insufficient to pay those of a higher degree. Braxton v. Winslow, 4 Call. 308; Hinton v. Kennedy, 3 S. C. 459; Stephens v. Barrett, 7 Dana, 257; Pope v. Wickliffe, 7 T. B. Mon. 212.

If a judgment is recovered against an administrator, payable out of specified assets, any other application of them will make him liable for a devastavit. Davis v. Flewellen, 22 Ga. 49; Smith v. Jewett, 40 N. H. 513.

It does not amount to a devastavit if an executor lend out money of the testator not wanted for the uses of the will on private security, provided he exercises a fair and reasonable discretion. Webster v. Spencer, 3 Barn. & A. 360.

Executors ought not, without great reason, to permit money of the testator to remain on personal security longer than is absolutely necessary, especially where infants are concerned. Powell v. Evans, 5 Ves. 839; Eagleton v. Coventry, 8 Ves. 466; French v. Hobson, 9 Ves. 103; Wilkes v. Steward, Coop. 6.

A creditor cannot charge as a devastavit an act not done by his consent and concurrence. Cain v. Hawkins, 5 Jones, 192; nor is the executor liable at law, as for a devastavit, in relation to equitable assets, unless by force of a statute. Green v. Collins, 6 Ired. 139; nor will he be charged with a devastavit in respect of property of which it does not appear that he ever knew of its existence. Ward v. Jones, 10 Yerg. 160.

Executors are as much liable for loss by nonfeasance, as by misfeasance. Fisher v. Skillman, 18 N. J. Eq. 229.

The law requires from trustees, good faith and due diligence, the want of which is punished by making them responsible for the losses which may be sustained by the property entrusted to them. When, therefore, a party has been guilty of a devastavit, he is required to make up the loss out of his own estate. 11 Vin. Abr. 306; 1 Vern. 328; 7 East, 257; 1 Binn. 194; 1 Serg. & R. 241.

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plainants came in two capacities, a part of the property having been purchased by them at sheriff's sale, under a judgment in favor of their intestate. The court regarded the complainants as having averred substantially that they purchased as administrators, and it was not for the defendants to question their authority; and Judge Sutherland said, "it is to be presumed at this stage of the cause, that they purchased at the request and for the benefit of the heirs, and a court of equity would compel them to account for the estate."

There is no adjudged case, it is believed, in which it has been held that an executor or administrator may not purchase property of others at a public judicial sale, under a decree, judgment, or process in favor of the testator or intestate, or of his personal representatives.

2. No estate or interest in the land in controversy was vested in the heirs of Gabriel Long, by virtue of the tripartite deed of the 1st Sept. 1824, nor by the deed of Catharine Dodge to Alexander McAllister, of 10th of Aug. 1828.

The first of these deeds is a mortgage in trust for sale. Under it, McAllister, as mortgagee, held the land to secure the debts due to the estate of Long, with power in case of default in the payments stipulated for, to make sale absolutely, at public or private sale, of the land embraced; the proceeds to be applied first to the payment of the principal and interest of the debt, and the residue, if any, to be paid over to Mrs. Dodge—McAllister held the estate as trustee for Mrs. Dodge, subject to the debt due from McNair to Long's estate. The personal representatives of Long, not his heirs, held the security for the debt, and were entitled to enforce it.

Before the execution of the second deed, McAllister made a settlement of his accounts as administrator of Gabriel Long's estate, and was credited with the amount of McNair's debts as desperate, so that he was no longer charged therewith as administrator.

The land continued to be held as a security for the debt of McNair, when Mrs. Dodge conveyed to McAllister her right to redeem the land which she had purchased from the United States, and mortgaged by the deed on 1st of Sept. 1824. McNair's right to redeem, however, still remained, until the sale made to O'Fallon.

There is no allegation or evidence that McAllister applied any of the assets of the estate of his intestate to the purchase of any part of the land in question, either at the sheriff's sale in 1824, or in consideration of the deeds of Mrs. Dodge, in 1824 and 1828; the accounts of the administrator, McAllister, exhibit no charge against the estate for anything paid on account of the land.

At the time O'Fallon became the purchaser, McAllister held in his own right all the estate and interest of McNair and Mrs. Dodge in the land, subject only to the incumbrance created by the tripartite deed of 1st Sept. 1824, under which he had a complete power of disposition, but was bound to apply so much of the proceeds of any sale as was necessary, to the payment of the debt of McNair to Long's estate. That is, at most, the land was subject to a *mortgage* to secure the debt to Long, which inured to the personal representatives of Long, and not an estate held by McAllister in trust for the heirs.

If, therefore, the defendant O'Fallon could be regarded as holding the land precisely as it was held by McAllister, he could be required only to satisfy the debt due from McNair to Long's estate, or sell the land and apply the proceeds to the payment; but he does not hold the estate in the land in trust for the heirs of Long. The cause of action, if any, against him, is in the personal representative of Gabriel Long. And even if the heirs might prosecute an action in a court of equity for a money demand, the interest of Alton Long was not assigned by his deed to Pemrise, and the bill was properly dismissed, because the heirs are not the proper parties complainant, and because a part of them only are made parties.

The sale to O'Fallon having been fairly made, and a full consideration paid, the title vested in him, discharged of the incumbrance in favor of the personal representative of Gabriel Long, created by the deed of 1st Sept. 1824.

The sale was made after the last settlement by McAllister of his accounts, as administrator, with the County Court of St. Louis, and it does not appear whether he afterwards accounted for the proceeds of the sale or not. The bill contains no allegation that he failed to account, and it was not put in issue in the cause. But it is clear that McAllister was authorized to make the sale to secure the money and make the conveyance, and there was no obligation on the part of the purchaser to see that he accounted for the proceeds as administrator of the estate of Long.

Grant v. Hook, 13 Serg. & R. 262; 2 Des. 378; Field v. Schieffelin, 7 Johns. Ch. 160.

Mr. Justice Campbell delivered the opinion of the court:

The appellants, a part of the heirs of Gabriel Long, deceased, instituted this suit in the Circuit Court against the defendant, to obtain a decree for a title to, and for an account for the rents and profits of, a parcel of land in St. Louis, Missouri.

The case made in the record is, that in 1820, Alexander McNair and wife executed a mortgage deed for the land in controversy to Gabriel Long, to secure a debt not then due. Before its payment, Long died, and Alexander McAllister was appointed to administer his estate. In 1823 this administrator obtained a decree in the Circuit Court of St. Louis County, for a foreclosure of the mortgage, and an order of sale, to be executed after a limited period. This order was executed in August, 1824, by a public sale of the property to McAllister, for a small portion of the debt.

The title of McNair, before this sale, had entirely failed. The Spanish concession and survey, under which he claimed the land, had been surveyed and located by the officers of the Land Office so as to exclude this parcel, and, in consequence, it was subdivided into five fractional sections; and was subject to sale as public land. At the date of the sale by the sheriff, two of these fractions, embracing the whole tract except nine acres, were claimed by Catherine Dodge, under a patent from the United States, and the remaining sections were patented to McAllister, as a purchaser, by entry at the Land Office in 1828.

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In September, 1822, Catherine Dodge and McNair agreed to secure the debt due to the estate of Long, by a mortgage in favor of McAllister.

The debt was divided into three unequal installments, which were to be paid within three years by McNair; and Mrs. Dodge conveyed her two fractional sections, in mortgage, with a power of sale in the event of a default, to secure the performance of the obligation.

McNair failed to make the payments, and in 1828 Mrs. Dodge released to McAllister her equity of redemption and her claim upon him for any surplus from the mortgage, for the consideration of one dollar.

In 1828 the defendant purchased the five 125*] fractional sections *from McAllister, for a fair price, and has been in the undisputed possession of the land since 1830. The defendant pleads the Statute of Limitations in bar of the recovery.

The opinion of the court is, that the conveyances of Mrs. Dodge to McAllister did not invest the heirs of Gabriel Long with an equitable estate, or a particular lien on the property described in them. Their primary object was to create a security, or a fund, for the payment of the debt of McNair, and to enable McAllister to dispose of the land in case of its non-payment, at his discretion, for its discharge. The release executed in 1828 was not made to extinguish any portion of the debt, nor did it remove the obligation of McAllister to convert the security into pecuniary assets. His sale of the land was a legitimate exercise of the powers of an administrator and trustee, and his vendee was not obliged to look to the application of the purchase money. Tyrrell v. Morris, 1 Dev. & Batt. Ch. 559. His failure to account was a devastavit, for which he and his sureties are liable on their official bond at law; and probably if the land had been retained by him, or any person claiming as a volunteer under him, a court of equity might have permitted the heirs to accept the property, instead of the debt due to the estate. But, in the present instance, the defendant is a purchaser in good faith, and is entitled to hold the property, exempt from the claims of the plaintiffs. Rayner v. Pearsall, 3 Johns. Ch. 578.

Nor can the title of the defendant to the three small fractional sections, entered by McAllister at the Land Office, and which were purchased from him by the defendant after his patent from the United States had been issued, be successfully questioned by the plaintifs. The estate conveyed to Long by McNair, in mortgage, was known to be without value in 1824. McAllister did not acquire by the sheriff's deed any interest in the land, or profit from his purchase. The land was then a part of the public domain, and subject to entry at the Land Office, under the laws of the United States. Without considering whether there was any relation between this administrator and these heirs, which precluded the former to purchase the land for his own account, under the principles of equity, we are satisfied that the heirs are not entitled to pursue their claim against a purchaser for value, who has not been guilty of fraud or collusion.

The facts necessary to sustain the plea of the Statute of Limitations are proved on the part of the defendant, and no charge in the bill discloses a case of exception from its operation. Piatt v. Vattier et al. 9 Pet. 405.

Decree of the Circuit Court affirmed.

C. C. LATHROP, Plff. in Er.,
v.
CHARLES JUDSON.

(See S. C. 19 How. 66-69.)

Where exceptions were not taken in the progress of the trial below, and were not made part of the record of the court below by bill of exceptions, they cannot be noticed here.

Argued Dec. 11, 1856. Decided Jan. 7, 1857.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

This suit was commenced in the Circuit Court to recover the amount of a judgment rendered by the Supreme Court of Louisiana for $1,810 and interest from May 2, 1845. Two defenses were set up: 1st. That the debt of the plaintiff had already been reduced to judgment, and that this suit was a double vexation. 2d. That the defendant, in Feb. 1851, made a cession of his goods to his creditors, which was accepted by them and the proper court, and that a syndic was appointed and legal administration had, and that the plaintiff was represented by an attorney appointed for absent creditors; that the debt was originally a Louisiana debt, and that the plaintiff was bound by the proceedings of insolvency.

The court overruled both these defenses, and rendered judgment for the plaintiff.

The plaintiff in error, by his counsel, assigns for error apparent on the face of the record in this case:

1st. That the exception and plea to the jurisdiction of the Circuit Court, founded on the fact that there was at the time an execution then in force, upon which a seizure had been made under the judgment sued on, which is found at page 26 of the record, was improperly overruled.

2d. That the decision of the lower court, to the effect that the original cause of indebtedness was not a Louisiana contract, upon the facts set forth in the decision of the court, at pp. 40 and 41 of the record, is erroneous and contrary to law.

Mr. Miles Taylor, for plaintiff in error:

1. In Louisiana only one execution can issue at a time on a judgment; and when a judgment is in the course of execution in one court, no judgment can be had on the same claim, unless subject to the condition that no execution issue until the result of the proceedings on the execution be ascertained.

Hudson v. Dangerfield, 2 La. 66; Newell v. Morton, 3 Rob. La. 102; Hennen's Dig. p. 782, No. 9.

2. Contracts are governed by the law of the place where they are entered into, and an obligation contracted or incurred, is payable at the domicil or residence of the obligor, in the absence of an express stipulation making it payable elsewhere.

Lynch v. Postlethwaite, 7 Mart. La. 213; Hennen's Dig. 1068, Com. of Laws, Nos. 4, 5, 10; Shamburgh v. Commagene, 10 Mart. La. 15; Hepburn v. Toledano, 10 Mart. La. 643; 2 Mart. N. S. 511.

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Mr. J. P. Benjamin, for defendant in error:

This bill exhibits a writ of error prosecuted from the judgment of the Circuit Court, but there is neither assignment of error nor bill of exceptions.

It has been so often decided by this court that it cannot take cognizance of a cause presented in this shape, that plaintiff in error could not have taken the writ with any other design than that of obtaining delay. Wherefore it is prayed that damages be allowed under the 17th rule of court.

Arthurs v. Hart, 17 How. 6; Weems v. George, 13 How. 190-197; Bond v. Brown, 12 How. 254; Field v. U. S. 9 Pet. 202; U. S. v King, 7 How. 833; Zeller's Lessee v. Eckert, 4 How. 289.

Mr. Justice McLean delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Eastern District of Louisiana.

The action was brought on a judgment rendered by the Supreme Court of Louisiana; certain matters were set up in the Circuit Court, as a defense, all of which were overruled, and judgment was entered for eighteen hundred and ten dollars, with interest and costs. The only errors assigned in this court, on which a reversal of the judgment of the Circuit Court is prayed, are: 1, that at the time suit was brought on the judgment, in the Circuit Court, an execution had been issued on the same judgment in the State court, which was in full force, and on which a seizure had been made; and 2, that the Circuit Court erred in holding that the indebtment was not founded on a Louisiana contract.

These exceptions were not taken in the progress of the trial in the Circuit Court, and do 69*] not appear on the record. The *fact that an execution was issued and returned appears in the record of the State court, but it was not made a part of the record of the Circuit Court, by bill of exceptions, and it cannot now be noticed. There is no ground of error on the face of the record, for the action of this court.

The judgment of the Circuit Court is affirmed with ten per cent. damages.

ROBERT J. VERDERWATER, Appt.,
v.
EDWARD MILLS, Claimant of the Steamer Yankee Blade, her Tackle, etc.

(See S. C. 19 How. 82-92.)

No tacit hypothecation of vessel for breach of agreement to carry passengers and freight—no lien, unless specially agreed—admiralty has no jurisdiction of such contract.

There is no tacit hypothecation, privilege or lien, given by the maritime law, for a breach of an agreement to employ a vessel in carrying passengers and freight from one port to another.

Where it is no part of such agreement that the vessel shall be hypothecated as security for performance, no lien exists.

Such agreement has none of the features of a charter-party.

Every breach of contract, where the subject matter is a ship employed in navigating the ocean, does not give a privilege or lien on the vessel.

The mere fact that the transportation is by sea and not by land, will not be sufficient to give the Court of Admiralty jurisdiction of an action for breach of the contract.

Argued Dec. 11, 1856. Decided Jan. 7, 1857.

APPEAL from the Circuit Court of the United States for the Northern District of California.

The libel in this case was filed in the District Court of the United States for the Northern District of California, against the steamer Yankee Blade, praying a decree against her for damages for the breach of a contract, of which the following is a copy:

This agreement made this 24th day of Sept., 1853, at the City of New York, between Edward Mills, as agent for the owners of steamship Uncle Sam, and William H. Brown, as agent for the owners of the steamship America, witnesseth: That said Mills and Brown hereby agree with each other, as agents for the owners of said ships before named, to run the two ships in connection for one voyage, on terms as follows, viz.: Of all the moneys received for passengers, and for freight contracted through, between New York and San Francisco, both ways, The Uncle Sam shall receive seventy-five per cent. and The America shall receive twenty-five per cent., the money to be received here by the said E. Mills, and the share of The America to be paid over to William H. Brown, or to his order, before the sailing of the ship, and the due share of The America of moneys received on the Pacific side to be paid over to said Brown or to his order, immediately on the arrival of the passengers in New York, by E. Mills, who guarantees, as agent aforesaid, the true and honest return of all funds received by his agents on the Pacific. It is understood that this trip is to be made by The Uncle Sam, leaving San Francisco on or about the 15th of October, and The America, leaving New York on or about the 20th of October next.

Each ship is to pay all the expenses of her running and outfits, and to be responsible for her own acts in every respect. Each ship is to retain all the moneys received for local freight or passengers; that is, for such freight and passengers as only pay to the ports the individual ship runs to, without any division with the other ship.

No commissioners are to be charged anywhere on any receipts for The America by said Mills in division; but the expense of advertising, and the amount paid out for runners at all points, are to be borne by each ship in the same proportion as receipts are divided between them.

In consideration of all the above, well and truly performed in good faith, Edward Mills, as agent for the steamship Yankee Blade, hereby agrees that when The America arrives at Panama, on her voyage hence for the Pacific Ocean, said ship Yankee Blade shall leave New York at such time as to connect with The America, conveying passengers and freight on the same terms as hereinbefore agreed (say twenty-five per cent. to The Yankee Blade, and seventy-five per cent. to The America), provided only that said connection shall be made at a time that will not prevent The Yankee Blade from making her connection with The Uncle Sam at her regular time.

E. Mills,
W. H. Brown.

The claimants filed certain exceptions, set-

NOTE.—Admiralty jurisdiction of contracts,—see *note, 66 L.R.A. 193.*

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ting up a want of jurisdiction in admiralty, there being no lien in rem created by said contract.

The District Court sustained the exceptions and dismissed the libel for want of jurisdiction. This decree having been affirmed, on appeal, by the Circuit Court, the libelant took an appeal to this court.

Mr. F. B. Cutting, for the appellant:

1. Agreements for carrying passengers and freight on the high seas are maritime contracts, and may be enforced specifically against the vessel by courts of admiralty proceeding in rem.

No express pledge is necessary in order to create a lien.

The jurisdiction in rem for breach of contracts of affreightments, by bills of lading or otherwise, is recognized by numerous cases. The ground of such jurisdiction rests upon the maritime nature and subject matter of the contract.

16 Decis. U. S. C. 722; S. C. 6 How. 392.

Contracts to carry passengers are analogous in principle. They are of a maritime nature; and when entered into with a particular ship, they bind her to the due performance of the service.

The Pacific, 1 Blatchf. 576, and the cases and arguments there presented.

2. This court has recognized and adopted this principle.

(a) Maritime torts to passengers, may be redressed in admiralty in rem, by reason of the vessel being bound by the contract.

The New World v. King, 16 How. 469.

(b) The case of The New Jersey Steam Navigation Company v. The Merchants' Bank, 6 How. 392, establishes that contracts to be executed on the seas, are maritime in their nature and within the admiralty jurisdiction, as well in personam as in rem. The principle of that case embraces the present.

3. The contract by Mills, as agent of the owner of The Yankee Blade, to proceed from New York with passengers and freight, to carry them to Panama, and to deliver them to The America, to be carried by her to San Francisco, is for a maritime service, to be performed upon the sea, and within the jurisdiction of the District Court of the United States.

(a) The mode or rate of compensation to be paid therefor, does not affect the jurisdiction of the court,

(b) The agreement did not constitute a partnership between the steamers.

The agreement to divide gross receipts was merely a mode of ascertaining the compensation of each vessel for her separate services.

(c) Even if the agreement were to be treated as a mutual arrangement between two vessels, for a joint service, to be rendered by them on the sea—the compensation therefor to be an apportionment between them for the whole freight and passage money to be earned by both—it would be a maritime contract, over which the admiralty has jurisdiction.

Andrews v. Wall, 3 How. 568.

(d) The contract is not one merely preliminary to a charter-party, but is a complete arrangement to be treated as a charter-party, containing in itself the substantial provisions of such an instrument—a definite voyage to be performed on one side, and a definite compensation to be paid therefor, by the other.

3 Sumn. 144, 148.

The question of jurisdiction does not depend upon the particular name or character of the instrument, but whether it imports a maritime contract or not.

The Tribune, 3 Sumn. 145, 148.

(e) The objection of the Circuit Court that the contract was made by the owners at the home port, does not appear to be authorized by any fact established in the case. It does not appear where the owner or owners of The Yankee Blade resided at the time of the contract, nor what was her home port.

(f) But assuming that The Yankee Blade belonged to New York, and that her owners resided there at the time of the contract, the Circuit Court erred in supposing that there could be no lien for that reason. The existence of a lien depends on the nature of the contract; and if that be maritime and creates a lien, the circumstance that it is executed by the owner in person does not affect it.

1 Valin, Ord. De la Mar. 630, Liv. 3, tit. I. art. 2; 2 Boul. Pat. Droit Com. 298; 3 Pardessus, Lois Mar. 159; 3 Pardessus, 281, 427; 2 Boucher Consul, 379, sec. 675; 457, sec. 870; 4 Pardessus, 40.

When bills of lading are signed in the home port by the owner, the lien of the shippers exists equally as if the master had signed them.

The following are cases of liens created by contracts made with the owners in the home port.

The Pacific, 1 Blatchf. 576; The Aberfoyle, 1 Blatchf. 360; Bearse v. Pigs Copper, 1 Sto. 314; The Mary, 1 Paine, 671; The Draco, 2 Sumn. 179.

(g) The conclusion of the learned Circuit Judge, that this was a personal agreement between the owners of the two ships, and that a personal credit existed which excluded the idea of a lien on the vessels, is not authorized by the facts.

The contract describes each of the parties to it, "as agents" of the owners. The "agents" acted as representatives of the vessels; the owners are not named or referred to. The inference is, that a mere personal credit was not relied on to the exclusion of a lien.

Mr. M. Blair, for appellee:

1. I contend that the contract on which this proceeding is founded, is not a maritime contract.

It is an agreement between the owners of two steamships to run their vessels in combination, in the transportation of freight and passengers, between New York and San Francisco, and to divide the proceeds between them; and also an engagement by one of the parties who is to receive all the money, to pay over to the other his proportion.

So much of this contract as relates to maritime service is but preliminary. No maritime service is contracted for, from one to the other. Such services are thereafter to be contracted for, and rendered to other persons, by both parties. In such case there is no jurisdiction.

Andrews v. Essex Ins. Co. 3 Mass. 6.

There is no difference in principle in this from the contract which this court considered in the case of The Orleans v. Phœbus, 11 Pet. 175.

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Consortship, it is true, is treated as a class on maritime contracts, by Judge Conkling, pp. 15, 236, 849, of his Admiralty Jurisdiction; but he says the case of Andrews v. Wall, 3 How. 568, is the only reported case relating to it.

The case of Cutler v. Rae, 7 How. 730, also shows that the nature of the consideration will not give character to a contract, or give jurisdiction even in personam.

2. But if this be regarded a maritime contract at all, it is certainly only partly so; the object as between the parties being to stipulate for the division of the proceeds to accrue to them from their services to others. It therefore falls within the cases of Plummer v. Webb, 4 Mas. 380; and L'arena v. Manwaring, Bee, 199, in which the court declined jurisdiction, because the whole contract was not of a maritime nature.

3. But the proceeding is in rem, and the district courts admit now that they have not jurisdiction to enforce maritime contracts by such proceedings, unless the contract expressly or by implication creates a lien on the ship.

The Draco, 2 Sumn. 180.

It is contended that this contract is in the nature of a charter-party, and therefore a lien is implied.

See definition of "charter party," Abbott, p. 241.

It is certainly not a contract for the hiring of a ship, or any part of one; nor is it a contract for the transportation of persons or property. The parties to such contracts are carriers of one side, and freighters, charterers, or passengers of the other.

But even an express contract of affreightment creates no lien on the vessel till the cargo is shipped.

The Freeman v. Buckingham, 18 How. 188.

4. The case of Blaine v. The Charles Carter, 4 Cranch, 331, shows that the law does not favor implied hypothecations of a ship, in obligations executed by the owner in the home port; and this is admitted by Judge Story, in the case of The Draco, above cited. In the absence of any precedent or established usage creating a lien in like cases, with reference to which the parties could be presumed to have contracted, there ought to be explicit language in the contract itself to create such a lien.

Mr. Justice Grier delivered the opinion of the court:

The libel in this case sets forth a contract between the owners of certain steamboats, of 89*] which The Yankee Blade was one, *to convey freight and passengers between New York and California. Among other things, it was agreed that The America should proceed to Panama, and The Yankee Blade should leave New York at such time as to connect with The America. The owner of The Yankee Blade refused to employ his vessel according to this agreement, and sent her to the Pacific under a contract with other persons. For this breach of contract the libelant demands damages, assuming that the vessel is subject, under the maritime law, to a lien which may be enforced in rem in a court of admiralty.

The Circuit Court dismissed the libel, being of opinion "that the instrument is of a description unknown to the maritime law; that it contains no express hypothecation of the vessel, and the law does not imply one."

In support of his allegation of error in this decree, the learned counsel for the appellant has endeavored to establish the following proposition:

"Agreements for carrying passengers are maritime contracts, pertaining exclusively to the business of commerce and navigation, and consequently may be enforced specifically against the vessel by courts of admiralty proceeding in rem."

Assuming, for the present, the premises of this proposition to be true, let us inquire whether the conclusion is a legitimate consequence therefrom.

The maritime "privilege" or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a "jus in re," without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and devested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings in rem, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore "stricti juris," and cannot be extended by construction, analogy, or inference. "Analogy," says Pardessus, Droit Civ. Vol. III. 597, "cannot afford a decisive argument, because privileges are of strict right. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another."

These principles will be found stated, and fully vindicated *by authority, in the [*90 cases of The Young Mechanic, 2 Curt. 404, and Kiersage, Ibid. 421; see, also, Harmer v. Bell, 22 E. L. & E. 62.

Now, it is a doctrine not to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance. This lien or privilege is founded on the rule of maritime law as stated by Cleirac (597): "Le batel est obligée à la marchandise et la marchandise au batel." The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter-party), and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter-party, its covenants will define the duties imposed on the ship. Hence it is said, 1 Valin, Ordon. de Mar. b. 3, tit. 1, art. 11, that "the ship, with her tackle, the freight and the cargo are respectively bound (affecté) by the covenants of the charter-party." But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver

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the cargo at the time and place stipulated in the bill of lading or charter-party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases.

See 2 Boulay, Paty Droit Com. & Mar. 299, where it is said, "Hors ces deux cas (viz.: default in delivery of the goods, or damages for deterioration), il n'y a pas de privilege à pretendre de la part du marchand chargeur; car si les dommages et intérets n'ont lieu que pour refus de depart du navire, pour depart tardif ou precipité, pour saisie du navire ou autrement il est evident que a cet egard la créance est simple et ordinaire, sans aucune sorte de privilege."

Thus, in the case of The City of London, 1 W. Rob. 89, it was decided that a mariner who had been discharged from a vessel after articles had been signed, might proceed in the admiralty in a suit for wages, the voyage for which he was engaged having been prosecuted; but if the intended voyage be altogether abandoned by the owner, the seaman must seek his remedy at common law by action on the case.

91*] *And this court has decided, in the case of The Schooner Freeman v. Buckingham, 18 How. 188, "that the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it."

Now, the damages claimed by the libelant, in this case, are not for the non-delivery of merchandise or cargo at the time and place according to the covenants of a charter-party, or for their injury or deterioration on the voyage, but for a refusal of the owners to employ the vessel in carrying passengers and freight from New York so as to connect with The America when she should arrive at Panama. The owners have not made it a part of their agreement that their respective vessels should be mutually hypothecated as security for the performance of their agreement; and, as we have shown, there is no tacit hypothecation, privilege, or lien, given by the maritime law.

We have examined this case from this point of view, because the libel seems to take it for granted that every breach of contract, where the subject matter is a ship employed in navigating the ocean, gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the argument, that if this contract was in the nature of a charter-party, or had some features of a charter-party, the court would extend the maritime lien by analogy or inference for the sake of giving the libelant this remedy, and sustaining our jurisdiction. But we have shown this conclusion is not a correct inference from the premises, and that this lien, being stricti juris, will not be extended by construction. It is, moreover, abundantly evident that this contract has none of the features of a charter-party. A charter-party is defined to be a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. Abb. Ship. 241.

Now, by this agreement, the libelant has not hired The Yankee Blade, or any portion of the vessel; nor have the master or owners of the ship covenanted to convey any merchandise for the libelant, nor has he agreed to furnish them any. But the agent for The Yankee Blade "agrees that when The America arrives at Panama, The Yankee Blade shall leave New York, conveying passengers and freight," which were afterwards to be received by The America and transported to San Francisco; and the passage money and freight earned was to be divided between them—25 per cent. to the Yankee Blade, and 75 to The America.

*This is nothing more than an agree- [*92 ment for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common law.

The decree of the Circuit Court is, therefore, affirmed.

Aff'g—McCall, 9.

WILLIAM H. SEYMOUR and Layton S. Morgan, Plffs. in Err.,
v.
CYRUS H. McCORMICK.

(See S. C. 19 How. 96-107.)

Patent—disclaimer, unreasonable delay in making, effect of on costs and suit—prior description in book, not evidence of prior operation.

Under the Act of March 3, 1837, plaintiff will be refused costs for unreasonable delay of disclaimer before suit brought, of any part of his invention not new.

The granting of the patent for the improvement, together with the opinion of the court below maintaining its validity, repel any inference of unreasonable delay in correcting the claims.

Under such circumstances, the patentee has the right to insist upon it, and not disclaim it, until the highest court to which it can be carried has pronounced its judgment.

A description of an improvement in "Loudon's Encyclopædia of Agriculture" before the patent is not evidence for jury that improvement operated successfully before the patent. Sec. 15 of the Patent Act of 1836 is the only authority for admitting the book in evidence.

Argued Dec. 10, 1856. Decided Jan. 7, 1857.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The original writ was sued out of the Circuit Court in the June Term, 1850. The declaration was filed August 23d, 1850, alleging that Cyrus H. McCormick was the first and original inventor of three certain improvements

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"in machines for reaping all kinds of small grain," for which three letters patent had been granted to him by the Commissioners of Patents of the United States. The first, dated June 21, 1834; the second, Jan. 31, 1845; the third, Oct. 23d, 1847, and that the defendants had manufactured and sold large numbers of reaping machines substantially like those patented by said McCormick in the said two last mentioned letters patent, without license or permission.

The defendants below prayed oyer of the three letters patent set out in the declaration, and it was given.

The defendants pleaded the general issue, and gave notice of various prior inventions and publications, in public works, which they designed to give in evidence in their defense.

This case has once been before this court, and was sent back for a new trial, on the ground of an error in the instructions as to damages.

16 How. 480.

The former trial was on the patent of Oct. 23, 1847.

The plaintiffs' recovery in the present case was on the patent of Jan. 31, 1845. The claims of the plaintiffs in that patent were as follows:

"I claim, 1st. The curved (or angled downward, for the purpose described) bearer, for supporting the blade in the manner described.

2d. I claim the reversed angle of the teeth of the blade, in manner described.

3d. I claim the arrangement and construction of the fingers (or teeth for supporting the grain), so as to form the angular spaces in front of the blade, as and for the purpose described.

4th. I claim the combination of the bow L, and dividing iron M, for separating the wheat in the way described.

5th. I claim the setting of the lower end of the reel post R behind the blade, curving it at R 2, and leaning it forward at top, thereby favoring the cutting, and enabling me to brace it at top by the front brace (S), as described, which I claim in combination with the post.

Cyrus H. McCormick."

The exceptions taken on the trial and incorporated in a bill of exceptions, are twenty in number, whereof the first twelve are to rulings admitting or rejecting evidence, and the last eight, to the charge.

Portions of the charge to the jury were substantially as follows: the patent upon which the action is founded, was issued to the plaintiff on Jan. 31, 1845, for an improvement in reaping machines. It seems that his experiments began as early as 1830 or 1831, and were continued down to 1834, when he first obtained a patent thereon. This machine, however, was not a successful one, and this seems to have been the fate of the experiments down to 1845, when a second patent was taken out for improvements on the first one. The machines did not go into general or successful operation until after the arrangement of the seat for the raker upon it, which was patented in 1847. Then the machines became eminently successful.

The improvements which were patented in 1845, and which were claimed by the plaintiff to have perfected his machine of 1834, as far as it respects cutting the grain and laying it on the platform, are two: the divider and the rearrangement of the reel-post.

It is said that neither of these improvements, assuming that the plaintiff was the author of them, is of a description entitling it to be regarded as the subject of the patent under our patent law. An improvement upon a machine, to constitute it an invention within the meaning of the law, must be new, not known or in use before; and it must also be useful; in other words, the person claiming the improvement must have found out himself, and created and constructed an improvement which had not before been found out or produced by any person, and which is beneficial to the public. This novelty worked out by the mind of the inventor, connected with utility, constitutes the essence of the patentable subject under the law.

It is said by the learned counsel of the defendants, that there is a claim in the patent outside of the two claims that are in controversy, which is void, because McCormick appears, from the evidence, not to have been its original and first inventor, and that inasmuch as he had made one void claim his patent is void, as it respects all the other claims. Although the evidence may show that he was the original and first inventor of all those other claims, as regards the law applicable to this point, the learned counsel is not strictly correct. The law is this: if a patentee makes a claim which is not well founded in the same patent with other claims which are well founded, he may disclaim, within a reasonable time, that which he had no right to claim, and then his patent will be good as to the residue—as good as if it had originally issued only for claims which are valid. If he omits to make a disclaimer, but brings a suit for the violation of his patent, and it satisfactorily appears upon the trial that he is entitled to be protected in a portion of the claims set up in his patent, but that he is not entitled to be protected in respect to another portion, he is still entitled to damages for a violation of the valid portion of his claims, the same as if all the claims were valid, so far as regards the mere right of recovery, but he gets no costs. That is the law. It has this qualification: if the jury are satisfied that there has been unreasonable negligence and delay on the part of the patentee, in making a disclaimer as respects the invalid part of his patent, then the whole patent is inoperative, and the verdict must be for the defendants; as in this case, the claim on which the question arises is as follows:

"I claim the reversed angle of the teeth of the blade, in manner described." It is said by the defendants that the plaintiff was not the first inventor of that arrangement, but that Moore was. Assuming that the position of the learned counsel for defendants is right, that the plaintiff was not the first inventor of what is claimed in that claim, if you believe that he was the first inventor of the divider, and of the arrangement of the reel-post, he may still be entitled to recover damages, unless he has unreasonably neglected and delayed to enter a disclaimer for what is covered by the claim in regard to the reversed angle of the teeth.

The claim in question is founded upon two parts of the patent. As the construction of that

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claim is a question of law, we shall construe it for your guidance. In the fore part of the patent, we have a description of the blade and of the blade case and of the cutter, and of the mode of fastening the blade and blade case and the cutter, and of the machinery by which the arrangement is made for the cutter to work. We have also the description of the spear-shaped fingers, and of the mode by which the cutter acts in connection with those fingers. Then, among the claims, are these: "2. I claim the reversed angle of the teeth of the blade in manner described. 3. I claim the arrangement for the construction of the fingers or teeth for supporting the grain, so as to form the angular spaces in front of the blade, as and for the purpose described. Now, it is insisted on the part of the learned counsel for the defendants, that this second claim is one simply for the reversed argles of the sickle teeth of the blade. These teeth are common sickle teeth, with their angles alternately reversed in spaces of an inch and a quarter, more or less. The defendants insist that the second claim is merely for the reversed teeth on the edge of the cutter, and that the reversing of the teeth of the common sickle as a cutter in a reaping machine, was not new with the plaintiff; and that if it was new with him, he had discovered it and used it long before his patent of 1845. The defendants claim that Moore had discovered it as early as 1837 or 1838; and it would also seem that the plaintiff had devised and used it at a very early day after his patent of 1834— that is, the mere reversing of the teeth. But on looking into the plaintiff's patent more critically, we are inclined to think that when the plaintiff says, in his second claim, "I claim the reversed angle of the teeth of the blade, in manner described," he means to claim the reversing of the angles of the teeth in the manner previously described in his patent. You will recollect that it has been shown in the course of the trial, that in the operation of the machine, the straw comes into the acute angled spaces on each side of the spear-shaped fingers, and that the angles of the fingers operate to hold the straws, while the sickle teeth, being reversed, cut in both directions as the blade vibrates. The reversed teeth thus enable the patentee to avail himself of the angles on both sides of the spear-shaped fingers; whereas, if the sickle teeth were not reversed in sections, but all ran in one direction like the teeth in the common sickle, he could use the acute angles upon only one side of the fingers, because the cutter could cut only in one direction. We are, therefore, inclined to think that the patentee intended to claim, by his second claim, the cutter having the angles of its teeth reversed in connection with the angles thus formed by the peculiar shape of the fingers; and as it is not pretended that any person invented that improvement prior to the plaintiff, the point relied on in this respect by the learned counsel for the defendants, fails.

The remainder of the charges related to the question of damages. The exceptions to the charge were as follows:

To so much of the charge of the court as instructed the jury in substance that the plaintiff, in his patent of Jan. 31, 1845, did not claim the reversed angle of the teeth of the blade as a distinct invention, but only claimed it in combination with the peculiar form of the fingers described in the same patent, the defendants' counsel excepted.

The defendants' counsel requested the court to instruct the jury that if they should be satisfied that Hiram Moore was the first inventor of the reversed angle of the teeth of the blade, and that the plaintiff was notified of that fact by the testimony of Moore on the trial of this cause, in June, 1851, and had not yet disclaimed that invention: then, in judgment of law, he has unreasonably delayed in filing his disclaimer, and the verdict should be for the defendants.

The court declined to so instruct the jury, and the defendants' counsel excepted to the refusal.

The defendants' counsel further requested the court to instruct the jury, that, if they should be satisfied that Hiram Moore was the first inventor of the reversed angle of the teeth of the blade, and that the plaintiff was notified of the fact by the testimony of Hiram Moore on the trial of this cause in June, 1851, and had not yet disclaimed that invention; then it was a question of fact for them to decide whether the plaintiff had or had not unreasonably delayed the filing of a disclaimer; and if they should come to the conclusion that there had been such unreasonable delay, their verdict should be for the defendants.

The court refused so to instruct the jury, and the defendants' counsel excepted to the refusal.

The defendants' counsel requested the court to submit to the jury the question under the evidence in the case, whether the plaintiff did or did not claim, in his patent of Jan. 31, 1845, the reversed angle of the teeth of the blade, independent of any combination.

The court refused to submit that question to the jury, and the defendants' counsel excepted to the refusal.

The defendants' counsel requested the court to charge the jury, that whether the adjustability of the inner bow of the divider, as described in the plaintiff's patent, was a necessary ingredient of the divider, was the question of fact for them to determine. And if they should find that it was, and the defendants did not use it, that then the defendants did not infringe that claim of the plaintiff's patent.

The court refused so to instruct the jury, and the defendants' counsel excepted to the refusal.

The court on that point then instructed the jury as follows: the inside iron in the plaintiff's divider is adjustable, so that it can be raised or lowered at pleasure. In heavy grain that stands high and may be cut high from the ground, it is desirable to raise the reel sometimes, and then this inside iron could be raised also, to insure the division of the grain, and cause the reel to overlap and carry all the grain to the cutter.

It is claimed by plaintiff, that although the defendants used no inside iron, yet they attained the same result by the shape of the inside of their divider, which thus answers to the inside edge of the plaintiff's divider. The defendants insist that, assuming this to be true, their divider has no such adjustability as the plaintiff's, and is therefore distinguishable from

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it. The answer to that position is this: The adjustability does not vary the principle of operation of the divider. It enlarges its capacity, so that it may be worked in heavy grain; but the principle and more of operation of the divider are the same whether the inner iron be adjustable or not.

The defendants' counsel excepted to this part of the charge, insisting that it was a question for the jury.

The defendants' counsel further requested the court to instruct the jury that the plaintiff, if entitled to a verdict, was entitled to only so much as the jury should be satisfied was the increased market value of the machines manufactured by the defendants, by reason of the use of the two improvements which they are charged with infringing, in place of using any other kind of divider and reel support, which had been before in public use.

The court refused to instruct the jury in relation to the subject matter of such request, otherwise than they had already charged, and the defendants' counsel excepted to the refusal.

The defendants' counsel also asked the court to instruct the jury, that, from the facts that Bell's machine operated successfully in 1829, and that it operated well also in 1853, they were at liberty to infer that it had operated successfully in the intermediate period, or some part of it.

But the court held and charged, that there being no evidence respecting it, except at the trial of it in 1829, and the trial of it in 1853, the jury could not infer anything on the subject, and refused to charge as requested. The defendants' counsel excepted to the refusal, and also excepted to the charge in this respect.

Messrs. H. R. Selden, P. H. Watson, E. M. Stanton, and Harding, for the plaintiffs in error:

1. The testimony which was offered with reference to the successful use of what was called on the trial, a horizontal divider, with a central ridge, should have been received. It was competent upon the question of utility of the plaintiff's invention, and also with reference to the amount of damages, it was material.

2. The question as to the practicable difference in value between the plaintiff's machines, with the divider and without, as to the comparative value of the machine with and without the seat and divider, and as to what the witness would give for a machine without the seat and divider, if he could get one for a fair price with a seat and divider, should not have been allowed.

3. The testimony in reference to the profits made by the plaintiff as the manufacturer of such machines was improperly received.

16 How. 480.

4. The question whether the plaintiff had granted licenses to construct his machines or not, should have been rejected; it was wholly foreign to the case, even upon the question of damages.

5. The plaintiff should have been required to produce the patent for his original machine of 1834, of which the invention patented in 1845 was alleged to be an improvement, so that the jury could see how much had become public property.

Lewis v. Davis, 3 C. & P. 502; Curtis, sec. 141; Lowell v. Lewis, 1 Mass. 188.

The construction given in the court below to the second claim of the patent of 1845, was erroneous.

(a) The words "in the manner described," used in the second claim, refer exclusively to the description of the construction of the sickle, without reference to the peculiar shape of the fingers, or to any combination whatever. They refer to the straight blade alone, with the specified positions of its teeth.

We suppose the correct rule for the interpretation of patents, is laid down by Mr. Curtis, in his Treatise on Patents, sec. 126: "The nature and extent of the invention claimed by the patentee, is the thing to be ascertained; and this is to be arrived at through the fair sense of the words he has employed to describe his invention. But that rule, even as limited or aided by the principle referred to in sec. 132, viz.: "That a specification should be so construed as, consistently with the fair import of the language, will make the claim coextensive with the actual discovery," does not relieve the plaintiff here from the distinct claim of the reversed teeth of the blade as an independent invention.

This principle was well applied in the case of Haworth v. Hardcastle, Web. Pat. Cas. 484, from which it was taken by Mr. Curtis.

See, also, Byam v. Farr, 1 Curt. 263; Act of 1836, sec 13; Curt. sec. 386; Godson, Pat. 204, 205, LeRoy v. Tatham, 14 How. 176; Act of 1836, sec. 6.

Both reason and the statute demand of him who claims the exclusive right, to define clearly the limits of his invention. It can in no case be difficult for an inventor to say distinctly, whether he claims two or more elements singly, or merely in combination.

Evans v. Hettick, 3 Wash. 408; S. C. 1 Rob. 166.

(b) The point was material.

Hiram Moore used such a sickle as early as 1836, if not in 1834. Notice of this invention by Moore was given to the plaintiff as early as September, 1850.

The plaintiff, in his history of his invention, sworn to Jan. 1, 1848, presented to the Commissioner of Patents, for the purpose of obtaining an extension of his first patent, shows that he did not use the blade with reversed teeth until the harvest of 1841.

Under these circumstances we insist that the plaintiff was called upon during the three years that intervened between the trial in June, 1851, and that in October, 1854, to disclaim the invention of the reversed angle of the teeth of the blade.

It was, therefore, a question for the jury, under the 9th sec. of the Act of March 3d, 1837 (Curt. 489, 690), whether the plaintiff had not unreasonably neglected or delayed to enter at the Patent Office his disclaimer.

To allow a patentee under such circumstances, to designedly delay a disclaimer, would defeat the manifest object of the last proviso to sec. 9, above referred to, which was to compel a patentee, who had inadvertently covered by his patent something to which he has not entitled, and thus wrongfully obstructed its free

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use, to remove the obstruction as soon as possible after the discovery of his mistake.

7. The exceptions to the refusal of the court to instruct the jury, that if they should be satisfied that Moore was the first inventor of the reversed angle of the teeth of the blade, plaintiff was notified of the fact by the testimony of Moore, on the trial of this cause in June, 1851, and had not yet disclaimed that invention, then it was a question of fact for them to decide whether the plaintiff had or had not unreasonably delayed the filing of the disclaimer, were well taken.

8. The question as to the immateriality of the adjustable feature of the plaintiff's divider, should have been submitted to the jury.

Curtis, secs. 220, 380, 385, 402.

9. If the question whether the adjustability of the divider was immaterial, belonged properly to the court as a question of construction, there was error in the charge to the jury on that subject, in saying: "The adjustability does not vary the principle of operation of the divider. It enlarges its capacity, so that it may be worked in heavy grain; but the principle and mode of operation of the divider are the same, whether the inner iron be adjustable or not."

The description given by the court ignores entirely the adjustable features of the divider, and puts forth substantially the "beneficial operation" or "useful effect" produced by the invention, as constituting its essence, rather than the machinery by which it is produced, thus making the patent cover an effect produced. Whether the patent might or might not rightfully cover the effect produced, need not be discussed.

See LeRoy v. Tatham, 14 How. 175; O'Reilly v. Morse, 15 How. 112; Corning v. Burden, 15 How. 269.

It is sufficient here that the plaintiff did not claim this.

The adjustability and form of the inner iron are not only material, but constitute the main feature of novelty in plaintiff's divider.

Prouty v. Ruggles, 16 Pet. 336; Davis v. Palmer, 2 Brook. 298.

10. The instruction as to the measure of damages which were asked for by the defendant's counsel, should have been given to the jury.

16 How. 488; Sedgwick on Damages, 2d ed. 69.

11. The request of instructions to the jury, "that from the facts that Bell's machine operated successfully in 1829, and that it operated well also in 1853, they were at liberty to infer that it had operated successfully in the intermediate period, or some part of it," should have been given and the actual charge, "that there being no evidence respecting it except the trial of it in 1829, and the trial of it in 1853, the jury could not infer anything on the subject," was erroneous.

We think that on the evidence given, it was proper to submit to the jury the question as to its operation, and not to place it under the ban as an entire failure, which seems to be the effect of the charge, as it was given.

If it operated well in 1829 and in 1853, which is clearly proved, and is assumed by the Judge, it must certainly have been capable of operating well at any intermediate time. Whether actually used or not, is wholly immaterial.

This prior invention of Bell's, if the court had not substantially excluded it from the consideration of the jury, would have furnished a complete answer to the charge of infringement of the fifth claim of Mr. Cormick's patent of 1845.

Evans v. Hettick, 3 Wash. 408; S. C. 1 Rob. 166.

12. It was erroneous to grant costs to the plaintiff, inasmuch as it appeared that he was not the first inventor of the reversed angle of the sickle, and had not filed a disclaimer prior to the commencement of the suit.

The testimony showed conclusively that Moore was the first inventor of the reversed angle of the teeth.

Messrs. E. M. Dickerson and Reverdy Johnson, for the defendant in error:

The counsel first discussed the first twelve exceptions, which related to the admission or rejection of testimony at the trial.

They then proceeded as follows;

Thirteenth exception. The description annexed to the letters patent of plaintiff, describes a sickle with reversed-cut teeth, and then describes the manner in which this reversed-cut sickle operates in connection with the spear-headed fingers, "forming an acute angle between the edge of the blade and the shoulder of the spear, by which the grain is prevented from yielding to the touch of the blade." The specification then claims "the reversed angle of the teeth of the blade in manner described."

a. It also appeared, that ever since the date of the first reaping patent in 1834, the plaintiff had experimented with this reversed sickle edge without producing any successful result, until he combined it in the manner described in the patent of 1845.

b. The sickle, separate and apart from the machine, is no invention in whatever way the teeth are cut; but when combined in the machine in the manner described, the reversed-cut becomes a very valuable invention, enabling the sickle to cut itself clear each stroke; whereas, if the sickle were cut only one way, and the fingers were straight, it would only operate on the grain half the time.

c. This part of the invention was not infringed.

Fourteenth exception. Unreasonable neglect to file a disclaimer under the 9th sec. of the Act of 1837, is a question of fact for the jury.

Fifteenth exception. There was no evidence that Moore had ever constructed a reversed-cut sickle in the manner described in the patent of plaintiff, nor that he had ever made one in any manner which was successful; the only claim being that in 1836-1837 he had made a reversed-cut sickle, and had never seen one before; while the plaintiff had done the same thing in 1834. There was therefore no fact for the jury to find, and it would have been erroneous if the court had submitted an hypothesis unsupported by evidence for their decision.

a. The construction of the claim also settled this point, because there was a pretense that

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such a manner of applying the reversed-cut sickle was old.

Sixteenth exception. The construction of a patent is a question of law.

Seventeenth and eighteenth exceptions. First, the construction of the patent is a question of law. Second, the specification does not mention adjustability. In the description it is spoken of as a quality of the inside edge of the divider; but when the patentee specifies his invention, he declares it to be for a combination of elements, of which his adjustable iron was one. Whether any other form of inside edge of this divider is substantially the same as this adjustable iron, is a question of fact for the jury; but whether the adjustability is one of the things claimed by the inventor as essential to his invention, is a question of law, arising upon the face of the patent itself. The former of these questions was submitted to the jury by the court, and the latter was decided by the court itself.

a. The whole description relative to adjustment, might be stricken out of the patent, without affecting the specification, which would still be framed in the same words, as null, whereas, in this idea of adjustability, where essential, its withdrawal would destroy the claim of the combination.

b. The combination specified is of three parts, the outside bow, the inside iron and the reel, co-operating with the other two to effect a separation. The removal of any of these without substituting an equivalent, would destroy the combination, and the grain would not be separated in the way described.

Nineteenth exception. "Actual damage" is the rule prescribed by the statute, and the rule sought to be established by this prayer, might be in direct conflict with the statute.

The increased market value might be much more than the patentee would be content to receive for his license, or it might be less. If the market value were the rule, it would place it in the power of an infringer to ruin any patent, by fixing a market value of the improvement which would be no compensation to the patentee.

Twentieth exception. The facts stated in this exception, that Bell's machine operated successfully in 1829 and in 1853, are not evidence from which the jury could legally infer that it had operated successfully in the intermediate period, or any part of it; for there is no rule which raises a presumption of successful operation out of the facts assumed in the prayer, but rather the contrary, since if it ever did succeed at all, it most probably never would have been abandoned, and then its continued use to a more recent date would have been quite as easily proved as its use at any prior date.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of New York.

The suit was brought by McCormick against Seymour and Morgan, for the infringement of a patent for improvements in a reaping machine granted to the plaintiff on the 31st June, 1845. The improvements claimed to be infringed were: 1st, a contrivance or combination of certain parts of the machinery described, for dividing the cut from the uncut grain; and 2d, the arrangement of the reel-post in the manner described; so as to support the reel without interfering with the cutting instrument.

In the course of the trial, a question arose upon the true construction of the second claim in the patent, which is as follows: "I claim the reversed angle of the teeth of the blade in manner described." This claim was not one of the issues in controversy, as no allegation of infringement was set forth in the declaration. But it was insisted, on the part of the defendants, that the claim of the improvement was not new, but had *before been dis- [*106 covered and in public use; and that, under the 9th section of the Act of Congress passed March 3, 1837, the plaintiff was not entitled to recover cost, for want of a disclaimer of the claim before suit brought; and that, if he had unreasonably neglected or delayed making the disclaimer, he was not entitled to recover at all in the case.

The ground upon which the defendants insisted this claim was not new, was, that it claimed simply the reversed angle of the teeth of the blade or cutters. The court below were of opinion, that, reading the claim with reference to the specification in which the instrument was described, it was intended to claim the reversed angle of the teeth in connection with the spear-shaped fingers arranged for the purpose of securing the grain in the operation of the cutting—the novelty of which was not denied.

The majority of the court are of opinion, that this construction of the claim cannot be maintained, and that it is simply for the reversed angle of the cutters; and that there is error, therefore, in the judgment, in allowing the plaintiff costs.

In respect to the question of unreasonable delay in making the disclaimer, as going to the whole cause of action, the court are of opinion that the granting of the patent for this improvement, together with the opinion of the court below in maintaining its validity, repel any inference of unreasonable delay in correcting the claim; and that, under the circumstances, the question is one of law. This was decided in the case of O'Reilly v. Morse. 15 How. 121. The Chief Justice, in delivering the opinion of the court, observed, that "the delay in entering it (the disclaimer) is not unreasonable, for the objectionable claim was sanctioned by the head of the office; it has been held to be valid by a circuit court, and differences of opinion in relation to it are found to exist among the justices of this court. Under such circumstances, the patentee had a right to insist upon it, and not disclaim it until the highest court to which it could be carried had pronounced its judgment."

Several other questions were raised in the case, which have been attentively considered by the court, and have been overruled, but which it cannot be important to notice at large, with one exception, which bears upon the fifteenth section of the Patent Act of 1836.

Bell's reaping machine was given in evidence, in pursuance of a notice under this section,

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with a view to disprove the novelty of one of the plaintiff's improvements; a description of it was read from "Loudon's Encyclopædia of Agriculture," published in London, England, in 1831. In addition to the description of the machine, it appeared in the work that the 107*] *reaper had been partially successful in September, 1828 and 1829.

It also appeared, from the evidence of Mr. Hussey, that he saw it in successful operation in the harvest of 1853.

The court was requested, on the trial, to instruct the jury, that from the facts that Bell's machine operated successfully in 1829 and in 1853, they were at liberty to infer that it had been operated successfully in the intermediate period, which was refused. Without stating other grounds to justify the ruling, it is sufficient to say, that the only authority for admitting the book in evidence, is the 15th section of the Act above mentioned. That section provides, that the defendant may plead the general issue, and give notice in writing, among other things, to defeat the patent, "that it (the improvement) had been described in some public work anterior to the supposed discovery thereof by the patentee." The work is no evidence of the facts relied on for the purpose of laying a foundation for the inference of the jury sought to be obtained.

The judgment of the court below is affirmed, with the qualification, that on the case being remitted to the court below, the taxation of costs be stricken from the record.

Dissenting, Mr. Justice Grier.

108*] *E. G. ROGERS and L. F. Rogers, Merchants and Copartners, doing business under the Name and Style of E. G. Rogers & Co., Part owners of the Cargo of the Schooner Ella; Pooley, Nicoll & Co., Owners of the said Schooner Ella; J. R. Brooks and F. G. Randolph, Merchants and Copartners, doing business under the Name and Style of Brooks & Randolph, and Thomas Sullivan, Trading under the Name of John Hurley & Co., Part owners of the Cargo of the Schooner Ella, Appts.

v.

THE STEAMER ST. CHARLES, James L. Day, Adam Wolfe, John Geddes, John Grant, Roger A. Herine, and Robert Geddes, Claimants.

(See S. C. 19 How. 108-113.)

Collision—schooner and steamer both in fault—loss apportioned—carrying the mail no excuse for speed.

Collision. On dark, windy and rainy night, schooner at anchor held in fault in not having a light in conspicuous place, it having been temporarily removed.

The steamer was also held in fault, on account of her rate of speed, of nine or ten miles an hour, in a channel where she was accustomed to meet sailing vessels and where vessels in rough and unpropitious weather, were accustomed to resort for safety.

The case is one for apportionment of the loss.

That the steamer carried the mail, is no excuse for the speed.

NOTE.—See note to Ure v. Coffman, 567, post.

Argued Dec. 8, 1856. Decided Jan. 7, 1857.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The libel in this case was filed in the District Court of the United States for the Eastern District of Louisiana, by the appellants, to recover damages resulting from a collision.

The decree of the District Court was in favor of the libelants. The Circuit Court, on appeal, having reversed this decree and dismissed the libel, the libelants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. J. P. Benjamin, for appellants:

The undisputed facts are as follows:

The Ella was at anchor. The night was dark and rainy. The hour of the collision was about half past eleven P. M.

The St. Charles was running at a speed of eight or nine miles an hour, at least.

The collision occurred by the steamer's running at that rate of speed against a vessel at anchor on a dark night.

2. We allege that The Ella was anchored in a proper place, and out of the track usually pursued by steamers from New Orleans to Mobile or Pensacola.

3. The Ella had her light out in the customary manner. This is proved by a number of witnesses, and their testimony is not to be overthrown by the oath of witnesses on the steamer that they did not see it.

Six witnesses swear positively that there was a light on The Ella.

4. It was extreme imprudence in the St. Charles to run at her rate of speed in a dark night, in waters crowded with small vessels, in a place where they usually anchor.

Her speed is stated by her officers as follows: Walker, her mate, 10 or 11 knots an hour; Jones, pilot, 8 or 9 knots an hour; Tyson, pilot, 10 knots an hour. Yet this speed was not checked, although several vessels were confessedly anchored together where The Ella was, all with lights displayed. Under this state of facts, it is impossible to exonerate the steamer from the responsibility for the loss.

The Virgil, 1 W. Rob. 202; The Gazelle, 5 Notes of Cases 101; The Omanli, 7 Notes of Cases 507; The Genesee Chief, 12 How. 460.

Mr. J. Nelson, for appellees, after stating the facts, made the following points:

By referring to the report of the commissioner and the decree of the District Court. It will be perceived that the claim of Brooks and Randolph is for the sum of $835.05, and that of John Hurley & Co., $1,368.98, sums insufficient to sustain the jurisdiction of the court, and that this appeal, as far as concerns them, must be dismissed.

Oliver v. Alexander, 6 Pet. 143.

With regard to the remaining libelants, the appellees will maintain that, upon the evidence, it is clear that the collision complained of was in nowise attributable to the fault or negligence of those navigating the steamer, but was the result of a want of care on the part of the schooner, and that the decree of the Circuit Court ought to be affirmed.

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Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of the State of Louisiana, sitting in admiralty.

The libel was filed in the District Court to recover the value of a quantity of merchandise on board the schooner Ella, which was sunk in a collision with the steamer on Lake Borgne, some six or eight miles east of the light-ship in Pass Mary Ann, while at anchor on the night of the 5th of February, 1853. The District Court rendered a decree charging the steamer with the loss.

On an appeal, the Circuit Court reversed the decree and dismissed the libel, on the ground that the schooner was in fault in not having a light in the fore rigging, or in any other conspicuous place on the vessel, to give notice of her position to the approaching steamer.

The night was dark and rainy, and the wind blowing fresh from north-northwest. A proper light had been hung in the fore rigging early in the evening, and kept there till near 110*] the *time of the collision, which happened about half past eleven o'clock. One of the hands had taken the lamp down to wipe off the water that had collected upon the glass globe, so that it might shine brighter. While he was standing midships, wiping the lamp, he heard the approach of the steamer, and immediately placed it on top of the cook-house. The collision soon after occurred. The fault lies in removing the lamp for a moment from the fore rigging to midships. If it was not practicable to wipe it in the rigging, another light should have been placed there on its removal. The time of the removal may be, as happened in this case, the instant when the presence of the light was most needed to give warning to the vessel approaching. All the hands examined, who were on board the steamer, deny that they saw any light at the time on the schooner.

We agree, therefore, with the court below, that the schooner was in fault.

But it is insisted, on the part of the appellants, that the steamer was also in fault on account of her rate of speed at the time, regard being had to the darkness of the night and the character of the channel she was navigating. The schooner, on coming out of the Pass Mary Ann, towards evening met a strong head wind and swell of the lake, and after pursuing her course some four or five miles, anchored under Cat Island. There were several other vessels at anchor at the time in that vicinity.

Some of the witnesses state that the place is used at a harbor for schooners, and other vessels navigating the lake in rough weather, as it is somewhat sheltered from the winds; and the number of vessels at anchor in the neighborhood, at the time of the collision, would seem to confirm this statement, and there is no evidence in the case to the contrary.

There is conflicting evidence on a point made by the appellant, that the steamer was out of the direct and usual course of steamers from Pass Mary Ann to Mobile. The weight of it is, that this course was a mile and a half or two miles north of the place where the schooner lay. But we do not attach much influence to this fact, as in the open lake there was no very fixed track of these vessels within the limit mentioned.

There is also some little discrepancy of the witnesses as to the darkness of the night. But the clear weight of it is, that at the time of the collision it was very dark and rainy and the wind blowing fresh.

The witnesses on the part of the steamer are very explicit on this part of the case. The pilot says the night was very dark, and drizzling rain. The captain, that the night was *dark and cloudy, and the wind blowing [*111 briskly. The engineer, that the night was so dark a vessel of the size of the schooner could not be seen at all till upon her, without a light; and yet he says there was nothing in the weather to prevent her running at her usual speed.

The steamer was going, at the time of the collision, at the rate of from nine to ten miles an hour. The pilot says, at her usual rate of speed, or at the rate of eight or nine knots. The engineer, not exceeding the usual rate of speed, which, it appears, averages about ten miles. The mate states that the speed at the time was between ten and eleven miles.

Now, considering the darkness of the night and state of the weather, and that the steamer was navigating a channel where she was accustomed to meet sailing vessels engaged in the coasting trade between Mobile and New Orleans and the intermediate ports, we cannot resist the conclusion that the rate of speed above stated was too great for prudent and safe navigation; and this, whether we regard the security of the passengers aboard of her, or the reasonable protection of other vessels navigating the same channel; and especially under the circumstances of this case, in which she was bound to know that the place where this schooner lay was a place to which vessels in rough and unpropitious weather, navigating this channel, were accustomed to resort for safety. The case presented is much stronger against the steamer than that of casually meeting the schooner in the open waters of the lake. She was at anchor with other vessels in an accustomed place of security and protection against adverse winds and weather, familiar to all persons engaged in navigating these waters. The place and weather, therefore, should have admonished the steamer to extreme care and caution, and it is, perhaps, not too much to say, should have led to the adoption of a course that would have avoided the locality altogether. The weight of the evidence is, even if she had pursued the most direct course from Pass Mary Ann to Mobile, it would have had this effect; she would have passed north of this cluster of vessels anchored under the shelter of the island.

Neither is it at all improbable, if the speed of the steamer had been slackened, and she had been moving at a reduced rate, with the care and caution required by the state of the weather, that she would have seen the light on the schooner in time to have avoided her. The proof is full that there was a light on board from the time she cast anchor till the happening of the disaster. But, at the critical moment, it was in the hand of the seaman at midships, instead of at a conspicuous place in the rigging. The light must have been in some degree *visible, as all the sails of the [*112

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vessels were furled, and was placed on top of the cook-house as soon as the wet and moisture were wiped from the glass.

The admiralty in England have repeatedly condemned vessels holding a rate of speed in a dark night, under circumstances like the present, and so did this court in the case of The Steamer New Jersey (Newton v. Stebbens), 10 How. 586; The Rose, 2 Wm. Rob. 1; The Virgil, Ib. 201.

It has been urged, on behalf of the steamer, that she carried the mail, and that a given rate of speed was necessary in order to fulfill her contract with the Government.

This defense has been urged in similar and analogous cases in England, but has been disregarded, and indeed must be, unless we regard the interest and convenience of the arrival of an early mail more important than the reasonable protection of the lives and property of our citizens.

Having arrived at the conclusion that the steamer was in fault, the case is one for the apportionment of the loss.

The decree must, therefore, be reversed, and the case remitted to the court below, for the purpose of carrying this apportionment into effect.

POOLEY, NICOLL & CO.
v.
THE STEAMER ST. CHARLES.

The decree of the court below is reversed for the reasons given in the case of E. G. Rogers & Co. v. The Same Steamer, and remitted to the court for an apportionment of the loss.

BROOKS & RANDOLPH
v.
THE STEAMER ST. CHARLES.

The appeal in this case is dismissed for want of jurisdiction, the decree in the court below being for a sum less than $2,000.

JOHN HURLEY & CO.
v.
THE STEAMER ST. CHARLES.

The appeal is dismissed for want of jurisdiction; the decree of the court below being for a sum less than $2,000.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is the opinion of this court that the appeals of Brooks & Randolph, 113*] and Hurley & Co., should be *dismissed for want of jurisdiction, on the ground that the amount in controversy in each of the said cases is less than $2,000; and it is also the opinion of this court that the steamer St. Charles was in fault, and that the decree of the said Circuit Court in the cases of E. G. Rogers & Company should be reversed, and the cause remanded for an apportionment of the loss on these two appeals. Whereupon it is now here ordered, adjudged and decreed by this court, that the appeals of Brooks & Randolph and of Hurley & Company be, and the same are hereby dismissed, for the want of jurisdiction; and that the decree of the said Circuit Court in the cases of E. G. Rogers & Company and Pooley, Nicoll & Company be, and the same are hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court, and as to law and justice shall appertain.

Ex parte in the Matter of DAVID A. SECOMBE.

(See S. C. 19 How. 9-16.)

Mandamus not proper to review decision of inferior court.

A decision of an inferior court cannot be reviewed or reversed by mandamus, however erroneous it may be or be supposed to be.

It rests exclusively with a court to determine who is qualified to become an attorney and counselor therein, and for what cause he ought to be removed.

But it is the duty of the court to exercise this power, by a sound and just judicial discretion.

Argued Dec. 19, 1856. Decided Jan. 12, 1857.

ON APPLICATION for a rule on the Judges of the Supreme Court or the Territory of Minnesota, to show cause why a peremptory mandamus should not be issued, commanding them to restore the petitioner to his office of attorney and counselor of the said Supreme Court.

The case is stated by the court.

Mr. Badger for petitioner.

Mr. Chief Justice Taney delivered the opinion of the court:

A mandamus has been moved for, by David A. Secombe, to be directed to the Judges of the Supreme Court of the Territory of Minnesota, commanding them to vacate and set aside an order of the court, passed at January Term, 1856, whereby the said Secombe was removed from his office as an attorney and counselor of that court.

In the case of Tillinghast v. Conkling, which came before this court at January Term, 1829, a similar motion was overruled by this court. The case is not reported; but a brief written opinion remains on the files of the court, in which the court says that the motion is overruled, upon the ground that it had not jurisdiction in the case.

The removal of the attorney and counselor, in that case, took place in a district court of the United States, exercising the powers of a circuit court; and, in a court of that character, the relations between the court and the attorneys and counselors who practice in it, and their respective rights and duties, are regulated by the common law. And it has been well settled, by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or per-

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sonal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

It has, however, been urged at the bar, that a much broader discretionary power is exercised in courts acting upon the rules of the common law than can be lawfully exercised in the Territorial Court of Minnesota; because the Legislature of the Territory has, by statute, prescribed the conditions upon which a person may entitle himself to admission as an at- 14*] torney *and counselor in its courts, and also enumerated the offenses for which he may be removed, and prescribed the mode of proceeding against him. And the relator complains that it appears by the transcript from the record, and the certificate of the clerk, which he filed with his petition for a mandamus, that in the sentence of removal he is not found guilty of any specific offense which would, under the Statute of the Territory, justify his removal, and had no notice of any charge against him, and no opportunity of being heard in his defense.

It is true that, in the Statutes of Minnesota, rules are prescribed for the admission of attorneys and counselors, and also for their removal. But it will appear, upon examination, that, in describing some of the offenses for which they may be removed, the Statute has done but little, if anything more than enact the general rules upon which the courts of common law have always acted; and have not, in any material degree, narrowed the discretion they exercised. Indeed, it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counselor ought to be removed. And the Legislature, for the most part, can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice, as cases may arise.

The Revised Code of Minnesota (ch. 93, sec. 7, subdivision 2) makes it the duty of the attorney and counselor "to maintain the respect due to courts of justice and judicial officers."

The 19th section of the same chapter enumerates certain offenses for which an attorney or counselor may be removed; and, among others, enacts that he may be removed for a willful violation of any one of the provisions of section 7, above mentioned. And, in its sentence of removal, the court say that the relator, being one of the attorneys and counselors of the court, had, by his acts as such, in open court, at the term at which he was removed, been guilty of a willful violation of the provision above mentioned, and also of a violation of that part of his official oath by which he was sworn to conduct himself with fidelity to the court.

The Statute, it will be observed, does not attempt to specify the acts which shall be deemed disrespectful to the court or the judicial officers. It must, therefore, rest with the court to determine what acts amount to a violation of this provision; and this is a judicial power vested in the court by the Legislature. The removal of the relator, therefore, for the cause above mentioned, was the act of a court done in the exercise of a judicial discretion which the law authorized and required *it to exercise. And the other cause as- [*15 signed for the removal stands on the same ground.

It is not necessary to inquire whether this decision of the Territorial Court can be reviewed here in any other form of proceeding. But the court are of opinion that he is not entitled to a remedy by mandamus. Undoubtedly the judgment of an inferior court may be reversed in a superior one which possesses appellate power over it, and a mandate be issued commanding it to carry into execution the judgment of the appellate tribunal. But it cannot be reviewed and reversed in this form of proceeding, however erroneous it may be or supposed to be. And we are not aware of any case where a mandamus has issued to an inferior tribunal commanding it to reverse or annul its decision, where the decision was in its nature a judicial act and within the scope of its jurisdiction and discretion.

These principles apply with equal force to the proceedings adopted by the court in making the removal.

The Statute of Minnesota, under which the court acted, directs that the proceedings to remove an attorney or counselor must be taken by the court, on its own motion, for matter within its knowledge; or may be taken on the information of another. And in the latter case, it requires that the information should be in writing, and notice be given to the party, and a day given to him to answer and deny the sufficiency of the accusation or deny its truth.

In this case, it appears that the offenses charged were committed in open court, and the proceedings to remove the relator were taken by the court upon its own motion. And it appears by his affidavit that he had no notice that the court intended to proceed against him; had no opportunity of being heard in his defense, and did not know that he was dismissed from the bar until the term was closed, and the court had adjourned to the next term.

Now, in proceeding to remove the relator, the court was necessarily called on to decide whether, in a case where the offense was committed in open court, and the proceeding was had by the court on its own motion, the Statute of Minnesota required that notice should be given to the party, and an opportunity afforded him to be heard in his defense. The court, it seems, were of opinion that no notice was necessary, and proceeded without it; and whether this decision was erroneous or not, yet it was made in the exercise of judicial authority, where the subject matter was within their jurisdiction, and it cannot, therefore, be revised and annulled in this form of proceeding.

*Upon this view of the subject, it [*16 would be useless to grant a rule to show cause; for if the Territorial Court made a return stating what they had done, in the precise form in which the sentence of dismissal now appears in the papers exhibited by the relator, a peremptory mandamus could not issue to restore him to the office he has lost.

The motion must, therefore, be overruled.

Cited—4 Wall. 379; 7 Wall. 377, 380, 535.

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JAMES H. URE, Claimant of the Steamer Gipsey,
v.
JAMES M. COFFMAN and Cyrus Coffman, Owners of the Flat-Boat and Cargo.

(See S. C. 19 How. 56-63.)

Steamer held liable for collision with flat-boat —vessel tied to bank, out of line of navigation, need not show light at night.

Where a steamer is managed without skill or prudence, and a collision with a flat-boat is the consequence, without any fault or want of care by those navigating the latter, the former is properly held liable for the damages.

The particular facts of the case examined.

When a vessel is tied to the bank of a river, not in port or harbor or at a place of landing and out of the line of customary navigation, at night, she is not required to show a light.

Argued Dec. 29, 1856. Decided Jan. 12, 1857.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The libel in this case was filed in the District Court of the United States for the Eastern District of Louisiana, by the appellees, to recover damages resulting from a collision.

The court found for the libelants, and entered judgment for $3,416.15, with interest. On appeal, the Circuit Court having affirmed this decree, the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **Miles Taylor**, for the appellant:

We submit:

1st. That the appellant was engaged in a lawful business; that he exercised ordinary prudence in the prosecution of his voyage on the night in question; and that the collision was the result of an accident, and not from negligence, misconduct or want of skill; and that he is in no way responsible for the loss sustained by the appellees.

Va. In. Co. v. Millaudon, 11 La. 115; Stainback v. Rae, 14 How. 532.

2. That if there was any fault or want of care on the part of the appellant, there was also fault or want of care on the part of the appellees, inasmuch as they failed to keep any watch on the flat-boat, or to expose a light upon it, and that therefore they have no right to recover.

Delaware v. Osprey, 2 Wall. Jr. 273; Ward v. Armstrong, 14 Ill. 283, 285; Innis v. Steamer Senator, 1 Cal. 459; Simpson v. Hand, 6 Whart. 324; Murphy v. Diamond, 3 La. Ann. 441; Lesseps v. Pontchartrain R. R. 17 La. 361; Fleytas v. Ponthartrain R. R. 18 La. 339; Carlisle v. Holton, 3 La. Ann. 48; The Aliwal, 25 Eng. L. & E. 604; 5 Stat. at L. 306, sec. 10; Act of La. of 1832.

3d. That if the appellant was at all in fault, and responsible in some degree because of that fault then the appellees are only entitled to one half of the amount of the damages occasioned by the collision.

Brickell v. Frisby, 2 Rob. La. 205; The Catharine v. Dickinson, 17 How. 170.

Mr. **J. P. Benjamin**, for appellees:

The claimants and appellants do not deny that they ran into and sank the flat-boat, whilst she was lying tied up to the bank at night; but they seek to excuse themselves by urging:

First. That the flat was lying moored to the bank of the river, at a distance of only fifty feet below a woodyard, in the way of the steamboats taking wood, and in the way of steamboats landing freight or passengers at the usual landing of Madame Trudeau, the owner of the plantation on which the woodyard was situated; and,

Second. That the flat-boat had no light out, and was so concealed by the shadows of the bank, that she could not be seen.

1. To this first excuse, the short and ready answer is, that The Gipsey was not engaged in any attempt to land at the woodyard, or at Mrs. Trudeau's landing place, when she ran into the flat-boat: but on the contrary, was bound up the river, for a landing at George Mather's plantation.

They pretend that the night was not too dark to run, and that it was quite light enough for them to pursue their voyage with safety. By the evidence of their own officers, The Gipsey would have run directly into the bank of the river, if the flat-boat had not intervened. Now, if it was light enough to navigate with safety, the fact proves the grossest carelessness, and negligence sufficient to make the steamer responsible.

If, on the contrary, it was not light enough to navigate with safety, there was criminal imprudence in continuing the voyage, instead of lying up till the darkness was dissipated.

2. To the second excuse, the answer is, that there was no obligation on the part of the flat-boat to exhibit a light.

She was moored in a nook or recess of the bank, where it had caved so as to leave a point of land jutting out into the river above and below her.

Whether near a woodyard or not, is a matter of no consequence. She was not at the woodyard. She was beyond the possibility of harm from ascending or descending boats, and was not harmed by any boat that was ascending or descending by a proper course, but by a boat, which, whilst its officers declare they were bound up the river, ran straight across it, to a spot where they had no intention of going.

Mr. Justice Wayne delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

It appears from the record that the steamer Gipsey was a packet on the Mississippi River, running from New Orleans to Lobdell's Store landing, above Bayou Sara, and, as all the other Mississippi steam river packets do, was in the habit of landing freight and passengers at all the intermediate points and plantations. She was making a trip up the river from New Orleans on the evening of the 21st December, 1853. The night was rainy and dark, and after midnight somewhat foggy. It was light enough,

NOTE.—Collision. Rights of steam and sailing vessels with reference to each other, and in passing and meeting—see note to St. John v. Paine, 13 L. ed. U. S. 537.

Rules of navigation, vessels meeting; speed; vessels in a fog; steamships; other vessels,—see note to The Umbria, 41 L. ed. U. S. 1053.

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though, for the boats navigating the river to run and to distinguish and make all their landings. All of the witnesses say it was a proper night for running, and none of the packets, or other boats, laid up on that night on account of the weather. Alexander Desarpes, a witness for the claimant, says "he was the pilot of The Gipsey, and was on watch at the wheel at the time The Gipsey struck the flat-boat. That the collision happened above the point at Trudeau's woodyard, about fifty-six miles above New Orleans, between twelve and one o'clock at night, on the 22d December, 1853. He says it was a pretty bad night, rainy, dark and smoky, rather than foggy, with a little fog. There was light enough, however, for the boat to distinguish landings, and she ran and made all of hers of freight and passengers as she went up. Her last landing before the collision was one of freight, at J. B. Armant's plantation, on the right-hand side of the river descending, about half a mile below Trudeau's woodyard. We then crossed the river from there, to go to George Mather's plantation. At that time the night was dark and rainy, but the shore could be seen for some distance. There was a light 60*] *at Trudeau's woodyard on the bank, which is pretty high there, at least fifteen feet above the water; I could see this light a long distance—three or four arpents from the shore; there was a point of land just below the woodyard; I was looking out when the boat was approaching the shore, for the purpose of going up that shore to make a landing; I could see an outline of the shore, or bank, all along, and distinctly, too; I did not discover the flat-boat until we were right up against her; the flat-boat was lying close to the bank, and in its shadow, and having no light on her I could not see her; she was lying just at the foot of the woodyard; the light on the bank was a good distance from the flat-boat, and did not shine upon her. As soon as we saw the flat-boat, we stopped the engine of The Gipsey, and backed. If there had been a light on the flat-boat, I could have seen it at a sufficient distance to have avoided the collision, but there was no light on her. As the flat-boat was low down in the water, if there had been a light on her, we should have known it was something down in the water. I saw nobody on watch on the flat-boat at the time of the collision, and heard no hail from her before it." The witness further states that he had been a pilot on the river for more than ten years, "running in this lower trade," and adds, at the time of and before the collision, the weather was such as boats are in the habit of running and making landings, and I, as a pilot, consider that it was safe and proper to run the boat. Mather's landing, where The Gipsey was going to land, was about a quarter of a mile above Trudeau's woodyard. Upon the cross-interrogation of this witness, he does not give an intelligent or certain statement of the collision, or where or how The Gipsey struck the flat-boat; but says she was tied to a point, and her stern lay a little out from the bank; she laid up and down the river in the same direction with the current; there are curvings in along the bank; the flat was lying at a point fastened, and there are curvings both above and below that point, which was a mere jutting out of the bank in consequence of curvings above and below it. The direct examination being resumed, this witness says, on a clear and starlight night, in such a stage of water as prevailed at the time of the accident, we could have seen a flat-boat at a good distance in time to prevent an accident. If there had been on the flat-boat such a light as is generally carried on deck by a steamboat, or a schooner, or on flat-boats when they are running, I could have seen it three or four arpents off, and this would have given me time to avoid the collision.

The evidence of this witness is not in any material particular changed by any other witness examined in the case. It is *rather [*61 confirmed; but the captain of the Gipsey, who was also sworn as a witness, gives a more certain account of the collision, as to the part of the flat-boat which was struck by the steamer, and by what part of the steamer she was struck. The testimony is conclusive, that the flat being tied to the shore, at what might have been considered a proper and safe place, was struck by the steamer with sufficient force to cut a part of her down, and to sink her in a few minutes. There are three points to be noted in the testimony of Desarpes. The first is, that the steamer, being upward bound, had made a landing, at Armant's plantation, about half a mile below Trudeau's woodyard, and that her next place for making a landing was a quarter of a mile above that, on the opposite side of the river, at Mather's plantation, making the distance between the two places about three quarters of a mile. Second, that in his opinion as an experienced pilot, and accustomed to the navigation of the river, there was nothing in the state of the weather to prevent the steamer from being run as usual, and put across the river to make a landing at Mather's plantation, but that she was run so close in shore as to be brought in collision with the flat-boat, and thereby that the witness admits that the only cause of it was, that the flat-boat was lying close to the bank, and so much in its shadow, and not having a light, he could not see her. His language is, that if there had been on the flat-boat such a light as is generally carried on deck by a steamboat or a schooner, or on a flat-boat when they are running, he could have seen it far enough off to have avoided the collision.

Captain Ure, then in command of The Gipsey, gives the same account, scarcely with a variance, of the navigation of his vessel from Armant's plantation until the collision had occurred, but says, with more positiveness than his pilot spoke, that the forward end of the Gipsey—some part of the bow pretty far forward—struck the flat-boat. His language is, that he "was on the roof of the steamer in front all the time, when they had made their landing at Armant's, up to the moment of the collision. From Armant's we ran the bend of the river on the same side a short distance, and then crossed over to make a landing at Mather's, above Trudeau's woodyard. There was a light above the woodpile, but I saw nothing but its glare before the collision, the woodpile being between the light and my eyes. I could see the glare some three or five minutes before the collision took place.

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We had almost hit the flat-boat when I saw it. I was looking out and saw the boat, seeing its outline pretty clearly about the same time that I saw the glare of the light spoken of. It was the shadow of the bank, which is high there, which prevented me from seeing. If 62*] there had *been on the flat-boat any such light as flat-boats usually carry, I could have seen it in time to avoid hitting her." He further says, "the night was slightly foggy and bad, and it had been raining, but cannot recollect whether it was raining at the time of the collision. There was no fog until we came to Armant's, and after we left Armant's the fog came on, and I think that smoke was mixed with the fog. We did not lay up that night for fog, but ran all night." Other witnesses were examined by the claimants, but it is not necessary to notice their testimony further than to say that neither of them gave any additional facts concerning the navigation of the steamer from Armant's plantation, or concerning the collision, contradictory from what was said of both by Captain Ure and his pilot Desarpes.

Trying, then, the claimant's case only by the evidence introduced by himself, it is obvious that the steamer was put across the river from Armant's in a state of weather and on a night proper for running, without proper care to make her next landing at Mather's, which was at least a quarter of a mile above the woodyard, a little below which the flat-boat was moored. Both the pilot and the captain attempt to indicate the place and the part of the steamer which was first in contact with the flat-boat, by mathematical figures. If that of the pilot's is taken as the fact of the case, it must be conceded that The Gipsey was put across the river a little below where the flat-boat laid, and so near the bank that she could not have been run above her, by pursuing that course, without a collision. Running so near to the bank, when there was ample channel way further out in the river for the steamer to pass that point and curve made by it, at which and within which the flat-boat was fastened, was a want of proper care. Both pilot and captain knew that the woodyard and its immediate vicinity was a point of the river at which boats were customarily moored at night, as a place of safety against collisions from ascending or descending boats, and should have run the steamer further out in the river to avoid all chance of collision with boats tied to the bank or woodyard; and in this instance, there was no occasion for the steamer having been run so near to the bank of the river, as it was not intended to make a landing at the woodyard, but to pass it to a landing higher up. The collision, according to the pilot's account of it, was caused by the steamer not having been kept on a course further out from the bank. That, of itself, is sufficient to make her answerable for all the consequences of it, without any regard to the fact that the flat-boat had not a light. A light upon her might, in the language of the witness, have enabled him to have avoided the collision by putting the steamer further out in the 62*] river, but *the want of a light was not the cause of it. The cause was, that the steamer's course was too near on shore. But if the captain's account of the collision is taken as the fact of the case, as we think it ought to be, the steamer is altogether without excuse, for she was put across the river without due care as to her course, and would have been run bow on into the bank, at the point where the flat-boat was fastened, if she had not been stopped by the collision. In such a view of the case as we have given from the testimony of the claimant's witnesses, it is not necessary for us to consider the point made by the witnesses, and by counsel in the argument, that the flat-boat had not a light to show herself or her mooring during that night. Tied, as she was, in a recess of the land, with a point of land extending into the river below the woodyard, there was no necessity for her to show a light to protect her from boats ascending or descending the river, or from landing, which might be made at the woodyard, as she was actually fastened to the bank, out of the line of a customary and safe navigation up or down the river. In other words, the steamer was either run closer into the bank than was necessary or usual at that point of the river, and out of what should have been her course to make her landing at Mather's, or she was run head upon the flat-boat, where the latter was tied to the bank. When a boat or vessel of any kind is fastened for the night at a landing place, to which other boats may have occasion to make a landing in the night, it is certainly prudent for her position to be designated by a light on her own account, as well as that the vessel making a landing may have light to do so. But when a vessel is tied to the bank of a river, not in a port or harbor, or at a place of landing, out of the line of customary navigation, there is no occasion for her to show a light, nor has it ever been required that she should do so.

After the best examination of this case, we are of the opinion that the steamer Gipsey was put across the river from Armant's, in the prosecution of the intention to make another landing with her at Mather's plantation, without skill or prudence, and that the collision with the flat-boat was the consequence of it, without any fault or want of care by those navigating it. There is, therefore, no ground for reducing the damages given by the district and circuit courts to the owners of the flat-boat.

Having examined the record very fully as to the items making up the aggregate of damage given by those decrees, we affirm the decree of the Circuit Court in the case.

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*JAMES STEVENS, Plff. in Er., [*64

v.

ROYAL GLADDING and Isaac T. Proud, Doing business under the Firm name of Gladding & Proud.

(See S. C. 19 How. 64-66.)

An assignment of error that the judgment was for plaintiff, whereas it should have been for defendant below, is not an error appearing on the face of the record which can be noticed by this court.

Submitted Dec. 11, 1856. Decided Jan. 12, 1857.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

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The matter in controversy has been before this court on two former occasions.

See Stevens v. Cady, 14 How. 524; Stevens v. Gladding, 17 How. 447.

James Stevens, in person.

The argument presented by the plaintiff appeared in the transcript of the record, in connection with the assignment of error, and is recited in the opinion of the court.

A further statement of the case appears in the opinion of the court.

Mr. Samuel Ames, for defendants in error:

The record of this case shows that at the November Term of the Circuit Court for the District of Rhode Island, 1848, the plaintiff in error brought a quo tam action against the defendants in error, to recover penalties and forfeitures alleged to have been incurred by them under the Act of Congress passed February 3d, 1831, entitled "An Act to amend the several Acts respecting copyrights;" that at the June Term of said court, 1850, the cause was submitted upon the general issue, to a jury, who in due form returned a verdict in favor of the defendants in error, of "not guilty"; whereupon judgment was entered, that they have and recover their costs of suit.

The record discloses no error in law, nor, to the knowledge of the defendants in error or of their counsel, was any error of law brought upon the record by the allowance of a bill of exceptions. The court has no choice, therefore, but to confirm the judgment below, with costs.

Mr. Justice McLean delivered the opinion of the court:

This is a writ of error to the Circuit Court for the District of Rhode Island.

An action was brought by the plaintiff in the Circuit Court, alleging that he was the author of a topographical map of the State of Rhode Island and Providence Plantations, surveyed trigonometrically by himself, the copyright of which he secured under the Act of Congress of the 3d April, 1831, entitled "An Act to amend the several Acts respecting copyrights;" and he avers a special compliance with all the requisites of said Act, to vest in him the copyright of said map or chart. And he charges the defendants with having published two thousand copies of his map, and sold them within two years before the commencement of the action, in violation of his right, secured as aforesaid, to his damage $4,000.

The defendants pleaded not guilty. The case was submitted to a jury, who returned a verdict of not guilty. A judgment was entered against the plaintiff for costs.

A writ of error was procured, and bond given to prosecute it with effect.

The defendant in proper person assigns for error, "that the verdict and judgment were given against the plaintiff in error, whereas the verdict and judgment should have been given for the plaintiff, and he prays a reversal of the judgment on this ground."

In a very short argument, the plaintiff in er-
66*] ror says, the *principal questions are: was the verdict and judgment correct? Was the sale of the engraved plate, on execution, the sale of the copyright? Did such sale authorize the defendants, or any other person to print and sell this literary production, still subsisting under a copyright in the plaintiff? And he refers to 14 How. 528, Stevens v. Cady. In that case this court held that a sale of the copperplate for a map, on execution, does not authorize the purchaser to print the map.

Two or three depositions, not certified with the record, were handed to the court as having been omitted by the clerk in making up the record; but it does not appear that they were used in the trial before the Circuit Court; and if it did so appear, no instructions were asked of the court to the jury, to lay the foundation of error.

It is to be regretted that the plaintiff in error, in undertaking to manage his own case, has omitted to take the necessary steps to protect his interest. There is no error appearing on the record which can be noticed by this court.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

WESLEY WILLIAMS, Garnishee of Edward F. Mahone, Plff. in Er.,
v.
HILL, McLEAN & CO.

(See S. C. 19 How. 246-252.)

Surplus from sale under deed of trust, cannot be retained for debts subsequently made—in Alabama, adverse claimant must prove bona fides of his claim—what evidence not received.

Surplus, arising from a sale of real property, under deeds of trust given to secure debts described in them, cannot be retained as security for debts subsequently made on the strength of a parol engagement.

In Alabama, the adverse claimant of property or effects seized at the suit of a creditor by attachment or execution, must prove the bona fides of his claim, if it is derived from the debtor after the origin of the creditor's demand. And the declarations or acknowledgments of the debtor will not be received to support the title.

Argued Dec. 30, 1856. Decided Jan. 13, 1857.

IN ERROR to the District Court of the United States for the Middle District of Alabama.

The case is stated by the court.

Messrs. P. Phillips and J. E. Belser, for the plaintiffs in error.

The answer of a garnishee is required by the Statute to be under oath, and when not disproved, must be taken as true.

Code, sec. 2540; Davis v. Knapp, 8 Mo. 657; Kergin v. Dawson, 1 Gill. 89; Mason v. McCampbell, 2 Pike, 511.

The plaintiff, by the Statute, is allowed to "controvert" the answer; that is, he may show it to be untrue. The present Code of Alabama does not point out the particular mode of proceeding; but when the issue is made up, it is evident that the trial must proceed, as in other cases. The Statute, as it existed before the adoption of the "code," in express terms requires that "an issue shall be formed and tried, as in other cases."

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Clay's D. P. 60, sec. 25; Code, sec. 2446; Thomas v. Hopper, 5 Ala. 442.

Not only the answer denies any indebtedness, but the promissory notes produced and proved, import a consideration. This is by the law merchant and by the Statute of Alabama.

Code P., 424, sec. 2278.

By the well established judicial construction of the attachment law, "no demand can be recovered by a writ of garnishment, on which the defendant in the judgment, who is also the creditor of the garnishee, could not maintain debt or indebitatus assumpsit.

Self v. Kirkland, 24 Ala. 277.

It follows that the proof required by the present plaintiff, is the same as would have been required of the defendant in the judgment, if he had brought the suit. Could he have recovered on the evidence in this record?

There being no evidence disproving or tending to disprove the answer which denied any indebtedness, and nothing impeaching the consideration of the notes, there was no predicate for the charge as to "fraud and collusion." The bill of exceptions sets out all the evidence in the cause. Where the facts are not disputed, fraud is a question of law.

Swift v. Fitzhugh, 9 Port. 66; Gillespie v. Battle, 15 Ala. 285.

Mr. H. W. Hilliard, for defendant in error:

The answer of the garnishee is not taken as true, when controverted by the plaintiff, his agent or attorney.

Code, sec. 2546.

The Code provides, that the answer of the garnishee being controverted by the oath of the plaintiff, his agent or attorney, an issue must be made up under the direction of the court; and if required by either party, a jury must be impaneled to try the facts.

Code, sec. 2546.

The answer of the garnishee is not evidence for himself upon the trial of this issue; the onus of disproving the facts of the answer of the garnishee, does not rest upon the plaintiff.

Travis v. Tartt, 8 Ala. 574; Myatt v. Lockhart, 9 Ala. 94.

The only proof offered by the garnishee to the court and jury, going to show that he was not indebted to defendant in execution, was that certain promissory notes had been made by said defendant; but the date of said notes, or rather the actual time of their execution, did not appear from the testimony. They were merely offered by garnishee as a set-off against the plaintiff's suit for the excess of money remaining in the garnishee's hands, after satisfying the debts provided for in the mortgages; and the consideration of said notes was not in proof.

The charge of the court, if erroneous, is in favor of the garnishee, and he cannot revise it in this court.

The counsel for plaintiffs requested the court to charge the jury, that their judgment against the defendant was a lien on his house and lot; and that they were entitled to the proceeds arising from the sale of said property, after the notes named in the mortgage were satisfied. This charge the court refused.

If the court erred in this, the garnishee cannot complain of it, nor can he complain of the remaining part of the charge; for if the judgment of the plaintiffs be a lien, then they can recover irrespective of the question of fraud.

The charge should have been given by the court.

19 Ala. 195; 19 Ala. 753; 21 Ala. 504; Hazard v. Franklin, 2 Ala. 349.

The charge of the court, on the second point, as to fraud, was clearly correct.

It was a question for the jury. The facts were disputed; the very existence of the notes denied; the silence of the garnishee respecting them, in his interview with the plaintiff's counsel on the day of sale; his offer to relinquish his claim to the house and lot upon being paid the remainder of the sum due on the notes named in the mortgages; the good faith of the entire transactions between garnishee and defendant in execution being contested; all this, and other facts appearing in the evidence, presented a case which a jury alone could decide. The very proceeding, being an issue made up under the code, was a question of fraud or no fraud, and either party was entitled to a jury.

Code, sec. 2546.

Mr. Justice Campbell delivered the opinion of the court:

The defendants recovered a judgment in the District Court in a plea of debt against one Mahone. The latter having no property in possession liable to an execution, the defendants, in consequence, served a garnishment on the plaintiff (Williams), to attach any debt he might owe their debtor, or secure any effects of theirs he might have.

The garnishee answered to the process, that on the day the writ of garnishment issued, he had sold some personal property *of the [*250 debtor, under the authority of two deeds of trust, for the satisfaction of the debts described in them; and there remaining a balance due, he sold a house and lot, described in one of the deeds, for a sum sufficient to extinguish those debts and to leave a surplus. He further answered that Mahone, prior to the judgment, was indebted to him upon another account, and had so continued a debtor till the sale; that before the judgment, and afterwards, before the sale, Mahone had instructed him to apply any surplus that might arise from the sale to the payment of that account; and he had done so, in accordance with the instructions.

There was an issue formed upon the answer of the garnishee, and the subject of the controversey was the claim of the respective parties to the surplus above described.

The garnishee produced on the trial a number of promissory notes, dated prior to the judgment, and proved the signature of Mahone to them; he also proved that Mahone had admitted authority of the garnishee to apply the surplus to the payment of his demands, not described in the deeds, shortly after the sale, and at that time disclaimed any power to control it. No evidence was given of the existence of the notes of a day prior to the answer, nor of their consideration. The defendants proved a conversation between their attorney and the garnishee, on the day of the sale, relative to the amount of the debt from Mahone to him, and that the notes were not mentioned by him in that conversation. The court instructed the jury that the inquiry for them was, whether

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there was fraud or collusion between the garnishee and the debtor. That if they found that the notes were made in fraud or collusion, they would render a verdict in favor of the attaching creditors, for the amount of the surplus in the hands of the garnishee. This charge includes the substance of all the questions presented to the court or jury.

We think the case was submitted as favorably for the garnishee as the facts warranted, and that he has no reason to complain in consequence of the instructions given or refused.

The plaintiff is not entitled to hold the surplus in his hands arising from the sale of the trust property, for the payment of the notes, under any stipulation in the deeds. These provide for a return of the surplus to the grantor, after the payment of the debts described. Nor can the real property conveyed in the deed be retained as a security for advances, or debts subsequently made on the strength of a parol engagement. Such a contract would be avoided by the Statute of Frauds. Nor is the deed of trust such a conveyance or title paper as to afford a security, as a deposit, for subsequent engagements.

251*] *In Ex parte Hooper, 1 Meriv. Ch. 7, Lord Eldon said: "The doctrine of equitable mortgage by deposit of title deed has been too long established to be now disputed; but it may be said that it ought never to have been established. I am still more dissatisfied with the principle upon which I have acted, of extending the original doctrine so as to make the deposit a security for subsequent advances. At all events, the doctrine is not to be enlarged. In the present case, the legal estate has been assigned, by way of mortgage. The mortgagee is not entitled to say this conveyance is a deposit, because the contract under which he holds it is a contract for conveyance only, and not for deposit."

The only other title that the garnishee has interposed against the claim of the attaching creditor is, that the debtor made a valid appropriation of the surplus arising from the sale, to the satisfaction of a bona fide demand of the garnishee against him, prior to the service of the garnishment. The principle adopted by the courts of Alabama for such cases is, that the adverse claimant for property or effects seized at the suit of a creditor by attachment or execution, must prove the bona fides of his claim, if it is derived from the debtor after the origin of the creditor's demand; and the declarations or acknowledgments of the debtor will not be received to support the title. The recitals in a deed or mortgage executed by him, or admissions made at the time of the execution, will not be received. Goodgame v. Cole, 12 Ala. 77; Nolen & Thompson v. Gwyn, 16 Ala. 725. Nor is the consideration of a note in favor of the claimant shown by the production of the note itself. De Vendel v. Malone, 25 Ala. 272. The objection to such evidence is said to be, that it can be manufactured by one indebted, and by that means a creditor might be defeated; for, in most cases, it would not be practicable for him to prove a negative, or disprove the statement made by his debtor. In the present case, the consideration of the notes was not proved; nor was their existence before the service of the garnishment shown otherwise than by their date—that is, by an assertion of the debtor. Nor was the order to appropriate the surplus to their payment proved, except by an acknowledgment to a stranger, after the writ of garnishment had been issued.

The bona fides of the titles of the garnishee to the surplus in his hands was not supported by competent proof, and therefore the lien of the garnishment was properly maintained.

The plaintiff contends that the proceeding by garnishment is a statutory proceeding, by which a creditor is enabled to reach a demand in favor of his debtor against a third person; *and that the remedy can only be resort- [*252 ed to when the debtor himself could maintain debt or indebitatus assumpsit; and that the only issue which can be made upon an answer of the garnishee is, indebitatus vel non. The Supreme Court of Alabama have decided, in the cases cited, that merely equitable demands or rights of action, not involving a debt or assumpsit, are not the subject of the garnishee process. But the same court has determined that money or effects in the hands of the garnishee, which are fraudulently withdrawn from the creditors of a defendant, may be reached, in an attachment or judgment, by that process. Hazard v. Franklin, 2 Ala. 349; Lovely v. Caldwell, 4 Ala. 684. And the Civil Code of Alabama, sec. 2523, provides explicitly for the attachment of a demand similar to that existing in this case.

Judgment affirmed.

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*JEAN LOUIS PREVOST, Plff. in Er., [*1

v.

CHARLES E. GREENAUX, Treasurer of the State Bank of Louisiana.

(See S. C. 19 How. 1-7.)

Power of U. S. by treaty to devest right of Louisiana to taxes.

An inhabitant of Louisiana died in 1848 intestate and without issue, leaving property. By the laws of that State, as they then stood, the property so left vested in Prevost, a French subject residing in France, subject to a tax of ten per cent. payable to the State. Held, that the Treaty subsequently made by the United States with France could not devest the right to the tax already vested in the State, even if the words of the Treaty had imported such intention.

Argued Dec. 22, 1856. Decided Jan. 13, 1857.

IN ERROR to the Supreme Court of the State of Louisiana.

This is a writ of error prosecuted from the decision of the Supreme Court of the State of Louisiana, rendered on a statute which has already been twice brought to the notice of this court.

See cases of Mager v. Grima, 8 How. 490; Poydras v. Treasurer of Louisiana, 18 How. 192.

The laws of Louisiana impose a tax of ten per cent. on the value of all property inherited in that State by any person not domiciliated there, and not being a citizen of any state or territory of the United States.

Jean Louis Prevost, a French subject residing in France, claims the delivery to him of the

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estate in question, free from the tax of ten per cent. and bases his claim to this exemption on the Consular Convention between the United States and France, concluded Feb. 23, 1853, ratified by the United States on April 1st, 1853, exchanged Aug. 11, 1853, and proclaimed by the President Aug. 12, 1853.

9 Stat. at L. 992.

The Supreme Court of Louisiana, whilst recognizing the binding force of this treaty stipulation, held that it did not apply to the case before it, because the tax had accrued, and the inheritance had been acquired by the heir, long anterior to the date of the Treaty.

From this decision, the heir has prosecuted the writ of error now before the court.

A further statement of the case appears in the opinion of the court.

Mr. Louis Janin, for plaintiff in error:

When the law imposing a tax or penalty is repealed before that tax is collected, the right to recover it is lost.

Case of City of New Orleans v. Mrs. Grailhe, 9 La. Ann. 562, decided Dec. 4, 1854; Cooper v. Hodge, 17 La. 476, and two other referred to in that decision.

In the case of Cooper v. Hodge, the principle is expressed in this form:

"We have held, that if a judgment be correctly given under a law which is repealed pending, the appeal, this court is bound to reverse it."

The Supreme Court of the United States have acted on this principle in cases of much more difficulty than that now before the court.

The Legislature of Virginia, by an Act passed in 1779, during the War, had authorized Virginia debtors of British subjects to discharge the debt by payment into an office existing under the state government. The defendants in error, under this Act, had paid into this office a portion of their indebtedness to the plaintiffs, and pleaded their discharge pro tanto under the Act. The plaintiffs replied the 4th article of the Definitive Treaty of Peace between Great Britain and the United States, of Sept. 3, 1783, in which it was stipulated that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.

The State was held to have had full power to make the law; but it had been annulled by the Treaty, and the defendants in error were liable to the full amount, notwithstanding partial payment to the State.

The U. S. v. The Peggy, 1 Cranch, 103. The Schooner Peggy was captured by a United States armed vessel and libeled as prize, ordered to be restored by the District Court, condemned by the Circuit Court on appeal, as lawful prize; when the owners of The Peggy prosecuted a writ of error to the Supreme Court. She had been captured as sailing under the authority of the French Republic. On Sept. 30, 1801, pending the writ of error, a convention was signed between the United States and the French Republic, and was ratified Dec. 21, 1801, which provided for the restoration of property captured, but not yet definitely condemned.

It was held by the court, in the opinion delivered by Chief Justice Marshall, that if subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied; that where a treaty is the law of the land, and, as such, binds the rights of parties litigating in court to condemn a vessel, the restoration of which was directed by it, it would be a direct infraction of that law, and of consequence improper; that if the law was constitutional, and no doubt of it had been expressed in the case, no court could contest its obligation. The effect upon civil rights acquired under a statute, of the repeal of the statute, was most fully considered in the case of Butler v. Palmer, 1 Hill, 324, in an elaborate opinion of Judge Cowen. In speaking of the effect of a repeal upon inchoate rights, he says: "That a repealing clause is such an express enactment as necessarily devests all inchoate rights which had arisen under the statute which it destroys. These rights are but incidents to the statute, and fall with it, unless saved by the express words of the repealing clause." He reviews Miller's case, 1 W. Black. 451, and gives a much fuller statement of it from some other reporter. See, also, Smith's Com. Stat. Const. pp. 888, 889, for the same case, and the English decisions in affirmance of it. The result of these decisions is, that where rights are inchoate and set up under a repealed statute, they are devested as fully as if the statute had never existed.

To impose, levy, and collect a tax, is an exercise of the sovereign power, as much as the levying and collecting a fine for misdemeanor. The repeal of the statute imposing one or the other, at once stops all action under it. The machinery for its collection provided by the statute, is paralyzed by the repeal.

So far as the statutes for the regulation of trade impose fines or create forfeitures, they are doubtless to be construed strictly as penal, and not liberally as remedial laws.

Mayor v. Davis, 6 Watts & Serg. 269.

Statutes levying duties or taxes upon subjects or citizens, are to be construed most strongly against the government, and in favor of the subjects and citizens; and their provisions are not to be extended by implication beyond the clear import of the language used.

U. S. v. Wigglesworth, 2 Story, 369.

No judgment can be rendered for a penalty given by a statute after the statute is repealed, although the action was commenced before the repeal.

Pope v. Lewis, 4 Ala. 487.

From these principles and authorities, it follows that the right of the state to claim or recover the foreign succession tax of 1842, is lost from the moment of the promulgation of the Consular Convention of 1853, although the tax might have been claimed and recovered, if proceedings had been instituted, perfected and executed before that convention.

Mr. J. P. Benjamin, for defendant in error:

The case is clearly within the jurisdiction of this court, and the only question is, whether the court of Louisiana has rightfully construed the Treaty. Its decisions under it have been:

First. That wherever the rights of the heir vested after the Consular Convention went into effect, the tax could not be recovered.

Succession of Defour, 10 Ann. 392.

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Second. That wherever the right of the heir vested anterior to the date of the Treaty, the right of the state vested at the same time.

The latter proposition is the one now in dispute.

1. At what time, under the laws of Louisiana, did the rights of the State to the tax of ten per cent. vest?

The Supreme Court of that State has held, ever since the year 1831, that under the State Statute, the rights of the heir and of the State both vested at the instant of the testator's death.

Arnaud's Heirs v. His Executors, 3 La. 337; Quessart's Heirs v. Canonge, 3 La. 561; Succession of Oyon, 6 Rob. 504; Succession of Deyraud, 9 Rob. 358; Succession of Dufour, 10 Ann. 392; Succession of Blanchard, 17 Ann. 392.

2. The only remaining question is, whether the Treaty was intended to devest any title acquired prior to its passage.

The terms of the Treaty are entirely prospective, and its language appears too plain to require any reference to canons of construction.

Frenchmen, after date, are to be considered, for all the purposes of the Treaty, as citizens of Louisiana. But the claim of the State would be good against its own citizens after the repeal of the taxing law, because vested prior to the repeal, as already shown by the authorities cited. Ergo, that claim is good against the Frenchmen.

6*] *Mr. Chief Justice Taney delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Louisiana. It appears that a certain François Marie Prevost, an inhabitant of that State, died in the year 1848 intestate and without issue, and possessed of property to a considerable amount. He left a widow; and, as no person appeared claiming as heir of the deceased, the widow, according to the laws of the State, was put in possession of the whole of the property by the proper authorities, in December, 1851. She died in March, 1853.

In January, 1854, Jean Louis Prevost, a French subject residing in France, presented himself by his agent in Louisiana as the brother and sole heir of François Marie Prevost, and established his claim by a regular judicial proceeding in court.

The laws of Louisiana impose a tax of ten per cent. on the value of all property inherited in that State by any person not domiciliated there, and not being a citizen of any state or territory of the United States.

This tax is disputed by the plaintiff in error, upon the ground that the law of Louisiana is inconsistent with the Treaty or Consular Convention with France. This Treaty was signed on the 23d of February, 1853, ratified by the United States on the 1st of April, 1853, exchanged on the 11th of August, 1853, and proclaimed by the President on the 12th of August, 1853.

The 7th article of this Treaty, so far as concerns this case, is in the following words:

"In all the States of the Union whose laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfers, inheritance, or any others, different from those paid by the latter, or to taxes which shall not be equally imposed."

Proceedings were instituted, in the state courts by the plaintiff in error, to try this question, which were ultimately brought before the Supreme Court of the State. And that court decided that the right to the tax was complete, and vested in the State upon the death of François Marie Prevost, and was not affected by the Treaty with France subsequently made.

*We can see no valid objection to this [*7 judgment. The plaintiff in error, in his petition to be recognized as heir, claimed title to all the separate property of François M. Prevost and his widow, then in the hands of the curator, and of all his portion of the community property, and of all the fruits and revenues of his succession from the day of the death of his brother. And, in adjudicating upon this claim, the court recognized the rights of the appellant, as set forth in his petition, and decided that he became entitled to the property, as heir, immediately upon the death of Fr. M. Prevost.

Now, if the property vested in him at that time, it could vest only in the manner, upon the conditions authorized by the laws of the State. And by the laws of the States, as they then stood, it vested in him subject to a tax of ten per cent. payable to the State. And certainly a Treaty, subsequently made by the United States with France, could not devest rights of property already vested in the State, even if the words of the Treaty had imported such an intention. But the words of the article, which we have already set forth, clearly apply to cases happening afterwards—not to cases where the party appeared, after the Treaty, to assert his rights, but to cases where the right afterwards accrued. And so it was decided by the Supreme Court of the State, and, we think, rightly. The constitutionality of the law is not disputed, that point having been settled in this court is the case of Mager v. Grima, 8 How. 490.

In affirming this judgment, it is proper to say that the obligation of the Treaty and its operation in the State, after it was made, depend upon the laws of Louisiana. The Treaty does not claim for the United States the right of controlling the succession of real or personal property in a state. And its operation is expressly limited "to the States of the Union whose laws permit it, so long and to the same extent as those laws shall remain in force." And as there is no Act of the Legislature of Louisiana repealing this law and accepting the provisions of the Treaty, so as to secure to her citizens similar rights in France, this court might feel some difficulty in saying that it was repealed by this Treaty, if the State Court had not so expounded its own law, and held that Louisiana was one of the States in which the proposed arrangements of the Treaty were to be carried into effect.

Upon the whole, we think there is no error in the judgment of the State Court, and it must, therefore, be affirmed.

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PIERRE FELIX COIRON and Marie J. T. Coiron, a Minor by her Next Friend, Pierre Felix Coiron, Appts.,

v.

LAURENT MILLAUDON and Edward Shiff, Syndics, Etc., of Alexander Lesseps, et al.

(See S. C. 19 How. 113–115.)

Necessary parties to bill—no excuse that they are out of jurisdiction—decree cannot be made without them—objection may be taken in court below, or in appellate court.

In a bill to set aside sale and distribution of insolvent's property for irregularities, by two of his heirs, the mortgage creditors or their representatives are necessary parties.

That they were out of the jurisdiction of the court is no answer to the objection.

The Circuit Court cannot make a decree in the absence of a party whose rights must necessarily be affected thereby.

The objection may be taken at any time on the hearing in the appellate court.

(Mr. Justice CAMPBELL, having been of counsel, did not sit in this cause.)

Argued Dec. 11, 1856. Decided Jan. 15, 1857.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The bill in this case was filed in the Circuit Court of the United States for the Eastern District of Louisiana, by the appellants, to recover a certain plantation, with slaves, profits, rents, etc.

The court below having dismissed the bill for want of equity, the complainants have brought the case here on appeal.

A further statement appears in the opinion of the court.

Messrs. H. D. Ogden and R. Hunt for appellants.

Mr. J. P. Benjamin for appellees.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the decree of the District Judge, sitting in the Circuit Court of the United States for the Eastern District of Louisiana.

The bill was filed in the court below by two of the heirs of J. J. Coiron, against Alexander Lesseps, Laurent Millaudon, and others, to set aside a sale of a plantation and slaves to the two defendants named, in 1834, in pursuance of proceedings in a case of insolvency before a parish court in the City of New Orleans.

The father of the complainants having become insolvent in 1833, applied to the court for liberty to surrender his property for the benefit of his creditors, and that in the meantime all proceedings against his person or property might be stayed, which application was granted, and the surrender of his property accepted.

Theodore Nicolet was appointed syndic of the creditors, and such proceedings were had, that a sale of the plantation and slaves was directed in March, 1834, when the two defendants became the purchasers. The inventory of the debts of the insolvent, which accompanied his application to the parish court, exceeded $177,000, and of his assets, $137,000. The assets sold for some $77,000; and after satisfying the charges and expenses of the proceedings, the balance was distributed among the creditors under the direction of the court. This amount, some $60,000, fell short of satisfying the claims of the two principal creditors, Van Brugh Livingston, and Harriet, his wife, of New York, and the firm of Nicolet & Co., of New Orleans, which were secured upon the estate by mortgages.

The object of this suit is to set aside the sale on the ground of irregularities in the insolvent proceedings, which are set forth in detail in the bill.

The court below, after hearing the case upon the pleadings and proofs, decreed against the complainants and dismissed the bill.

The record is quite voluminous, but we have stated enough *of the fact to present the [*115 questions upon which we shall dispose of the case.

According to the law of Louisiana, on a surrender by the insolvent of his property for the benefit of creditors, the estate vests in the latter sub modo, and is disposed of by them through the agency of the syndic, under the supervision and control of the court before whom the proceedings take place. 2 Rob. 193, 194.

They appoint the syndic and fix the terms and conditions of the sale, and have the charge of the estate in the meantime between the surrender and the final disposition.

The creditors, therefore, are the parties chiefly concerned in these proceedings; and as it respects those to whom the proceeds of the estate have been distributed, they are directly interested in upholding the sale; for, if it is set aside, and the proceedings declared a nullity, they would be liable to refund the share of the purchase money each one had received in the distribution.

A court of equity, in setting aside a deed of a purchaser upon grounds other than positive fraud on his part, sets it aside upon terms, and requires a return of the purchase money, or that the conveyance stand as a security for its payment. 1 Johns. Ch. 478; 4 Johns. 536, 598, 599.

This constitutes the essential difference between relief in equity, and that afforded in a court of law. A court of law can hold no middle course. The entire claim of each party must rest, and be determined at law, on the single point of the validity of the deed; but it is the ordinary case in the former court, that a deed not absolutely void, yet, under the circumstances, inequitable as between the parties, may be set aside upon terms.

Nicolet & Co., and Van Brugh Livingston and wife, the mortgage creditors, or their legal representatives, were, therefore, necessary parties to the bill, as any decree made in the case disturbing the sale may seriously affect their interests.

This objection has been anticipated in the bill, and an averment made that these parties were out of the jurisdiction of the court. But it is well settled, that neither the Act of Congress of 1839 (5 U. S. Stat. at L. 321, sec. 1),

NOTE.—Necessary parties in equity—see note to Marshall v. Beverly, 5 L. ed. U. S. 97.

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nor the 47th rule of this court, enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and that the objection may be taken at any time upon the hearing, or in the appellate court. 17 How. 130; 1 Pet. 299.

We think the decision of the court below was right in dismissing the bill, and therefore affirm the decree.

8*] *BENJAMIN F. MORGAN, Plaintiff in Error,

v.

ALFRED G. CURTENIUS and John L. Griswold.

(See S. C. 19 How. 8, 9.)

Important paper omitted in record, ordered to be supplied.

Where a paper, which may be important to the decision of the matter in controversy between the parties, has been omitted in the record, and which paper was offered in evidence by the defendants, and must have been deemed material to their defense; the court think it would not be just to them to proceed to final judgment, without having this paper before them.

And the defendants having no counsel in this court, the court of its own motion order the case to be continued, and a certiorari issued to the Circuit Court, directing it to supply the omission and return a full and correct transcript to this court, on or before the first day of the next term.

Submitted Dec. 31, 1856. Decided Jan. 15, 1857.

IN ERROR to the Circuit Court of the United States for the District of Illinois.

Mr. Washburne for plaintiff in error.

Mr. Purple, counsel of record in this court, did not appear nor file any brief.

Mr. Chief Justice Taney delivered the opinion of the court:

Upon examining the transcript of the record filed in this case, we find that it is imperfect, and that a paper has been omitted which may be important to the decision of the matter in controversy between the parties.

The bill of exceptions upon which the case is brought before this court, after stating that the defendants read in evidence the deed from Bogardus to Underhill, under which they claim title, proceeds in the following words:

"The defendants next offered in evidence to the jury a certificate of the Register of the Land Office at Quincy, dated ——, which is in the words and figures following, to wit:"

But the certificate thus referred to is not inserted in the exception, nor its contents stated in any part of the transcript. And as this paper was offered in evidence by the defendants, it must have been deemed material to their defense; and the court think it would not be just to them to proceed to final judgment, without having this paper before us.

And as the defendants have no counsel appearing in their behalf in this court, the court of its own motion order the case to be continued, and a certiorari issued in the usual form to the Circuit Court, directing it to supply the omission above mentioned, and return a full and correct transcript to this court, on or before the first day of the next term.

The court made the following order:

Upon an inspection of the record of this cause, it appearing to the court here that the bill of exceptions states that "the defendants offered in evidence to the jury a certificate of the *Register of the Land Office at Quincy, [*9 dated ——, which is in the words and figures following, to wit:" and that the said certificate, thus referred to, is not inserted in the exception, nor its contents stated in any part of the transcript; on consideration whereof, it is now here ordered by this court, that a writ of certiorari be, and the same is hereby awarded, to be issued forthwith, and to be directed to the Judges of the Circuit Court of the United States for the District of Illinois, commanding them to supply the omission above mentioned, and return a full and correct transcript to this court, with this writ, on or before the first day of the next term of this court.

BURR H. BETTS, Appt.,

v.

JOHN H. LEWIS and Mary M. F. Lewis, His Wife.

(See S. C. 19 How. 72, 73.)

Equity practice prescribed by this court—same in all the States—dismissal of bill for want of equity, while exceptions to answer are pending, not permitted.

The equity practice of the courts of the United States is governed by rules prescribed by this court, and is the same in all the States.

This practice does not sanction the dismissal of the bill on motion made while the parties are perfecting the pleadings.

Argued Jan. 2, 1857. Decided Jan. 20, 1857.

THE bill in this case was filed in the District Court of the United States for the Northern District of Alabama, by the appellant, to recover a certain legacy.

On motion, the bill was dismissed for want of equity, by the court below; thereupon the complainant took an appeal to this court.

Mr. A. P. Butler for appellant.

Mr. Reverdy Johnson for appellees.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from the decree of the District Court of the United States for the Northern District of Alabama, having the powers of a circuit court. The appellant filed his bill in that court to charge a legacy on property alleged to have come to the hands of the respondents, and to be chargeable with its payment. After answers had been filed, and while exceptions to one of the answers were pending, the respondents moved to dismiss the bill for want of equity, and the court ordered it to be dismissed. This was irregular, and the decree must be reversed. It is understood to be in conformity with the practice of the State courts of Alabama to entertain such a motion at any stage of the proceedings. But the equity practice of the courts of the United States is governed by the rules prescribed by

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this court under the authority conferred upon it by the Act of Congress (McDonald v. Smalley, 1 Pet. 620), and is the same in all the States. And this practice does not sanction the dismissal of the bill, on a motion made while the parties are perfecting the pleadings. The question whether the bill contains any equity, may be raised by a demurrer. If the defendant answer, this question cannot be raised until the hearing. Non constat, that a defect may not be removed before the hearing.

The case must be remanded to the Circuit Court, and if any defects exist in the bill capable of being cured by amendments, as no replication has been filed, it is within the rules of ordinary practice to allow them to be made.

JAMES MEEGAN, Plff. in Er.,
v.
JEREMIAH T. BOYLE.

(See S. C. 19 How. 130-150.)

Common law was adopted in Missouri Territory in 1816—wife's succession administered without husband's control—recorded copy not evidence where original is not—Spanish law as to wills—will dormant for fifty years—proof of ancient instrument—Missouri territorial limitations.

The common law was adopted in Missouri Territory in 1816 and governs all subsequent legal transactions.

A succession accruing to the wife during marriage is her paraphernal property, which she may administer without consent or control of the husband.

The wife may give the control of this property, in writing, to her husband.

The husband had no power, without the wife's concurrence and action, to convey her real estate.

If an original deed is not evidence a recorded copy of it cannot be read.

By the Spanish law a will was required to be proved by the attesting witnesses within one month after the decease of the testator; and when proved, is required to be recorded.

By it, the testator cannot disinherit a child without naming the child and the reasons for doing so.

No heir can claim a devise without performing the condition annexed to it.

If the will had been a genuine instrument, it could not, it would seem, have remained dormant fifty years, without judicial action.

Here it has not been treated as valid, as no claim has been set up under it, and the heirs have acted in regard to their father's estate as if he had died intestate.

The rule admitting a will in evidence without proof, as an ancient instrument, embraces no instrument which is not valid on its face, and which does not contain every essential requirement of the law.

By Act of December 17, 1818, the Missouri Territorial Legislature abolished rules of prescription under the Spanish law in real actions, and substituted a limitation of twenty years after action accrued, and in case of disability by coverture, twenty years after it ceased.

By revised Code of March 10, 1835, 396, sec. 11, this Act shall not apply to any actions commenced, or right of action accrued, before it takes effect, but the same shall remain subject to the laws then in force.

By the limitation Act of 1818 no laches can be charged against femes covert until discoverture; such act does not begin to run against them until they became discovert.

NOTE.—Proof of ancient documents. Alteration of instruments—see note to Coulson v. Walton, 9 L. ed. U. S. 51.

Argued Dec. 22, 1856. Decided Jan. 20, 1857.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This was an action of ejectment, brought in the Circuit Court of the United States for the District of Missouri, by the defendant in error, for the recovery of a common field lot in the City of St. Louis. The plaintiff obtained a verdict and judgment in the court below, for an undivided two fifths of a portion of the premises in question. The defendant brought the case here on a writ of error.

A very full statement of the case appears in the opinion of the court.

Mr. H. S. Geyer, for the plaintiff in error:

The Circuit Court erred in rejecting the documentary evidence offered by him at the trial.

1. The instrument purporting to be the deed of the heirs of Moreau to Chouteau, dated Sept. 3, 1818, and that offered as the act of Pierre Reaume and wife, dated Nov. 6, 1819, ought to have been admitted in evidence.

The execution of the last-mentioned deed was fully proved by proof of the death of the subscribing witnesses and their handwriting.

Both instruments were more than thirty years old at the time of trial, and proved themselves. The bare production of them was sufficient to entitle them to be read.

1 Greenl. Ev. sec. 21, p. 142.

The presumption of the due execution of these instruments is, moreover, corroborated by the facts and circumstances in evidence at the trial.

2. It is proved that several of the parties collected at St. Louis from other places for the purpose of making a conveyance of their interest in the land, at about the time of the date of the first instrument, and afterwards declared that they had sold to Pierre Chouteau.

The existence of the deed soon after is established by the official certificates appended.

3. The title of Chouteau, as derived from the heirs of Moreau, is recited in his deed to Mullanphy, executed, acknowledged and recorded in 1819.

4. Both the instruments rejected by the court, were recorded in the proper office and were in the possession of Mullanphy, under whom the defendant below claimed, more than thirty years before the trial.

5. Mullanphy, the grantee of Chouteau and those claiming under him, have been in undisturbed possession of the land, claiming under those deeds more than thirty years.

6. All the parties grantors, except Alexis and Joseph Moreau, resided in the County of St. Louis, and no one of them ever set up a claim to the land.

See 1 Greenl. Ev. sec. 21, pp. 143, 144, 570, and cases there cited; Gray v. Gardner, 3 Mass. 399; Colman v. Anderson, 10 Mass. 105; Shaller v. Brand, 6 Binn. 435; Lee v. Tapscott, 2 Wash. Va., 276; Doe, ex dem. Clinton, v. Phelps, 9 Johns. 169; Same v. Campbell, 10 Johns. 475; Newman v. Studley, 5 Mo. 291.

If the antiquity of the instrument, together with the facts and circumstances disclosed at the trial, were not absolutely conclusive of their due execution, they at least afford a fair and reasonable presumption of that fact, and ought to have been referred to the consideration

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of the jury, to whom alone it belonged to determine upon the precise force and effect of the circumstances proved, and whether they were sufficiently satisfactory and convincing to warrant them in finding the fact.

1 Phil. Ev. 437.

The fact, if it had been found by a jury or admitted, that the deed of Sept. 3, 1818, was "not signed or acknowledged by Marie Collin, Angelique Mallette, and Helen Cerré, and had not been executed by any person under whom the plaintiff claims, would not authorize the rejection of the deed; it being admitted, and very fully proved, that it was duly executed by other parties having title as tenants in common in the land.

The plaintiff exhibited no conveyance or other evidence of title from Marie Collin, and if her interest was not conveyed by the deed of 1818, it passed on her death (she having died without issue) to her brothers and sisters, and their descendants. Nor does he derive title under Angelique Mallette, or Helen Cerré, by any act of theirs or of their representatives. His claim is founded on a sheriff's sale on execution (without any judgment produced) against Angelique Mallette, Pierre Willimen, and Malanie Cerré, his wife, Felix Pingal and Josephine Cerré, his wife, by her guardian, which Malanie and Josephine are two of three surviving children of Helen Cerré. The latter, Josephine, was probably dead at the time of the sale, and if living, an infant. At most, the plaintiff could claim only one share and two thirds of another; and it was competent for the defendant to give in evidence conveyances from the other parties in interest.

The deed of Sept. 3, 1818, was duly acknowledged, and the execution of it was proved at the trial by proof of the handwriting of Thomas R. Musick, in whose presence it was signed and acknowledged. The execution of the deed of Reaume and wife is proved beyond controversy. Joseph Menard, Elinor Ortiz, and Marceline Reaume, are the children and heirs of Marie Louise Menard, deceased, who was a daughter of Francis Moreau, and wife of Joseph Menard, deceased.

The execution of the same deed by Alexis Moreau, and by Joseph Moreau, is fully established.

But it is sufficient, if the deed was executed by any one of those having title under Francis Moreau, to entitle the defendant to read it in evidence; if admitted, the plaintiff could not have recovered, there being no proof of an actual ouster, or any act equivalent.

Rev. Code of Mo. 1845, tit. Ejectment, S. 1.

2. The will of Francis Moreau, being one of the archives of the Spanish government deposited in the office to the Recorder of St. Louis County, and therein recorded and duly certified, was competent evidence by the statute law of Missouri.

Rev. Code 1845, tit. Evidence, S. 12.

This document is what is called an open testament, being dictated viva voce. It was made before the Commandant in lieu of a notary, in the presence of a sufficient number of witnesses, and afterwards deposited and preserved among the archives of the government, and needed no probate to give it effect.

Partidas, L. 3, T. 1, B. 6; Novis. A. Recop. L. 1, T. 18, B. 10; Schmidt's Civil Law, tit. 7, C. 5.

In Upper Louisiana, the commandants of the posts or some one designated by the Lieutenant-Governor, were substituted for the notaries, and their acts have always been regarded as notarial acts, and of the same effect.

See McNair v. Hunt, 5 Mo. 300.

The will contains no condition precedent to the operation of the clause by which Joseph Moreau is instituted universal heir, and if it did, proof of performance would not be a necessary preliminary to the admission of the document in evidence. The will is not void on account of the institution of a universal heir—the effect is only to give to him that portion of the estate disposable by testimentary donation, which in this case is one third; the residue will pass to the heirs ab intestato. The acceptance of the donation by the instituted heirs is not more necessary than the acceptance of the succession by the legal heirs—in either case it may be expressed or implied; and when material is a question of fact for the jury.

Schmidt's Civil Law, tit. 7, ch.—, art. 1059; ch. 8, art. 1177, tit. 8, ch. 5; Novis. Recop. L. 1, T. 18, B. 10; 18 Law of Toro; Partidas, L. 11, 13, 15, tit. 6, B. 6.

Messrs. W. L. Williams and Samuel T. Glover, for the defendant in error:

1. The property in dispute belonged to Francis Moreau, and on his death, which took place prior to the change of government, descended to his children. It was afterwards by the Acts of Congress, June 13th, 1812, and April 29th, 1816, confirmed to the children in virtue of their father's right. The children, originally seven, were reduced to six, by the death of Louis, intestate and without issue. By the death of Marie, intestate and without issue, they were reduced to five. The plaintiff derived his title from two of the surviving daughters, Angelique and Helen, and may therefore be said to claim under Louis, Marie, Helen and Angelique. It was conceded at the trial, that the property vested in the daughters in this way was paraphernal, according to the code of laws lately prevailing here. "A succession accruing to the wife during marriage is her paraphernal property, which she may administer without the authorization, consent or interference of her husband."

Flower v. O'Connor, 8 Mart. N. S. 556; Savenat v. Le Breton, 1 La. 520.

This species of property could not be sold by the husband, without the consent of the wife.

O'Connor v. Barre, 3 Mart. 455.

The property a woman inherits during marriage is paraphernal.

Allen v. Allen, 6 Rob. 104.

The woman is accustomed to bring, besides her portion (dot), other property which is called paraphernalia, and which is or are the property and things, whether (muebles) personal or (reeles) real, which wives retain for their separate use. From this definition it follows,

1. That if the wife gives to the husband this property, with the intention that he may have the dominion (senorio) of it, he shall possess it during marriage; and if she should not do this expressly in writing, the dominion of such property shall always be in the wife.

1 White, New Recop. p. 56.

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On the same page, note 33, it is said that Palacios questions the necessity of a writing, but says it must appear that the wife made a gift to her husband, with the intention of giving him dominion over it.

2. The supposed deed of Angelique Mallette, Marie Collin, and Helen Cerré, was properly excluded from the jury as a conveyance of their property.

1. The supposed deed was not valid under the Spanish law, as to Marie Collin, because her husband did not execute it.

2. It was not valid as to either of the women, because it does not appear that either of them ever signed it or assented to it, nor that either of them ever knew of its existence in the life of her husband; nor does it appear that either of them ever gave her husband the property or power to sell it.

3. That the supposed deed was not valid under the common law, which was introduced into the Territory Jan. 19, 1816, is too obvious for comment.

1 Ter. Laws of Mo. 436.

4. The facts in evidence did not authorize any presumption of the execution of the instrument by the married women. It was insisted at the trial, that the supposed deed should be admitted, that it might be submitted to the jury, whether, under all the evidence in the cause, they would not presume a conveyance by them to the parties in possession. The position on the other side was this: that if the husband conveys the wife's land, and possession is taken under the conveyance, and is continued for thirty years, and is open and notorious, and then the husband dies, any subsequent claim by the wife is overturned by the presumption of fact arising on these circumstances, that she has conveyed the property. To our minds this is a monstrous proposition. The discussion of it is undertaken with the apology that it was pressed with a great deal of zeal at the trial, and is perhaps to constitute the principal point in the cause in this court. Nothing is more intelligible than the principle on which a conveyance is presumed. It is well stated as follows: "The rational ground for presumption is, when the conduct of the party out of possession cannot be accounted for without supposing that the estate has been conveyed to the party in possession."

Kingston v. Lesley, 10 S. & R. 391.

"It is founded on the consideration that the facts and circumstances are such as could not, according to the ordinary course of human affairs, occur without presuming a transfer of title, or an admission of an existing adverse title in the party in possession."

Jackson v. Porter, 1 Paine, 457.

"The presumption may always be rebutted, by showing that the possession held or privilege exercised was perfectly consistent with the right or interest of the party who afterwards sets up the adverse claim."

Daniel v. North, 11 East, 372.

"And this presumption in favor of a grant, and against written evidence of title, can never arise from mere neglect of the owner to assert his rights, where there has been no adverse title or enjoyment by those in whose favor the conveyance is to be presumed."

Schauber v. Jackson, 2 Wend. 37; Doe v. Butler, 3 Wend. 153; Lynde v. Denison, 3 Conn. 396; Ricard v. Williams, 7 Wheat. 109; Rob. Frauds, 67, note.

"As soon as it appears that during the time in which it is presumed the party would have asserted his right, if he had one, that party was under a legal disability, which prevented or excused it, there is an end of the presumption."

Martin v. State of Tenn. 10 Humph. 157.

What was the condition of the persons here, against whom presumptions are supposed to rise? Marie Collin was married in 1805, and so remained till March 22, 1840. Angelique Mallette was a married woman from 1804 till April 19, 1844. Helen Cerré was married at the date of the supposed deed, and so remained till 1838. The common law was introduced into the Territory of Missouri Jan. 19, 1816 (1 Ter. Laws Mo. 436), and placed these women under all the disabilities belonging to that code. When their property was sold by their husbands, there was no possible mode in which they could interpose a legal objection. No remedy known to the law within their reach, to redress the wrong done; their silence, then, is perfectly consistent with their rights. They seemed to acquiesce in the possession because they could not help it. They could not sue; and reason would seem to indicate that in such case they should be excused for not suing. But just the reverse is the argument of the plaintiff in this court. He contends that the same law which put it out of their power to sue, at the same moment declared that if they did not sue, it must be presumed that they had surrendered their titles. The plaintiff in error claims that it has been so decided in Melvin v. Proprietors of Locks and Canals on the Merrimac River, 16 Pick. 140. In that case, the course of the opinion was such as to indicate a predetermined purpose of the court to rob the plaintiff of his lands; and, that purpose was carried out in 17 Pick. 259, when the case was again before the court. Facts which transpired after the marriage, were allowed to go to the jury, as evidence of a grant prior to the marriage.

It is well, perhaps, that there is one case on record in which an intelligent court has been found to set down in a deliberate opinion, the absurdities of the doctrine contended for by the plaintiff.

In the case of Weatherhead's Lessee v. Baskerville, 11 How. 329, the subject was thoroughly discussed, and settled by an opinion of this court. The court say: "The rule in such case is, that when a person is under a legal incapacity to litigate a right in a court of justice, and there has been no relinquishment of it by contract, a release of it cannot be presumed from the circumstances over which the person had no control, happening before the incapacity to sue has been removed." A married woman "cannot sue without the assent and association of her husband, for any property which she owns, or to which she may become entitled, in any of the ways in which that may occur." "For this cause it is, the Statute of Limitations does not run against her during coverture." She is presumed to "act under the coercion of her husband.

When there is a statute of limitation applicable to the case, presumptions are never per-

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mitted; "for, to presume a grant in a case where the title would otherwise be protected by the statute, would be a plain evasion of the statute."

Cow. & Hill's Notes, 356, 357, n. 311.

3. It has been supposed that in Missouri the law in force at the dissolution of the marriage by death, fixes the marital rights dependent on that event, and not the law which was in force at the time of the marriage.

Riddick v. Walsh, 15 Mo. 537.

This case, it is said, is broad enough to give to the husband a tenancy by courtesy, in lands vested in the wife prior to the Statute of Missouri, July, 1807 (1 Ter. Laws, 131, sec. 16), which introduced that tenure amongst us. If this be the force of the case of Riddick v. Walsh, 15 Mo. 537, then the husbands of Madame Cerré, and Madame Mallette, by virtue of the Act of July, 1807, the prior marriage and the issue born, became tenants by courtesy, which was a particular estate for life in the husbands.

Reaume v. Chambers, 22 Mo. 37—see appendix; Alexander v. Warrance, 17 Mo. 229.

The introduction of the common law in 1816 (1 Ter. Laws 436), though it did not give tenancy by courtesy to Madame Collin's husband, she never having had issue, did nevertheless, upon the above view of Riddick v. Walsh, give him an estate of freehold in the lands of his wife, determinable with her life.

2 Kent's Com. 130.

If this view is correct, then the deed of Antoine Mallette and Pierre Cerré passed to Chouteau their life estates as tenants by the courtesy; and there was also outstanding in Louis Collin, during the whole of his life, a freehold estate which was interposed between his wife and any claim by her to the land in controversy.

When the plaintiff, therefore, established that the husbands of Madame Cerré and Madame Mallette became tenants by courtesy, by force of the Act of July, 1807, and that Louis Collin took a freehold by force of the common law introduced in 1816, he shows that the women in question had no title to the property in dispute while the husbands were living, and consequently that their causes of action did not accrue to them till they were respectively discovert.

Then there is no possible ground upon which any presumption can rest; they had really no interest in the property—nothing to convey—nothing which the presumption of a conveyance can reach.

"Neither a descent cast, nor the Statute of Limitations, will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began, because a right of entry in the remainderman cannot exist during the existence of the particular estate, and the laches of tenant for life will not affect the party entitled after him."

Jackson v. Schoonmaker, 4 Johns. 402; Jackson v. Johnson, 5 Cow. 75-103.

"At common law, the alienation of the husband seised in the right of the wife, discontinued the wife's estate." But by Stat. 32 Hen. VIII. adopted in Missouri (1 Ter. Laws, 436), the contrary was provided. Since that Statute, the husband's deed passes his own right, and the wife's stands intact as a reversion or remainder; so that her interest ceases during coverture, and springs up again on its determination.

Jackson v. Sears, 10 Johns. 435; Jackson v. Stevens, 16 Johns. 110; Jackson v. Cairns, 20 Johns. 303; Miller v. Shackleford, 3 Dana, 289; S. C. 4 Dana, 278; Meraman v. Caldwell, 8 B. Mon. 33; Gill v. Fauntleroy, 8 B. Mon. 177; Gregory v. Ford, 5 B. Mon. 471; Martin v. Woods, 9 Mass. 377; Heath v. White, 5 Conn. 228; Jackson v. Johnson, 5 Cow. 96; 1 Hill. Real Prop. 555.

4. The Statute of Limitations is no defense to this action. As early as Dec. 17, 1818, the Territorial Legislature passed an Act for limiting real actions, and it has been in force ever since. This Act abolished all the rules of prescription known to the Spanish law, and substituted in lieu thereof its own period of twenty years after the action accrued, and in case of disability by coverture, twenty years after disability removed.

1 Ter. Laws, 598; Landes v. Perkins, 12 Mo. 257; Youse v. Norcums, 12 Mo. 549; Biddle v. Mellon, 13 Mo. 335; Blair v. Smith, 16 Mo. 277; Jackson v. Cairns, 20 Johns. 301; Jackson v. Sellick, 8 Johns. 262; Rev. Stat. Mo. 1835; p. 392, art. 1, sec. 1, also sec. 4; Rev. Stat. Mo. 393, art. 3, sec. 11; Reaume v. Chambers, 22 Mo. 37, Appendix.

It would seem to be very plain that whether the cause of action accrued to the women in 1820, when Mullanphy took possession of the premises, or at the moment when the life estates respectively of the husbands terminated, not one of their titles is cut off by the Statute of Limitations. In either case the period of limitation would not be less than twenty years. If the cause of action accrued in 1820, the 11th section of the 3d article of the "Act for prescribing the time for commencing actions," approved March 16, 1835 (Rev. Code, 1835, p. 396), exempts their case from the operation of that Act; and then by the Statute of 1818 (1 Ter. Laws, 598, and Rev. Code of 1825, sec. 3, p. 511), twenty years is allowed wherein to sue after discoverture.

And if the cause of action accrued at the termination of the life estate of the husbands, then by all the statutes ever in force in Missouri, twenty years at least would be given wherein to sue.

It has always been held by our courts, that the enactment of the Statute of Limitations of 1818, and the introduction of the common law in 1816, not only abolished the rules of prescription under the Spanish law, but annulled the power of married women and infants to bring any action while under disability.

Landes v. Perkins, 12 Mo. 257; Youse v. Norcums, 12 Mo. 549.

Felix Pingal was entitled as tenant by the courtesy to his wife's lands, although neither the husband or the wife was actually seised during the coverture.

4 Kent's Com. 29-30; 1 Hill. Real Prop. 111; Reaume v. Chambers, 22 Mo. 37, Appendix.

5. When a large amount of property is in controversy, desperate means are sometimes resorted to for the purpose of holding the possession. Such is the attempt to set up in bar

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of this suit, the pretended will of Francis Moreau.

The Spanish law required a will to be produced before the Judge, and proved by the attesting witnesses within one month after the testator's death. The witnesses having been examined, the will was ordered to be protocoled (recorded).

1 White's Recop. 111; 2 Moreau & Carleton's Partidas, 975–977.

Francis Moreau had no right to give all his property to one child. He could not disinherit a child without cause, nor without naming expressly the child, and the reason of the disinherison.

2 Moreau & Carleton's Partidas, 1031–1053; 1 White's Recop. 107.

To entitle an heir to the benefit of a devise, it was necessary he should have performed the conditions annexed to it. 2 Moreau & Carleton's Partidas, 997, and following; 1 White's Recop. 103; and it is also necessary he should appear before the judge and plainly accept or reject the devise.

1 White's Recop. 111, 127.

But this will, if it was ever seen by Francis Moreau, was never produced to any judge after his decease, never shown to the pretended witnesses, never proved, never recorded, never accepted by the heir in the manner required by law; and Joseph Moreau, who is made by it universal heir, never performed any of the conditions which it imposed upon him.

Joseph did, after his father's death, make claim to the succession, and for this he was imprisoned by the Lieutenant-Governor.

It is most probable, therefore, that the pretended will was a forgery.

It is certain that Joseph Moreau, after his release from prison, acted towards the property of the estate and towards his brothers and sisters, as if his father had died intestate, and the estate was settled and distributed as an intestate's estate. If the pretended will had been legally established, Joseph was estopped by his own acts from settling it up.

Mr. Justice McLean delivered the opinion of the court:

This writ of error brings before us the judgment of the Circuit Court for the District of Missouri.

144*] *Boyle brought an action of trespass and ejectment in the Circuit Court for a common field lot, in what was formerly known as the Big Prairie, of St. Louis, containing one arpent in front, on Broadway, in the city aforesaid, by the depth of forty arpents, running westwardly, being the same lot of land granted by the Spanish government to Moreau, and confirmed to his representatives by the United States, and known as survey 1,480.

The defendant pleaded not guilty. A verdict of guilty was found against him for an undivided two fifths of the land described.

A grant of the land claimed under the Spanish government was proved to have been made to Francis Moreau, who occupied the land some time before his death, which took place in 1802. He left seven children surviving him—three sons and four daughters. His sons were named Joseph, Alexis, and Louis; his daughters, Manette, widow of one Cadeau, and afterwards wife of Louis Collin; Marie Louise, wife of Joseph Menard; Helen, who afterward intermarried with Pierre Cerré; and Angelique, who intermarried with Notaine Mallette.

The plaintiff gave in evidence a sheriff's deed, dated the 24th of February, 1853, which recites a judgment in favor of David Clary and William Waddingham, against Angelique Pierre Willemin, and Melanie Cerré, his wife, Felix Pingal and Josephene Cerré, his wife, by her guardian, for $455.31, on which an execution was issued, and levied on the defendant's land, designated as survey 1,480, and the same was sold the 19th of February, 1853, to the plaintiff Boyle, to whom the above deed was given, which purports to convey all the right and interest of the defendants.

The plaintiff proved that defendant had been in possession of the premises since 1839.

On the part of the defendant it was proved that, in the summer of 1820, John Mullanphy built a small brick house, which stands partly on the premises sued for, and partly on one of the common field lots confirmed to Vien. Soon after the house was built, Mullanphy fenced three or four acres of ground, including the house. In 1822 or 1823, he inclosed fifteen or twenty acres, and in 1835 or 1836, John O'Fallon, the executor of Mullanphy, induced Waddingham to inclose all the land claimed by the estate of Mullanphy in that neighborhood, which included the land sued for. The house and inclosures were rented to different persons from time to time, and were occupied with occasional intervals, sometimes of several months. In 1846 or 1847, Waddingham's fence fell down, and the tract *lay vacant and uninclosed [*145 for a year or two, when portions of it were enclosed by the heirs of Mullanphy.

At the trial, a paper was offered in evidence, purporting to be the deed of Joseph Moreau, and others, heirs of Francis Moreau, deceased, dated the 3d of September, 1818, conveying to Pierre Chouteau all their estate and interest in the tract of land in the declaration described. A certificate of Thomas R. Musick, a justice of the peace, certifying that Joseph Menard and wife, Joseph Ortiz and his wife, signed the instrument, and acknowledged it to be their deed. There was also offered an instrument purporting to be a deed of Pierre Reaume and Marceline, his wife, and of Joseph Menard and Marie Louise Moreau, dated 6th November, 1819, conveying to Pierre Chouteau their interest in the land conveyed by their co-heirs, by the foregoing deed. Also, there was offered a certificate of Raphael Widen, notary public, of the acknowledgment of this instrument, the 6th November, 1819; and also a certificate that both the instruments were recorded 6th June, 1822.

It was proved that the above papers, after the death of John Mullanphy, came into the possession of John O'Fallon, having been found among the papers of the deceased.

The signatures to the first instrument were affixed by marks, the names being in the handwriting of F. M. Guyol and others.

Certain persons swore that they heard several of the heirs say they had sold their land to Pierre Chouteau. That Joseph Moreau lived in Louisiana in a destitute condition, where he died; and that he was never heard to claim

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any land in St. Louis, and, in fact, that he said he had sold his land in Missouri.

Pierre Chouteau and wife, on the 30th of October, 1819, conveyed the tract in controversy to John Mullanphy by deed, which was duly acknowledged and recorded.

On the above evidence, the two deeds in 1818 and 1819 were offered in evidence, to which the plaintiff objected, "because the first deed was not signed or acknowledged by Marie Collin, Angelique Mallette, and Helen Cerré, under whom he claims, and that it did not convey any title of the femes covert.

The defendant then offered in evidence a copy of the will of Francois Moreau, certified by S. D. Barlow, Recorder, to have been taken from among the archives of the French and Spanish governments, deposited in his office, and filed for record on the 17th August, 1846, being archive 2,257. If the Recorder had power to certify as to the deposit of the will, it does not appear by whom it was made, nor at what time.

146*] *This instrument states that in the year 1798, on the 2d August, we, Louis Collin, in default of a notary, went to the home of St. Francis Dunegant, Captain Commandant of St. Ferdinand, of Florisant, assisted by Antoine Rivierre, and five others named; where St. Francois Moreau went with Joseph Moreau at my residence; the said Francis Dunegant and the said Francois Moreau declared and requested to make his last will, which he pronounced to us in a loud and intelligible voice, as follows, etc.: "Among other provisions the testator names his son Joseph universal legatee, and afterwards declared it is with the reserve, that he shall reimburse to each of his brothers and sisters $27 silver out of the estate of their deceased mother, and it is declared that Joseph Moreau obliges himself to furnish certain articles annually to his father during his life." The testimoneum is as follows: Done and passed in St. Ferdinand, in Florisant, the day and year aforesaid, and signed (after being read) before Don Francis Dunegant, Captain commanding, and the aforesaid witnesses; the said Francis Moreau made his ordinary mark, etc.

At the time of offering the will, the following deeds and documents were read in evidence, as bearing upon said will, and its admissibility in evidence: a deed dated 2d April, 1818, from Joseph Moreau and others, for a lot on Third Street, Town of St. Louis. In the deed it is stated that Joseph Menard, Aurora, the wife of Joseph Hortiz, are children of —— Moreau, alias Menard, deceased. Also, the inventory and account of sales of the estate of Francis Moreau, the inventory of the community property of Francis Moreau and wife, under the direction of Francis Dunegant, Commandant, etc.

On the foregoing testimony the defendant moved to instruct the jury as follows:

1. If the jury find that Francis Moreau, in his lifetime was owner of the lot in controversy; that he died prior to 1804, and that his two daughters, Mrs. Mallette and Mrs. Cerré, took their husbands prior to 1804, then the several interests of said daughters in said lot became upon their marriage, and was their paraphernal property.

2. If the jury find, as mentioned in instruction No. 1, and further find, that in the year 1818, Mallette and Pierre Cerré, husbands of said daughters, made the deed read in evidence by the defendants, then, under the evidence in this cause, the jury may presume that said daughters gave the administration of said paraphernal property to their husbands, and that the same was alienated with their consent.

3. If the jury find, as mentioned in instruction No. 1, and further find, that defendants, and those under whom they *claim, [*147 have had open and continued possession of the lot in question for thirty years or more, before the beginning of this suit, claiming to own the same, then the plaintiff cannot recover any interest in said lot, derived by Mrs. Mallette or Mrs. Cerré from their said father.

4. If Mrs. Pingal was dead, leaving a child, at the time of the sheriff's sale, under which plaintiff claims, and during all the time of the coverture of said Mrs. Pingal the lot in controversy was in possession of defendants, and those under whom they claim, holding the same adversely to Mrs. Pingal and her husband, and there never was any entry upon the part of the wife or husband, then the plaintiff derived no title to the lot in controversy under Mrs. Pingal or her husband.

The court gave the first instruction, and refused the others, to which refusal exception was taken.

It is argued that the deed of the heirs of Moreau to Chouteau, dated September 3, 1818, and that offered as the Act of Pierre Reaume and wife, dated 6th November, 1819, ought to have been admitted in evidence; that the execution of the last-mentioned deed was fully proved by proof of the death of the subscribing witnesses and their handwriting.

Some of the grantors in this deed acknowledged the execution of it before Thomas R. Musick, a justice of the peace, but there was no proof that Angelique or Helen Cerré, or Marie Collin, had signed or acknowledged the deed, and these were the heirs under which the plaintiff claims. It was proved by Colonel O'Fallon, that he was the executor of John Mullanphy, and that in 1833 he received from the son of the deceased the title papers of the estate, among which was the above original deed with certain indorsements. And it was proved that the deed was in the handwriting of Guyol, a justice of the peace, with whose handwriting he was well acquainted. It was also proved that the signatures, Antoine Mallette, Pierre Cerré, and Joseph Moreau, were in the handwriting of Guyol, and that of Marie Collin in the handwriting of her husband, Louis Collin; the signature, Ellen Moreau, the wife of Pierre Cerré, is in the handwriting of Hawley. Guyol, the witness states, was a man of good character. There was some proof that Pierre Cerré and Antoine Mallette, after the date of said paper, stated often that they sold their land to Pierre Chouteau, Sr.; but there appears to be no proof that Angelique Mallette, or Helen Cerré, or Marie Collin, had ever stated or admitted that they had parted with their interest in the land.

One of the defendant's witnesses stated that Joseph Moreau said, that, after the decease of his father, he set up a claim to *the suc- [*148

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cession, and that he was imprisoned for doing so, and that Pierre Chouteau had him released. Some evidence was given as to the deed having been deposited in the Recorder's office for record, and an indorsement that it was to be handed to Mullanphy.

The common law was adopted in the Missouri Territory in 1816, and consequently it governs all subsequent legal transactions.

The children of Moreau, being seven at the time of his decease, were reduced, by the death of Louis, intestate, and Marie, who also died intestate, to five. And it seems that the plaintiff derived his title from two of the surviving daughters, Angelique and Helen, and their heirs; he therefore claims under Louis, Marie, Helen, and Angelique. It seems not to be contested that the property vested in the daughters, under the civil law, was paraphernal. A succession accruing to the wife during marriage is her paraphernal property, which she may administer without the consent or control of her husband. O'Conner v. Barre, 3 Martin, La. 455. The wife may give the control of this property, in writing, to her husband. 1 White's New Recop. 56, note 33.

The Circuit Court committed no error in excluding from the jury the above deed. The execution of it, by the parties under whom the plaintiff claims, is not proved, nor do the facts relied on, from which a presumption is attempted to be drawn in favor of its validity, authorize such presumption. The femes covert were under disabilities. They could only devest themselves of their rights in the mode specially authorized. Their husbands had no power, without their concurrence and action, to convey their real estate.

The defendant offered to read a certified copy of the deed, to show its condition at the time it was recorded, but the court refused to permit such copy to be read. If the original deed was not evidence, it is difficult to perceive for what legal purpose a recorded copy of it could be read. There was no error in this ruling by the court.

There was no evidence that the will had been proved, or that the conditions stated in it had been complied with.

A deed dated 2d April, 1813, from Joseph Moreau and his brothers and sisters, conveying to Hempstead and Farrar a lot which would have passed by the supposed will to Joseph Moreau, had it been operative. Also, there was shown a sale bill of the personal property of the estate on the 19th of April, 1803, Joseph Moreau being present, and that he purchased a part of the property devised to him by the will.

Also, it was shown that an administrator 149*] was duly appointed *on the estate of Francis Moreau, and his estate was administered in the same manner as if he had died intestate.

By the Spanish law, a will was required to be proved by the attesting witnesses within one month after the decease of the testator; and, when proved, it is required to be recorded. 1 White's Recop. 111; 2 Moreau & Carleton's Partidas, 975–977. The testator cannot disinherit a child without naming the child, and the reasons for doing so. 1 White's Recop. 107. No heir can claim a devise without performing the condition annexed to it. 1 White's Recop. 103. It is required that he shall appear before the judge, and either accept or reject the devise. 1 White's Recop. 111, 127. None of these requisites were performed by Joseph Moreau, who was made, by the will, universal heir.

If the will was a genuine instrument, and Joseph was the universal heir, it could not have remained dormant, it would seem, for fifty years, or in the archives, without being brought to the light, and having on it some judicial action. But whether it be a genuine instrument or not, it has not been treated as valid, as no claim has been set up under it, and all the heirs have acted, in regard to the estate of their father, as though he had died intestate.

Neither the deed to Chouteau, nor the will can be admitted in evidence, without proof, as an ancient instrument. The rule embraces no instrument which is not valid upon its face, and which does not contain every essential requirement of the law under which it was made. Neither the deed nor the will comes within the rule, and we think the court very properly excluded them both from the jury.

In regard to the second, third and fourth instructions, which the court refused to give to the jury, there was no error.

As early as Dec. 17, 1818, the Territorial Legislature passed an Act limiting real actions, which remains in force. The Act abolished all the rules of prescription under the Spanish law, and substituted a limitation of twenty years after action accrued, and in case of disability by coverture, twenty years after is ceased. In 1820, it appears, Mullanphy took possession of a part of the premises in controversy, and from that time retained possession. Some of the husbands had a life estate in the lands; but whether this was so or not is immaterial, as there is no bar to the claim of the plaintiff by the Statute of Limitations.

By an Act "prescribing the time for commencing actions," approved March 10, 1835 (Revised Code, 396), it is declared, in the 11th section, "that the provisions of this Act shall not apply to any action commenced, nor to any cause where the *right of action [*150 or entry shall have accrued, before the time when this Act takes effect, but the same shall remain subject to the laws now in force."

It will be observed that the Limitation Act of 1818, being still in force, cannot operate on any of the femes covert of whom the plaintiff claims. It did not begin to run against them until they became discovert, from which time it required twenty years to bar their right. Under such circumstances no presumption can arise against them, as they had no power to prosecute any one who entered upon their land. No laches can be charged against them until discoverture; and there is no ground to say that either the Statute or lapse of time, since that period, can affect the rights of the plaintiff, or of those under whom he claims. The court, therefore, did not err in refusing to give to the jury the instructions requested.

Upon the whole, the judgment of the Circuit Court is affirmed, with costs.

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E. I. DUPONT De NEMOURS & COMPANY, Libelants and Appellants,
v.
JOHN VANCE et al., Claimants of the Brig Ann Elizabeth.

(See S. C. 19 How. 162-182.)

When cargo is lawfully jettisoned its owner has no lien on the vessel for its value.

A jettison, the necessity of which is occassioned by a peril of the sea, is a loss by a peril of the sea, and within the exception in the bill of lading.

But if the unseaworthiness of the vessel, at the time of sailing on the voyage, caused, or contributed to, the necessity of the jettison, the loss is not within the exception of perils of the sea.

Seaworthiness defined, and method of testing same.

When cargo is lawfully jettisoned, its owner has no lien on the vessel for its value.

But he has a lien on the vessel for its contributory share of the general average compensation.

And he may enforce payment thereof, by a proceeding in rem against the vessel, and against the residue of the cargo if it has not been delivered.

This court may make a decree for such lien, although in the court below the claim was that the jettison was unlawful, or if lawful, could not be a defense because the master had failed in the duty incumbent on him in a case of general average.

Argued Dec. 12, 1856. Decided Jan. 20, 1857.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The libel in this case was filed by the appellants against the Brig Ann Elizabeth, in the District Court of the United States for the Eastern District of Louisiana.

It stated the shipment of an invoice of gunpowder by the appellants, at their wharf on the River Delaware, on board the brig above named, which was to be delivered at New Orleans. It also stated the failure to deliver a portion of the gunpowder, and claimed damages for the loss of the same. It was alleged in defense, that this portion of the gunpowder was necessarily thrown overboard in the course of the voyage.

The District Court made a decree in favor of the libelants, basing its opinion upon the grounds that there was no evidence to show the fact of the jettison, except the protest of the master, and that this was inadmissible for that purpose.

The Betsy Gaines, 2 Hagg. Conklin's Adm. 688; 3 Hagg. 340, 342; W. Rob. 169.

The appellees appealed to the Circuit Court.

Additional evidence was taken, which, in the opinion of the court, was sufficient to show the jettison, and the decree of the District Court was reversed.

The case turns principally upon the question whether the jettison was necessitated by the perils of the sea, or by the unseaworthiness of the brig. It appears that on the voyage the vessel encountered heavy weather, and that she sprung a leak, and that jettison of a portion of the cargo was necessary for the safety of the vessel and the residue of the cargo. After the vessel reached New Orleans, she was placed in a dry dock, and it appeared that there were worm holes in the hull of the vessel.

NOTE.—General average—see note to Columbian Ins. Co. v. Ashby, 10 L. ed U. S. 186.

Mr. B. Gerhard, for the appellants:

1. If the vessel was unseaworthy at the commencement of her voyage, and this unseaworthiness exclusively caused the imminent and impending danger which the appellees alleged existed and rendered the jettison necessary, the owners are liable.

Abb. on Ship. 5 Am. ed. part 4, ch. 5, sec. 1; 1 Arnold on Ins. 652; 1 Phil. on Ins. 308; Putnam v. Wood, 3 Mass. 485; 3 Kent's Com. 8 ed. 266; Lodwicks v. Ohio Ins. Co. 5 Ham. 435; Bullard v. Roger Williams Ins. Co. 1 Curt. 148; McArthur v. Sears, 21 Wend. 190.

Injury by worms constitutes unseaworthiness.

Hazzard v. N. E. Mar. Ins. Co. 8 Pet. 557; 1 Sumn. 231; Copeland v. N. E. Mar. Ins. Co. 2 Met. 438.

2. If any defects existed in the vessel prior to the commencement of the voyage, which might have contributed to the crisis of danger and the alleged necessity of the jettison, the owners of the ship are liable.

Prescott v. Union Ins. Co. 1 Whart. 399; Hart v. Allen, 2 Watts, 115; Crosby v. Fitch, 12 Conn. 410; Williams v. Grant, 1 Conn. 487; Davis v. Garrett, 6 Bing. 716; Walsh v. Homer, 10 Mo. 6; Reed v. Dick, 8 Watts, 480.

3. If the court think the brig was seaworthy and the jettison necessary and legal, the master was bound, on his arrival at New Orleans, his port of destination, to have the general average adjusted there by general contribution.

Stevens & Benecke, ch. 7, p. 227; 3 Kent's Com. 244; Strong v. New York Firemen's Ins. Co. 11 Johns. 323; Abb. on Ship. part 4. ch. 10, sec. 14, 5 Am. ed. p. 611, note; U. S. v. Wilder, 3 Sumn. 308; Cole v. Bartlett, 4 La. 130.

Mr. J. A. Bayard, for the appellees, after stating the case, submitted the following points and authorities:

First. The brig was seaworthy at the time she commenced her voyage, being sufficient in all respects for the voyage, well manned and furnished with sails and all necessary furniture; and being so reasonably sufficient for the voyage, the necessity for the jettison of part of the cargo, to save the vessel and the residue of the cargo, cannot be met by the allegation, that, with a stouter vessel, or one better manned, the necessity for the jettison might not have occurred.

Conk. Adm. pp. 164, 165; 1 Curt. 155, 156.

Second. The testimony shows that the necessity for the jettison did not arise from the worm holes, which were discovered after the arrival of the vessel in port, as the pumps were abundantly able to overcome any danger which could possibly arise from such a source.

Third. The failure of the master to use proper exertions to have the average account adjusted, does not render the brig or owners liable for the loss by jettison, nor is any claim made in the libel for an alleged negligence of the master in this respect.

Fourth. The claim of the libelants for contribution against the other shippers and the owners, is not affected by the laches of the master; but the contribution may be recovered, either by a suit in equity against all, or by several suits at law against each party who ought to contribute; nor is the right of the

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sufferer affected by the delivery of the cargo to the respective consignees, without taking an average bond.

Abb. on Ship. 207, 208.

Fifth. The measure of damages, where the contract of affreightment is not performed, is properly the value of the goods at the port of shipment, with interest from the time when they ought to have been delivered.

Conk. Adm. 185, et seq.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Louisiana.

The libel alleges that the appellants shipped on board the brig Ann Elizabeth, at Wilmington, in the State of Delaware, a large quantity of gunpowder, to be carried to New Orleans, in the State of Louisiana; and that, on the 166*] shipment thereof, *bills of lading, in the usual form, were signed by the master of the brig; that, according to the invoices of the merchandise specified in the bills of lading, its value was $7,233.75; that, on the arrival of the brig at New Orleans, the libelants required the delivery of the merchandise thus shipped, but they received only a part thereof; and that the part not delivered consisted of 1,646 packages, which, according to the same invoice valuation, amounted to the sum of $5,936.-54.

The libel further alleges that no part of that sum has been paid to the libelants; and it prays process against the brig, and a decree for the damages thus demanded, and for such other relief as shall to law and justice appertain.

The master of the brig, intervening for his own interest and that of his part owners, admits that the shipment of goods was made, as alleged in the libel; but propounds that, in the course of the voyage, it became necessary, for the safety of all concerned, through the perils and dangers of the seas, to make a jettison of that part of the libelant's goods which were shipped and not delivered.

The first question is, whether the claimant has shown, in support of his defensive allegation, that the jettison was occasioned by a peril of the sea. If it was, then the carrier is exonerated from the delivery of the merchandise, and has only to respond for that part of its value which is his just contributory share towards indemnity for the common loss by the jettison. A jettison, the necessity for which was occasioned solely by a peril of the sea, is a loss by a peril of the sea, and within the exception contained in the bill of lading.

But, if the unseaworthiness of the vessel, at the time of sailing on the voyage, caused, or contributed to produce the necessity for the jettison, the loss is not within the exception of perils of the seas.

That there was such a necessity for this jettison as justified the master in making it, we think, is proved. In the case of Lawrence v. Minturn, 17 How. 109, this court had occasion to consider the extent of the authority of the master to make a jettison. We then held, that "if he was a competent master; if an emergency actually existed, calling for a decision whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision, with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person to whom the law has intrusted authority to decide upon and make it, has duly exercised that authority."

*We find the case at bar is within this [*167 rule. We do not detail the evidence, because the authority of the master to make the jettison has not been seriously controverted.

This part of the case turns upon the inquiry, whether the vessel was unseaworthy for the voyage when it was begun.

It is the hull of the vessel which was alleged to have been unseaworthy. To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, stanch, and strong, as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck.

If a vessel, during the voyage, has leaked so much as to injure the cargo, or render a jettison of it necessary, one mode of testing seaworthiness is, to ascertain what defects, occasioning leakage, were found in the vessel at the end of the voyage; and then to inquire which of those defects are attributable to perils of the seas, encountered during the voyage, and which if any, existed when it was begun; and if any of the latter be found, the remaining inquiry is, whether they were such as to render the vessel incompetent to resist the ordinary attacks of the sea, in the course of that particular voyage, without damage or loss of cargo.

This vessel, on her arrival at New Orleans, was taken into dock and examined. She was found to be a new vessel, and that she had been strained. A butt, about midships, at or near the third or fourth streak, was started. The hood ends forward were also strained, and on trial, it was found they would take about a thread of oakum.

Two worm holes were also found in her bow, about three-eighths of an inch in diameter—one about three streaks from the keel, the other a little higher up. As the vessel was new, there seems to be no doubt these holes were in the plank when put on the vessel, but from some cause remained undiscovered.

The vessel sailed from Wilmington on the afternoon of the 21st of December, 1852. The wind being northeast and strong, the vessel came to anchor at Reedy Island, and on the 22d proceeded to sea. The master, being a part owner and claimant, has not been examined. The first officer appears to have died before the proofs were taken in the Circuit Court. No account is given of the second officer or the crew, except one seaman, who, together with two passengers, have been examined on the part of claimants, to prove the occurrences of the voyage. It would have been more satisfactory to have had the evidence of one or more officers of the vessel, and especially of the mate, with his log-book. Still, these three witnesses do satisfactorily show, that on the night of the 23d of December, *the brig encountered a [*168 strong gale and heavy seas, causing her to labor and strain badly. This weather continued, and

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the sea became more heavy, up to the night of the 27th. Until about 8 o'clck that night, it was not known that the vessel was leaking; but on sounding the pumps at that time, it was found that the vessel had two feet of water in the hold. The pumps were manned and kept going, but the leak increased two feet in about two hours. The jettison was then made, and the vessel so far relieved that the pumps could control the leak, and the vessel, with the residue of the cargo, arrived at New Orleans.

It is manifest that the vessel encountered extraordinary action of the sea; and as the vessel appears to have been new, and generally stanch and well fastened, the defects found at New Orleans, except the worm holes, are fairly attributable to this cause. The starting of a butt, and the opening of the hood ends of a new vessel of ordinary strength indicate a very uncommon degree of strain; and such defects would alone account for the amount of leakage of a vessel heavily laden, and exposed to such a sea as is described.

We do not think the existence of the worm holes amount to unseaworthiness. Any leak which might have been occasioned by them in any ordinary sea, does not appear to have been such as the pumps could not control, without damage to the cargo. All vessels have leaks; and independent of the strains received from the violent action of the sea, we are not satisfied that this vessel would have leaked so much that the pumps could not have controlled the water in her hold, and prevented its doing damage to the cargo.

We find, therefore, that the vessel is exonerated from the claim for the full value of the merchandise; and the remaining question is, whether the vessel is chargeable with any part of the value of the merchandise in this cause.

When a lawful jettison of cargo is made, and the vessel and the remaining cargo are thereby relieved from the impending peril, and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, he has a lien for that part of its value which the vessel and its freight are bound to contribute towards his indemnity for the sacrifice which has been made for the common benefit. And this lien on the vessel is a maritime lien, operating by the maritime law as a hypothecation of the vessel, and capable of being enforced by proceedings in rem.

The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment, has very long existed in the general maritime law. It is found asserted 169*] *in a variety of forms in the Consulado, the most ancient and important of all the old codes of sea laws (see chaps. 63, 100, 227, 254, 269), and the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law.

The Schooner Freeman, 18 How. 182; The Ship Packet, 3 Mas. 261; The Volunteer, 1 Sumn. 550; The Reeside, 2 Sumn. 567; The Rebecca, 1 Ware, 188; The Phœbe, 1 Ware, 263; The Waldo, Davies, 161; The Gold Hunter, 1 Blatchf. & How. 305.

Pothier declares (Treatise of Charter-parties, preliminary chapter on Average) that the right to contribution in general average is dependent on the contract of affreightment, which embraces in effect an undertaking, that if the goods of the shipper are damaged for the common benefit, he shall receive a due indemnity by contribution from the owners of the ship, and of other merchandise benefited by the sacrifice.

The power and duty of the master to retain and cause a judicial sale of the merchandise saved, has also been long established.

Consulado del Mare, ch. 51, 52, 53, and note 1 in Vol. III. p. 103 of Pardessu's Collection; Laws of Oleron, art. 9; Ord. de la Marine, Liv. 3, tit. 8, secs. 21, 25; Nesbit on Ins. 135; Strong v. New York Fireman's Insurance Company, 11 John. 353; Simonds v. White, 2 B. & C. 805; Loring v. Neptune Insurance Company, 20 Pick. 411, 3 Kent's Com. 243, 244.

And this right to enforce a judicial sale, through what we term a lien in rem, is not confined to the merchandise, but extends to the vessel.

Emerigon (ch. 12, sec. 43), speaking generally of an action of contribution, says it is in its nature a real action. Cassaregis (dis. 45, N. 34), "est in rem scripta."

It would be extraordinary if the right to a lien were not reciprocal; if it existed in favor of the vessel, when sacrifice was made of part or the whole of its value for preservation of the cargo, and not against the vessel, when sacrifice was made of the cargo for preservation of the vessel.

By the ancient admiralty law, the master could bind both the ship and cargo by an express hypothecation, to obtain a ransom on capture. So he could, and still may, when the whole enterprise has fallen into distress, which could not otherwise be relieved, hypothecate both the vessel and cargo to obtain means of relief. These are cases of express hypothecation made by the master, under the authority conferred on him by the maritime law; but he can also sell a part of the cargo to enable him to prosecute his voyage, or deliver a part of it in payment of ransom of his vessel, and the residue of the *cargo, on capture; and when [*170 he does so, the law of the sea creates a lien on the vessel as security for the reimbursement of the loss of the shipper whose goods have been sacrificed.

The Packet, 3 Mas. 255; Pope v. Nickerson, 3 Story, 492; The Gold Hunter, 1 Blatchf. & How. 300; The Boston, Ib. 309; Consol. del Mare, ch. 105; Laws of Oberon, art. 25; Ord. of Antwerp, art. 19; Emerigon Con. a la Grosse, ch. 4, secs. 9, 11.

The authority to make a jettison of cargo is derived from the same source; an instant necessity, incapable of being provided for save by a sacrifice of part of what is committed to the master's care, and the presumed consent of the owners of all the subjects at risk, that the loss shall become a charge upon what is benefited by the sacrifice.

The Gratitudine, 3 C. Rob. 240.

If the sacrifice be made to enable the vessel to perform the voyage, by paying what the owners are bound to pay to complete it, the charge is on the vessel and the owners. If it be made to relieve the adventure from a peril which has fallen on all the subjects engaged

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in it, the risk of which peril was not assumed by the carrier, the charge is to be borne proportionably by all the interests, and there is a lien on each to the extent of its just contributory obligation. This authority of the master to make the sacrifice, and this consent of the owners of the subjects at risk to have it made, and their implied undertaking to contribute towards the loss, are viewed by the admiralty law as sufficient to create an hypothecation of the subjects benefited, for the security of the payment of the several sums for which those subjects are respectively liable. In other words, as the master is authorized to relieve the adventurer from distress, by means of an express hypothecation, in case of capture or distress in port, or by means of a sale of a part of the cargo, thereby creating a maritime lien on the property ultimately benefited, in favor of the owner of what is sold or hypothecated; so he may also, in a case of necessity at sea, make a jettison of cargo, and thereby create a lien on the property thus saved from peril. Pothier (Con. Mar. n. 34, 72) and Emerigon (Con. a la Grosse, ch. 4, sec. 9) say that the sale of part of the cargo in port, to supply the necessities of the ship, is a kind of a forced loan. Though the sacrifice of part of the cargo at sea cannot be considered a loan, it is a forced appropriation of it to the general benefit of those engaged in a common adventure, under a contract of affreightment; and such use of the property of one, for the benefit of others, creates a charge on what was thus saved, for what may fairly be termed the price of that safety. Abb. on Ship. part. 4, ch. 10, sec. 6.

171*] *In United States v. Wilder, 3 Sumn. 311, which was a case of general average, Mr. Justice Story likens it to a case of salvage, where safety is obtained by sacrifices of labor and danger, made for the common benefit; and he says the general maritime law gives a lien in rem for the contribution, not as the only remedy, but as in many cases the best remedy, and in some cases the only remedy. In the District and Circuit Courts of the United States this jurisdiction has been exercised, and some cases of this kind are found in the books; though most of their decisions are not in print.

The Mary, 5 Law R. 75; 6 Law R. 73; The Cargo of the George, 8 Law R. 361; Sparks v. Kittredge, 9 Law Rep. 349; Dunlap's Add. Pr. 57; 2 Browne's Civ. and Ad. Law, 122; The Packet; The Gold Hunter; The Boston, above cited.

The restricted admiralty jurisdiction in England seems insufficient to enforce this lien.

The Constancia, 2 W. Rob. 487.

Nor is there anything in the case of Cutler v. Rae, decided by this court in 1849, and reported in 7 How. 729, which conflicts with the view we have now taken.

That was a libel by the owner of a vessel against the consignee of cargo, to recover the contributory share of the average due from the goods which the master had voluntarily delivered to the respondents before the libel was filed. The court decided, that though the master, as the agent of the owner of the vessel in that case, had by the maritime law a lien upon the goods, as security for the payment of their just contribution, this lien was lost by their voluntary delivery to the consignee; and that the implied promise to contribute could not be enforced by an action in personam against the consignee, in the admiralty. This admits the existence of a lien, arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation; which, as is well known, is waived by an authorized delivery without insisting on payment.

On full consideration, we are of opinion that when cargo is lawfully jettisoned, its owner has, by the maritime law, a lien on the vessel for its contributory share of the general average compensation, and that the owner of the cargo may enforce payment thereof by a proper proceeding in rem against the vessel, and against the residue of the cargo, if it has not been delivered.

The remaining question is, whether the pleadings in this case are in such form as to present this claim for the consideration of this court, and entitle the libelant to assert a lien on the vessel for its contribution.

The rules of pleading in the admiralty are exceedingly simple *and free from tech- [*172 nical requirements. It is incumbent on the libelant to propound with distinctness the substantive facts on which he relies; to pray, either specially or generally, for the relief appropriate to them; and to ask for such process of the court as is suited to the action, whether in rem or in personam.

It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defense, either in part or in whole, to the case made by the libel.

The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance, or departure in pleading, like those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel, because that entire case is not distinctly stated in the libel. Thus, in cases of collision, it frequently occurs that the libel alleges fault of the claimant's vessel; the answer denies it, and alleges fault of libelant's vessel. The court finds, on the proofs, that both were in fault, and apportions the damages.

Looking to this libel, we find it states that a contract of affreightment was made to transport these goods from Wilmington to New Orleans, on board this brig; and the goods were laden on board and the brig had arrived, but only a part of the goods have been delivered. It states the value of the part not delivered, avers that the libelants have not been paid any part of that sum, prays for process against the brig, and a decree for the value of the merchandise not delivered, and also for such other relief as to law and justice may appertain.

The answer admits all the facts stated in the libel, but sets up, by way of defensive allegation, a necessary jettison of that part of the cargo not delivered. It is manifest, that though this answers, in part, the claim for damages made by the libel, it does not wholly answer it. It shows sufficient cause why the libelant should not assert a lien on the brig for the

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whole value of his merchandise, but at the same time shows that the libelant has a valid lien on the brig for that part of the value of the merchandise which the vessel is bound to contribute. While it asserts that the performance of the contract of affreightment by transportation of the merchandise to New Orleans was excused by a peril of the sea, it admits that an obligation arose out of the relations of the parties created by that contract of affreightment, and out of the facts relied on as an excuse for not transporting the merchandise; that this 173*] *obligation was to pay to the shipper a part of the value of his goods; that it was the duty of the master, at the port of New Orleans, to ascertain what part of that value the vessel was bound to contribute, and that there is a lien on the vessel to secure its payment.

If the technical rules of common law pleading existed in the admiralty, there might be difficulty in admitting a claim for general average, in an action founded on a contract of affreightment; because, though the claim for such average grows out of a contract of affreightment, the implied promise to pay it is technically different from the promise on the face of a bill of lading. In the case of Pope v. Nickerson, 3 Story, 465, Mr. Justice Story went into a very extensive examination of such claims, under an agreed statement of facts, in an action of assumpsit on bills of lading; and it does not seem to have occurred, either to him or the counsel, that it was inconsistent with any substantial rule of the common law so to do.

But in the admiralty, as we have said, there are no technical rules of variance or departure. The court decrees upon the whole matter before it, taking care to prevent surprise, by not allowing either party to offer proof touching any substantive fact not alleged or denied by him.

But where, as in this case, the defensive allegation of the respondent makes a complete case for the libelant, so that no evidence in support of it is required, and where that case is within the form of action and the prayer of relief, and the process used by the libelant, we think it not a sufficient reason for refusing relief, that the precise case on which the court think fit to grant it is not set out in the libel.

We understand, that in the court below the libelants relied on the duty of the master to adjust and collect, and pay to them, the general average contributions, as precluding the defense of a necessary jettison. We think this defense was properly overruled. The libelants did not there insist on their lien on the vessel for its contribution. We do not consider their failure to do so precludes them from calling on this court to make that decree, to which the record shows they are entitled. In Finley v. Lynn, 6 Cranch, 238, this court was of opinion that the appellant, whose bill was dismissed by the Circuit Court, was entitled to an account, on a ground not assumed in the Circuit Court. This court said: "The plaintiff probably did not apply for this account in the court below, and it does not appear to have been a principal object of his bill. This court therefore doubted whether it would be most proper to affirm the decree dismissing the bill, with the addition that it should be without prejudice to any 174*] future claim *for profits, and for the debt due from one store to the other, or to open the decree, and direct the account. The latter is deemed the more equitable course. The decree therefore, is to be reversed, and the cause remanded, with directions to take an account of the profits of the jewelry store, if the same shall be demanded by the plaintiff." But, as the libelants failed to call the attention of the Circuit Court to this view of their rights, and placed their claim there solely on the grounds that the jettison was unlawful, or, if lawful, could not be a defense, because the master had failed to do the duty incumbent on him in a case of general average, we think the decree should be reversed without costs.

The cause must be remanded to the Circuit Court, with directions to ascertain the amount of the lien of the libelants on The Ann Elizabeth, for the share to be contributed by the vessel towards the loss sustained by the libelants, and to enter a decree accordingly.

Mr. Justice Campbell, dissenting:

I dissent from that part of the opinion of this court which allows to the libelants a decree against the libelee for the amount of his contributory share in the account of average.

The libel is for the non-delivery of cargo according to the conditions of a bill of lading. The exemption claimed in the answer is, that the failure was occasioned by a peril of the seas, which made a jettison of the goods necessary; and this issue was tried in the District and Circuit Courts.

The objection raised here is, that the exemption is not complete, unless the contributory share of the libelee, to be ascertained, in the first place, by the adjustment of an average account, is also admitted and tendered.

In Bird v. Astcock, 2 Bulst. 280, which was an action on the case against a carrier for the non-delivery of goods lost by a jettison, Coke, Lord Ch. J., cited a case which had been decided, and said, in respect to it: "We all did resolve, that this being the act of God, this sudden storm, which occasioned the throwing over of the goods, and which could not be avoided; and for this reason the plaintiff recovered nothing." Mouse's case, 12 Co. 63.

I have not been able to find a precedent, either in the United States or Great Britain, where a contributory share, in the nature of average, has been recovered, in a contentious litigation, in an action on a bill of lading for the non-delivery of cargo.

But the books of precedents show that average contributions *are recovered in [*175 actions either of special or general assumpsit, the form of the action depending on the fact of the adjustment of the account. 2 Chitt. Plead. 50, 152, 161; Saund. Plead. & Ev. 278.

"I entertain a decided opinion," said Chancellor, then Ch. J. Kent, "that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and ought, consequently to be very carefully touched by the hand of innovation." Bayard v. Malcolm, 1 Johns. 471. And the advantage of an orderly, not to say scientific system of administration, is as apparent in the courts of admiralty, and the mischiefs of uncertainty or inexactness are as positive there, as in any other tribunals. Such seems to have been the opinion of Justice Story. The Boston, 1

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Sumn. 328. This difference in opinion with the court would not have been the ground of a public dissent on my part, if I had not deemed the decree erroneous, and if I did not believe that the parent error is to be found in this departure from accurate pleading. The decree treats the liability of the master or owner for an average contribution as an integral part of their special written contract of affreightment; and their failure to pay their share of average is disposed of as a breach of the express obligation. My opinion is, that the obligations are distinct, though intimately associated, and are referable to different principles of law, and in the judicial administration of the United States may be subject to distinct jurisdictions.

The principle of the rule of general contribution, as applied to the case of a jettison, exists in all commercial nations, and the rule itself became a part of the statute law of England, in the reign of the Conqueror, and that of his youngest son. In a later period, the same principle was applied to a great number of analogous cases.

The inquiry is, upon what courts was the duty devolved of enforcing and administering this principle of general jurisprudence, and particularly in the cases of average. In Birkley v. Presgrave, 1 East. 220, which was a special action of assumpsit for average on an unadjusted average account, Lord Kenyon says: "This action, the grounds and nature of which are fully set out in the special count, is founded in the common principles of justice. A loss is incurred, which the law directs shall be borne by certain persons in their several proportions. When a loss is to be repaired in damages, where else can they be recovered but in the courts of common law? And wherever the law gives a right, generally, to demand payment of another, it raises an implied promise in that person to pay." In Dobson v. Wilson, 3 Camp. 480, Lord 176*] Ellenborough said: "A *court of equity may perhaps be a more convenient forum for adjusting the claims of the different parties concerned; but if a shipper of goods, which are sacrificed for the salvation of the rest of the cargo, is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy. The difficulty of showing, by strict evidence, the exact amount of the contribution is great; but, as there are data upon which it may be calculated with great certainty, I think, is no objection to the action," Price v. Noble, 4 Taunt. 123.

Holroyd, in the argument of the case in East, said: "At the common law, where a contribution was required, a writ of contribution issued, precedents of which are to be found. Fitz. Nat. Brev. This has fallen into disuse; because, in most instances, as many persons were concerned, a more easy remedy was administered in equity."

And so, from the earliest of the chancery reports, we learn that chancery will enforce an average or contribution to be made, when necessary, and that it will enforce an agreement among merchants to pay average. Comyns' Dig. Chan. 2 J. 2 S.; Hick v. Palington, F. Moore, 297; Ca. Parl. 19. Spence, in his history of equitable jurisdiction, says: "That the court of chancery, from a period which cannot be traced, but which, as it was also apparently adopted from the Roman law, was probably coeval with the establishment of the court, exercised jurisdiction to compel contribution amongst general shippers of goods, when those belonging to one were thrown overboard for the safety of the ship, or in cases, as they are technically called, of general average." 1 Spence Eq. Jur. 663. The popular treatises on the chancery system show that the title "Contribution" is one of great reach, comprehending a variety of cases which rest upon a familiar maxim of equity, and that average is only an instance of its application. How stands the historical evidence in regard to the jurisdiction of the admiralty courts, with reference to this subject? What say the "Black Book" and "Godolphin," or the controversionalists, Prynne, or Jenkins, in support of the ancient claims of these tribunals? What is to be found in the treaty of limits between the courts of common law and admiralty? In the case of The Constancia, 2 W. Rob. 488, a question arose upon the distribution of the proceeds of a ship and cargo which were on deposit in the registry of the court, in a cause in which its jurisdiction was indisputable.

The claimant asserted a preference in the distribution, because a portion of the cargo belonging to him had been sold *for the [*177 repairs of the ship. A learned judge of that court said: "As far as my own experience extends, no claim of a similar description is to be found in the annals of the court; a circumstance which naturally induces me to consider with some carefulness whether the novelty of the claim be specious or real. In other words, whether, novel in appearance, it does not rest upon some recognized principles by which other claims have been decided. What, then, is the true character of the claim in question? It is a claim on behalf of the owners of certain property shipped on board of the vessel, and applied to relieve the ship's necessities, and to enable her to complete her voyage.

"In the case of The Gratitudine, 3 C. Rob. 240, Lord Stowell has held that property so sacrificed is to be considered as the proper subject of general average; and Lord Tenterden, in his book on shipping, lays down the same doctrine. If this be so, and if, upon the authority of my Lord Stowell, thus confirmed by my Lord Tenterden, I am to consider this claim as a subject of general average, two considerations immediately suggest themselves. First, whether I have any jurisdiction at all over questions of general average; and second, whether I could satisfactorily exercise such a jurisdiction under the circumstances of this case. The absence of any precedent, where the court has exercised the jurisdiction, is of itself strong prima facie proof that I have no authority to entertain the question at all; and I am the more strongly inclined to this opinion, by the further consideration that, in all cases of average, it is essential that the tribunal which is to adjust it should have the power to compel all parties interested to come in, and to pay their quota. I possess no such power; and if I could not bring all parties interested before the court, I could not adjust a general average, which is a proportionate contribution

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by all." These citations from the opinions of the various tribunals which administer different departments of the judicial power of Great Britain, show that the doctrine upon which average contributions is made, is not peculiar to the maritime code; and, also, that the maritime courts of the first commercial power that has existed have never administered it, and their judges suppose their modes of proceeding unsuitable to it. In the case of The Constancia, the res was in the custody of the Court of Admiralty, yet that court denied the existence of a maritime lien, or that any liability of the freighters against the ship could be enforced there. And this is equally apparent from the doctrines of the courts of chancery and law. In Hallett v. Bousfield, 18 Vesey, Jr. 187, which was the case of a shipper whose property had been overthrown to lighten a 178*] ship in a storm, and who moved *to restrain the master and ship owner from delivering any part of the cargo and receiving the freight, or parting with any share of the ship, Lord Eldon said, "that in such a case there is a lien upon the goods of each freighter, for contribution and average, in some sense; that is, the master is not bound to part with any part of the cargo until he has security from each person for his proportion of the loss; but there is no authority, that on the ground that he has a lien to the extent of entitling him to call on every person to give security for the amount of their average when it shall be adjusted, every owner of a part of the cargo can compel the captain to do so; and it strikes me, upon the short time I have had to consider it, that is a length the plaintiff cannot reach. The defendant, it is true, is a trustee for others, but the nature of the trust is regulated by the practice; and there is no instance of an action, or a suit in equity, to effectuate the lien, otherwise than through the right of the master to take security; that practice ascertaining the true nature and extent of the trust." This lucid statement of the English law explains the meaning of the older class of writers on commercial law, when they speak of the master's lien, and his duty to settle an average account.

Valin observes, that the article of the Ordinance of 1681, which confers a right of detention upon the master, does not impose an imperative obligation upon him, and that he may deliver to each freighter his goods, without fear of consequences, unless specially required to withhold them. And other writers concur in the opinion, that the freighters, under that ordinance, had no action against one another. Boucher, Droit Mar. 450, 451.

Lord Tenterden cites this case from Vesey, Jr. without dissent, in his work on shipping, Abb. on Ship. 508; and in Simonds v. White, 2 B. & C. 805, he describes the power of the master over the goods "as a power of detention," given in order that the expense, inconvenience and delay of actions and suits, may be avoided. This court, in Cutler v. Rae, 7 How. 729, declared that the party entitled to contribution "has no absolute and unconditional lien upon the goods liable to contribute." The captain has a right to retain them until the general average with which they are charged has been paid or secured; and, that this right of retainer, is a "qualified lien," "dependent on the possession of the goods by the master or ship owners," and "ceases when they are delivered to the owner or consignee;" "and does not follow them into their hands, nor adhere to the proceeds;" and a corresponding opinion of Lord Tenterden is to be found in Scaife v. Tobin, 3 Barn. & Ad. 523, in which he says, "a consignee who is the absolute owner *of the goods is liable to pay general [*179 average, because the law throws upon him that liability; but a mere consignee, who is not the owner, is not liable." And this demonstrates that the lien for average is not a maritime lien. A maritime lien does not include or require possession. The claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached. Harmer v. Bell, 2 L. and Eq. 6. These cases show, that neither in the adjudications in the courts of Great Britain or the United States, nor in the usages of their merchants, is there any sanction for the doctrines of this decree. No adjudication during sixty years of our history is to be found, where the power to adjust or to collect an average account is affirmed, or has been exerted by the district courts sitting in admiralty, upon direct application to them for the purpose.

The importance of the subject will justify me in an examination of the continental authorities, which are supposed to establish the existence of a martime lien for contribution. The ancient codes do nothing more than recognize the existence of a rule of contribution in regard to losses arising from a jettison, or cases of a similar character, and the masters' power of detention of the cargo saved, for the security or payment of the contributory shares, but they do not ascribe any greater operation to the rule, either in affecting property or in designating the jurisdictions to which the enforcement of the rule should be committed.

The leading authority cited for the doctrine, that average affords a maritime lien on the property saved, is found in a line of Emerigon, who says, "the action in contribution is real in its nature."

But that author discriminates the feature in a real action to which the action in contribution has any resemblance. The feature is, "that the action vanishes if the effects saved by means of the jettison, perish before arriving at their destination."

The real action is for a thing, or to assert some right in it, and is terminated by its surrender, or destruction without the fault of the possessor. So long as the ship and cargo are exposed to peril in the same voyage, in which the jettison is made, the action in contribution is inchoate, and dependent on the ultimate safety of the thing; and thus far it resembles a real action. But when the safety of the ship and cargo is confirmed, the liability of the contributories becomes personal, and the sums due are recoverable without further reference to *them; in [*180 France, by action in contribution; and in England, by a bill in equity for contribution, or action of assumpsit. It is a great mistake to

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suppose that the action in contribution was a hypothecary action, as I shall hereafter show.

In the time of Emerigon, it was thrown upon the master, as the legal attorney of all persons interested in the ship and cargo. It was his duty to collect the contributory shares, and to pay them among the parties concerned; but he was not liable for the shares of insolvents, nor obliged to detain the goods, and that was an unusual, if not an unprecedented remedy.

The Ordinance of 1681 simply permitted this remedy to be used. This Ordinance was defective in not defining the rights of the master in the goods liable to contribution. The Ordinance did not take the precaution to establish the existence and legitimacy of privileged claims, is the testimony of those who framed the Code of Commerce of Napoleon. 3 Locré Com. 22. The Code of Commerce was framed to repair what was considered a defect. In reference to average, it provides, "that in all the cases before mentioned, the master and mariners have a privilege on the goods or their proceeds for the amount of the contribution." This clause was not in the "projet" of the commission, nor in their revision; but after successive changes, the article appears in this form for the first time in the final draught of the Code. The jus in re is conferred by this clause on the master, and he may proceed to enforce his rights by judicial seizure and sale, or opposition, or he may sue each contributory for his share in contribution, and is responsible in an action to each of them. But the evils of dormant liens are removed by limitations upon the extent and duration of the claim. The Code bars actions against the freighter who receives his goods and pays his freight without a legal notice of the claim for average; and each claim must be notified in twenty-four hours to the opposite party, and be pursued by judicial demand in one month.

Thier. Droit Con. 41, 124, 277; 4 Locré Com.; 3 Pard. Droit Com. sec. 750.

Other articles define the liability of the owner, and the contributory share of the ship and cargo, the responsibility of the master, and create a privilege upon the ship and freight to answer the agreements of the charter-party, and whatever defaults of the master and mariners.

Thier. Con. Droit, 28 sec. 2; 29, sec. 11; Code de Com. 190, secs. 11, 216, 222, 280.

The commentaries of Pardessus, Locré, Boulay, Paty, and other authors, are made upon these enactments of French statute law. They affirm that these articles establish, as the 181*] *law of France that the freighter of a ship is obliged, by a contract or quasi contract to the master to contribute his share of an average contribution; and that the master engages to indemnify the freighter whose property has suffered or been sacrificed for the common benefit; and that reciprocal rights of action are given to either party. I have no occasion to question the accuracy of their conclusions, nor to deny that the Code itself embodies the usages, experience and regulations, of the French nation in the management of their commerce, and is adapted to the wants and habits of their merchants. And no one can doubt that the authority of Louis XIV. and Napoleon was adequate to the introduction of the Ordinance and the Code. But the question arises here—and it is one of grave import to those who desire to preserve the Constitution of the Union inviolate, and the limits it prescribes to the judicial power of the federal government, and the lines of division among the federal courts undisturbed—the question arises, by what authority is it that the commercial system of France, the product of the legislative authority of her monarchs, has become the basis for judicial decision in the courts of the United States, and her legal administration of purely municipal regulations is taken as a guide to determine the jurisdictional limits of those courts of justice. That Congress may prescribe rules in reference to the settlement of average contributions, arising in the foreign or federal commerce of the country, may be admitted, and also may assimilate the American and French systems of commercial regulation. But I am not prepared to admit that this can be done by judicial authority.

The commercial systems of Great Britain and the United States recognize no such contract between the masters and freighters as the French Code establishes; they invest the master with no such privilege upon the property of the shippers; they confer no such powers to maintain suits, and subject him to no such liabilities. The policy and spirit of the British and American commercial systems tend to restrain the agency and control of subordinates to precise limits in settlements or contests with respect to property and obligations; wherever it can be done, they bring the owners of the property and the principals in the obligations, to confront one another. In my opinion, this decree introduces a new principle into the American commercial system, and that this interpolation adds to the jurisdiction of the Judiciary Department of this Government. This is done by judicial authority. In my opinion, the Constitution does not give such a power to this court. I therefore dissent from the decree.

*The following is the order of the [*182 court:

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, without costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to ascertain the amount of the lien of the libelants on The Ann Elizabeth, for the share to be contributed by the vessel towards the loss sustained by the libelants, and to enter a decree accordingly.

Dissenting, Mr. Justice Campbell, Mr. Justice Catron, and Mr. Justice Grier.

Rev'g 4 Blatchf. 48.

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WILLIAM A. SHAFFER, Plff. in Error,
v.
JAMES A. SCUDDAY.

(See S. C. 19 How. 16–21.)

Jurisdiction—good patent by state.

This court have no jurisdiction to revise a judgment of state court holding that a patent granted by the state conveyed no right to the land in question, because the state had parted from its title by its patent previously granted to another. It was a question for the state courts.

Argued Dec. 30, 1856. Decided Jan. 22, 1857.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Mr. J. P. Benjamin, for the plaintiff in error:

Prior in date to Scudday's location, to wit: on March 2, 1849, Congress passed an Act, the 1st section of which provides, "that to aid the State of Louisiana in constructing the necessary levees and drains on reclaimed swamp and overflowed lands therein, the whole of the swamp and overflowed lands which may be, or are found unfit for cultivation, shall be, and the same are hereby granted to that State."

9 Stat. at L. 352.

Under the Statute, the Secretary of the Interior decided that the granting clause "imports a grant in present," and that although "other proceedings are necessary to perfect the title, yet when the selections are made and approved, the title becomes perfect, and has relation back to the date of the grant." This decision of the Secretary is in perfect accordance with the adjudication of this court.

Rutherford v. Green, 2 Wheat. 196; Lessieur v. Price, 12 How. 59; Foley v. Harrison, 15 How. 433.

The land in controversy was included in the grant of March 2, 1849. Scudday's location was consequently null and void ab initio, and was revoked by the Secretary of the Interior, April 14, 1853. Upon the decision of the proper authorities of the United States being made, Shaffer and defendant entered the land in controversy on July 18, 1853, under a swamp land warrant, by virtue of the Act of the Legislature of Louisiana of March 17, 1852.

This entry was made by virtue of a preference right, acquired by that Act to the persons in possession of, or cultivating, the tract entered by them.

The Supreme Court of Louisiana decided by a decree, reversing the judgment of the District Court, that the Secretary of the Interior had no authority to make the decision revoking Scudday's location, and held his title superior to Shaffer's, who claimed under an entry made on the authority of the Secretary's decision.

The case is, therefore, before the court under that clause of the 25th section of the Judiciary Act which empowers it to take appellate jurisdiction from the highest state courts, where "is drawn in question the validity of an authority exercised under the United States, and the decision is against the validity," and is fully within the principles decided in Chouteau v. Eckhart, 2 How. 344.

The sole question in the cause then is, whether the Secretary had authority to decide, and did rightly decide, that Scudday's location was null, and must be revoked.

This is hardly an open question in this court.

The 8th section of the Act of 1841, under which Scudday claims, directs the locations to be made on "any public land, except such as is or may be reserved from sale by any law of Congress."

This court has decided in the cases above cited, and particularly in that of 15 How., that the Act of 1841 vested no present title in the State of Louisiana, but was a mere authority to enter lands in the same manner as individuals could enter them; and that the entry under a location made by virtue of a state warrant, and backed by a state patent, did not confer the fee in the land, which is only devested by a patent issued by the United States.

The Secretary of the Interior approved the location under the mistaken supposition that the land was "public land;" whereas, in point of fact, Congress had already conveyed title to it by the grant in the Swamp Land Law of 1849.

Before any patent was issued by the United States, Scudday's entry was revoked, under the authority which has been universally conceded to exist in the offices of the Land Office, since the decision of this court, made thirty years ago, and never subsequently called in question.

Chotard v. Pope, 12 Wheat. 587.

The case may be summed up in few words, as follows:

1st. Shaffer claims title under a grant made by statute of the United States, vesting the fee in him, as fully as a patent would if issued directly to him.

Strother v. Lucas, 12 Pet. 454; Chouteau v. Eckhart, 2 How. 344.

2d. Scudday claims under an inchoate title from the United States, not only still incomplete, but which it is impossible ever to render complete, and his title has been erroneously preferred by the Supreme Court of Louisiana, only because he holds a patent from the State.

But no state authority can confer a right in land, sufficient to eject a patentee under the United States.

Bagnell v. Broderick, 13 Pet. 436.

Mr. Miles Taylor, for defendant in error:

1. The question raised as to the construction of the Act of 1849, was not decided by the Supreme Court of Louisiana. The court expressly said that they did not "consider it necessary to decide that question." "The construction of the Act of 1849, by the Secretary of the Interior, may be strictly correct, and yet it does not follow that the location of a warrant, under the Internal Improvement Law of 1841, which had been approved by the proper department of the Government, and for which a patent had been subsequently issued by the State could be revoked, so as to destroy the title conferred by the patent. The question would have been different if, after the passage by Congress of the Act of 1849, the United States had granted the land away from the State of Louisiana. Such was not the case; and as both the Acts of 1834 and 1849 were grants of land to the State, we cannot go behind the patent which the State granted." From this it is clear that there was no decision

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against the validity of a treaty or statute, or an authority exercised under the United States, etc., etc., in the highest court of Louisiana; and that inasmuch as no error can be assigned or regarded as a ground of reversal, other "than such as appears on the face of the record, and immediately respects the questions of validity or construction," etc., therefore, there was no right to a writ of error in this case, and that the case must be dismissed for want of jurisdiction.

1 Stat. at L. p. 85, sec. 25; Almonester v. Kenton, 9 How. 1.

The entry by James A. Scudday, on the 12th of July, 1850, and the patent of the Governor of Louisiana, granted on the 12th day of November, 1852, vested an absolute title under the authority of the Act of Congress approved Sep. 4, 1841, and the Act of the Legislature of Louisiana, passed in 1844.

The grant to the State of Louisiana, made by the Act of Congress, approved March 2, 1849, could not in any way affect the title vested in Scudday by the sale from the state to him, if the grant be regarded as taking effect at the date of the Act.

Bonin v. Eyssaline, 12 Mart. 187; M'Guire v. Amelung, 12 Mart. 640; Woods v. Kimbal, 5 Mart. N. S. 247; C. C. 3, 271; Stokes v. Shackleford, 12 La. 170; Fenn v. Rils, 9 La. 95; Lee v. Ferguson, 5 La. Ann. 532.

The land in question was granted by the United States to Louisiana, and all the title of the State of Louisiana is now vested in James A. Scudday, by a patent under the seal of the State, issued in conformity with law; and his right to it cannot be questioned by one claiming under the State of Louisiana.

Patterson v. Winn, 5 Pet. 241; U. S. v. Arredondo, 6 Pet. 728; Lott v. Prudhomme, 3 Rob. La. 293; Carter v. Monetti, 6 Rob. La. 82; Bagnell v. Broderick, 13 Pet. 436.

Mr. Chief Justice Taney delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Louisiana.

It appears that a petitory action was brought by Scudday, the defendant in error, against Shaffer, the plaintiff in error, to recover a quarter section of land described in the pleadings.

The defendant in error derives his title in the following manner: By the 8th section of an Act of Congress of the 4th September, 1841, the Government of the United States granted to each of the several States specified in the Act, and among them to Louisiana, 500,000 acres of land, for the purposes of internal improvement. The Act provided that the selections of the land were to be made in such manner as the Legislature of the State should direct, the locations to be made on any public lands, except such as were or might be reserved from sale by any law of Congress, or proclamation of the President of the United States. The 9th section of the Act provided that the net proceeds of the sales of the lands so granted should be applied to objects of internal improvement within the State, such as roads, railways, bridges, canals and improvement of water-courses and draining of swamps. An Act of the Legislature of Louisiana of 1844 provided that warrants for the location of the lands should be sold in the same manner as the lands were located—and it was made the duty of the Governor to issue patents for the lands located by warrants, whenever he should be satisfied that they had been properly located. The defendant in error, being the holder of such a warrant, located it on *the land claimed in the [*19 suit. The location having been approved by the Secretary of the Interior, and a certificate to that effect granted by the Register, the Governor of Louisiana issued a patent to the plaintiff, bearing date 12th November, 1852.

The opposing title of plaintiff in error is derived under an Act of Congress of March 2d, 1849, and certain Acts of the Legislature of the State, passed to carry into effect the Act of Congress. The 1st section of the Act of Congress of 1849 declares, "that to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of the swamp and overflowed lands which are or may be found unfit for cultivating, shall be, and the same are hereby granted to the State."

The 2d section provides, that as soon as the Secretary of the Treasury shall be advised by the Governor of Louisiana that the State has made the necessary preparations to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the Surveyor-General thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation, and a list of the same to be made out, and certified by the deputies and the Surveyor-General to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed and held by individuals; and on that approval the fee simple to said lands shall vest in the State of Louisiana, subject to the disposal of the Legislature thereof, provided, however, that the proceeds of said lands shall be applied exclusively, as far as necessary, to the construction of the levees and drains aforesaid.

On the 21st of March, 1850, the Legislature of Louisiana passed an Act to enable the Governor to have the swamp and overflowed lands selected; and in 1852 they passed an Act, giving a preference in entering such lands to those in possession of or cultivating them, and the time of entering them was further extended by an Act of 1853. The plaintiff in error entered this land on the 18th day of July, 1853, by virtue of a preference right claimed under that Act of the Legislature. He was permitted to make this entry at the State Land Office, in consequence of the Secretary of the Interior having, on the 14th of April, revoked his approval to the State under the Act of 1841, of this and other lands which had been located under warrants sold by the State, in conformity to the Act of the Legislature of 1844.

The reason assigned by the Secretary of the Interior was, that these locations had been made subsequent to the passage of the Act of Congress of 1849, granting to the State all the swamp and overflowed lands. He states, in his opinion, that he considered the words used in the 1st section of that Act as *import- [*20 ing a grant in presenti, and as confirming a right to the land, though other proceedings were necessary to perfect the title; and that when

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the title was perfected, it had relation back to the date of the grant. His approval to the State, of the location of the land in controversy under the Internal Improvement Law of 1841, was revoked, but the land was at the same time approved to the State, as having a vested title to it, under the Act of 1849, and taking effect from the date of the passage of the Act.

The controversy between the parties arises upon these two patents, both granted by the State of Louisiana—the one to Scudday, under the grant made by the Act of Congress of 1841, for the purposes of internal improvement; the other to Shaffer, under the grant made by the Act of 1849, for the purpose of draining the swamp lands.

The case came regularly before the Supreme Court of the State; and that court, after stating that it was unnecessary to decide whether the construction placed upon the Act of 1849 by the Secretary of the Interior, under which he revoked his approval of Scudday's location, was erroneous or not, proceeded to express their opinion as follows:

"It is certain (say the court) that the Legislature could not have disposed of the land as belonging to the State, under the provisions of that Act [the Act of 1849], until she had complied with the conditions imposed on her by the Act of Congress, and until the approval of the Secretary of the Treasury; but if she had not chosen to avail herself of the right given to her to appropriate these lands as swamp lands by defraying the expenses of locating them, she had still the right of locating them under the Internal Improvement Law of 1841, which was unconditional. The construction of the Act of 1849, by the Secretary of the Interior, may be strictly correct; and yet it does not follow that the location of a warrant, under the Internal Improvement Law of 1841, which had been approved by the proper department of the government, and for which a patent had been subsequently issued by the State, could be revoked, so as to destroy the title conferred by the patent. The question would have been different, if, after the passage by Congress of the Act of 1849, the United States had granted the land away from the State of Louisiana. Such was not the case; and as both the Acts of 1841 and 1849 were grants of land to the State, we cannot go behind the patent which the State has granted. The patent can only be attacked on the ground of error or fraud. It is true that a patent issued against law is void; but in the present case the patent and all the proceedings on which it was based were in con- 21*] formity to *the laws. As between the government of the United States and the State of Louisiana, a question will arise, whether the State is not entitled to an additional quantity of land, to be located under the Act of Congress of 1841, in consequence of the swamp lands having been appropriated for locations of warrants issued under the Internal Improvement Act; but we are of opinion that the title which the State has granted to the plaintiff, and for which she has been paid, is unaffected by the acts of the officers of the United States government and of the state government, done since the patent was issued."

Upon these grounds, the Supreme Court of the State gave judgment in favor of Scudday, and this writ of error was brought to revise that decision.

It does not appear from the opinion of the court, as above stated, that any question was decided that would give this court jurisdiction over its judgment. The land in dispute undoubtedly belonged to the State, under the grants made by Congress, and both parties claim title under grants from the State. The construction placed by the Secretary upon the Act of 1849, and the revocation of his order approving the location of Scudday, did not and was not intended to revest the land in the United States. On the contrary, it affirmed the title of the State; and its only object was to secure to Louisiana the full benefit of both of the grants made by Congress, and leaving it to the State to dispose of the lands to such persons and in such manner as it should by law direct. It certainly gave no right to the plaintiff in error. He admits the title of the State, and claims under a patent granted by the State. Now, whether this patent conveyed to him a title or not, depended altogether upon the laws of Louisiana, and not upon the Acts of Congress or the acts of any of the officers or authorities of the general government. It was a question, therefore, for the State courts. And the Supreme Court of the State have decided that this patent could convey no right to the land in question, because the State had parted from its title by a patent previously granted to Scudday, the defendant in error. The right claimed by the plaintiff in error, which was denied to him by the State Court, did not, therefore, depend upon any Act of Congress, or the validity of any authority exercised under the United States, but exclusively upon the laws of Louisiana. And the Supreme Court of the State have decided that, according to these laws, he had no title, and that the land in question belonged to the grantee of the elder patent.

We have no authority to revise that judgment by writ of error, and this writ must, therefore, be dismissed for want of jurisdiction.

THE CLAIMANTS AND OWNERS OF THE STEAMER "VIRGINIA," Appellants,

v.

MICHAEL W. WEST, Wm. T. Bell, Albert R. Heath, and James J. Edwards, Partners under the Firm of Heath & Edwards; Thomas C. Bunting and ——— Lecato, Partners under the Firm of Bunting & Lecato, and John M. Henderson.

(See S. C. 19 How. 182, 183.)

In appeals, transcript must be filed and case docketed next term after appeal.

In appeal from the Circuit Court to this court, the transcript must be filed in this court and the case docketed at the term next succeeding the appeal in order to give this court jurisdiction.

This not having been done in this case, but the transcript having been filed later, the case must therefore be dismissed.

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But this dismissal does not bar the appellant from taking and prosecuting another appeal at any time within five years from the date of the decree, provided the transcript shall be filed and the case docketed within the time above mentioned.

Argued Jan. 16, 1857. Decided Jan. 27, 1857.

APPEAL from the Circuit Court of the United States for the District of Maryland.

On motion to dismiss, on the ground that the record was not filed at the term next succeeding the appeal.

Mr. Schley for appellants.

Messrs. Johnson and Teacle for appellees.

Mr. Chief Justice Taney delivered the opinion of the court:

The decree from which the appeal has been taken was passed by the Circuit Court on the 17th day of November, 1855, and the appeal was prayed on the same day in open court. But it was not prosecuted to the next succeed-183*] ing term of this court *and no transcript of the record was filed here during that term. But a transcript has been filed at the present term of this court, and the case docketed. And a motion is made to dismiss it, upon the ground that the appeal is not legally before this court, according to the Act of Congress regulating appeals.

The construction of this Act of Congress, and the practice of this court under it, has been settled by the case of Villalobos v. The United States, 16 Curt. 619 (reported in 6 How.) The transcript must be filed in this court and the case docketed at the term next succeeding the appeal, in order to give this court jurisdiction. This case must, therefore, be dismissed.

But the dismissal does not bar the appellant from taking and prosecuting another appeal at any time within five years from the date of the decree, provided the transcript is filed here and the case docketed at the term next succeeding the date of such second appeal.

JOHN BROWN, Plff. in Er.,
v.
DUCHESNE.

(See S. C. 19 How. 183-199.)

Use, by foreign vessel, of patented improvement placed upon her in a foreign port, is not an infringement of the patent, although used while coming into and going out of an American port.

The rights of property and exclusive use granted to a patentee do not extend to a foreign vessel lawfully entering one of our ports.

The use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.

Argued Jan. 15, 1857. Decided Jan. 27, 1857.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This action was brought in the Circuit Court of the United States for the District of Massachusetts, by the plaintiff in error, to recover damages for an alleged infringement of a certain patent.

The defendant demurred to the declaration, and the court below gave judgment in his favor. The plaintiff then sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. Richard Henry Dana, Jr., for plaintiff in error:

The question for the court is, whether, under the circumstances of this case, there is an exemption from the operation of our patent laws, by reason of the nationality of the vessel.

Since this cause was argued in the Circuit Court, my attention has been called to the following case:

Caldwell v. Van Vlissengen, 9 Hare, 415; 9 Eng. L. & Eq. 51.

In that case, the machine patented was a screw propeller. This was a substantial part of the vessel, and almost necessary to her use. The vessel was built and solely owned in Holland, where the invention was in free and common use. The affidavits set forth facts sufficient to establish an exemption, if national character can give one. The court fully considers the question and decides against the exemption. On pp. 58, 59, the court puts the right to an injunction upon the ground that actions at law are maintainable in these cases. The court considers that the question of the exemption of foreign vessels, either entirely or in cases of reciprocity, is one of national policy, and to be dealt with by the Legislature, rather than by the courts.

After reading this decision, I wrote to Sir William Page Wood, the counsel for the respondents, then Solicitor-General, and now Vice-Chancellor, and received from him the following reply:

"31 Great George St., Westminster,
Nov. 6, 1855.

My Dear Sir—Your letter reached me yesterday. The case you refer me (Caldwell v. Van Vlissengen), was not appealed. I thought the decision was right, though it was against me. At the same time, I saw that there were inconveniences in the application of the law; and in the session of 1852, when a bill was passing through the House of Commons, with reference to the amendment of the patent laws, I proposed the insertion of the following clause." [Here follows section 26 of the Act of 15 and 16 Victoria, ch. 83.]

The opinion of Sir William Page Wood is entitled to great weight before every judicial tribunal, as is well known to your Honors.

After this decision, the Act 15 and 16 Victoria, ch. 83, was passed; section 26 of which is as follows, 4 Chit. Stat. 217: "No letters patent for any invention (granted after the passing of this Act), shall extend to prevent the use of such invention in any foreign ship or vessel, or for the navigation of any foreign ship or vessel, which may be in any port of Her Majesty's dominions, or in any waters within the jurisdiction of Her Majesty's courts, where such invention is not used for the manufacture of any goods or commodities to be vended within or exported from Her Majesty's dominions; provided always, that this enactment

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shall not extend to the ships or vessels of any foreign state, of which the laws authorize subjects of such foreign state, having patents or like privileges for the exclusive use or exercise of inventions within its territories, to prevent or interfere with the use of such inventions in British ships or vessels, while in the ports of such foreign states or in the waters within the jurisdiction of its courts, where such inventions are not so used for the manufacture of goods or commodities, to be vended within or exported from the territories of such foreign state."

Such is the state of the law in Great Britain, the greatest commercial nation of Europe. There is no reason to believe that the law of any other nation of Europe, varies from that of England. Indeed, it is probable that other nations will do likewise, and keep in their own hands the power of granting or withholding such an exemption, on considerations of policy, by legislation or treaty.

It is therefore respectfully suggested, that the court should leave this question to the law-making and treaty-making departments of our Government, in the mean time, placing the law in this country upon the same basis upon which it rests in England.

Is there any controlling reason why the court should not do this?

It is conceded that the Statute, in its terms, suggests no exemption. No interpretation of the Statute would suggest an exemption. If one is established, it must be by some imposed construction paramount over the plain language of the Acts.

The defendant's vessel, being private property, and here voluntarily for purposes of trade, has no exemption from general national jurisdiction.

Phillim. Int. Law, 367-373; The Exchange, 7 Cranch, 144; Story's Con. Laws, sec. 383.

International law respects absolute rights, the violation of which is cause of war, and comity or rights of imperfect obligation, the contravention of which is not presumed, but which each nation is competent to contravene, if it chooses. This distinction is well stated in Mr. Webster's letter to Lord Ashburton, in the appendix to Wheat. Law of Nations.

It will not be claimed that the prohibition or the use of such an article as this, in a private vessel, under these circumstances, is a violation of any absolute right secured by the law of nations. The government has the right to prohibit commerce altogether, or with particular nations, as by embargo or non-intercourse laws.

1 Kent's Com. sec. 33, n; Vattel, b. 2, ch. 7, sec. 94, ch. 8 sec. 100; ch. 2, secs. 25, 33; b. 1, ch. 8, sec. 90.

As a nation may prohibit trade so it may lay conditions and restrictions.

Authorities cited supra; Vattel, b. 2, ch. 8, sec. 100.

The question is really under the comitas gentium. Between countries trading freely, is there a presumption from the law of comity, that no nation will prohibit or restrict the use of such an invention, under such circumstances, so well settled as to authorize a court to establish the exception against the language of the Statute?

This can hardly be contended, since the case of Caldwell v. Van Vlissengen, and the Act 15 and 16 Victoria.

This is not a question of property or the domicil or situs of property. We admit the property in the article to be in the defendant; that it is part of the national wealth of France: and has its situs in France for purposes of taxation, and for all national purposes.

Hays v. Pacific Co. 17 How. 596.

The question is upon the restriction of its use within our dominions.

As the use of the machine is not alleged to be necessary, and the presence of the vessel here is voluntary, if the comity of nations does not allow the prohibition in this case, it would forbid it in all cases of patents; and vessels nominally owned in the British provinces and in the West India Islands may use all our nautical patents.

The foreigner and his personal property are subject to all burdens, taxes and duties relating to the police and economical regulations of a state.

Vattel, b. 2, ch. 8, sec. 106.

They are subject to imposts and duties, prohibitions and restrictions.

Vattel, b. 2, ch. 8, sec. 106; 1 Kent's Com. 35.

The patent and copyright laws of a country stand upon the same ground with navigation laws, and laws prohibiting altogether or restricting certain kinds of trade for economical purposes, or to add to the military resources and strength, or to increase the effective power and industry of a country, or to develop its genius. As to these, each nation is the proper judge of its own policy.

Vattel, b. 2, ch. 2, secs. 25, 33.

Indeed, Vattel (b. 1, ch. 20, sec. 255) seems to define the police regulations of a country, so as to include patent laws.

In this state of the international law, and in the absence of all direct decisions in support of the defendant's position, it is respectfully suggested that the question should be treated as a political, rather than a legal question, and the British precedent be followed by the court, until Congress or the treaty-making powers shall act upon it.

Messrs. Austin and Goodrich, for defendant in error:

1. Foreign vessels entering a port of the United States, by the express or implied permission of the government, do so under an implied immunity and reservation of the right belonging to them by the laws of the country to which they belong, with an implied understanding that the persons on board shall not violate the peace or domestic laws of the country.

Vattel's Law of Nations, b. 2, ch. 8, sec. 101.

The Alcyon, coming from the Island of Miquelon, may be deemed to have entered a port of the United States by express permission.

5 U. S. Stat. at L. 748, ch. 66, which specially mentions this island.

The question is, whether the patent law can be properly so construed as to include a use of said gaff saddle, notwithstanding the circumstances under which the said gaff saddle was incorporated into the structure of the Alcyon, and notwithstanding the express or implied permission of the United States by force of which she entered a port of the United States.

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2. What shall or does constitute a vessel, must be determined exclusively by the law of the country to which the vessel belongs, i. e., by the law of the owner's domicil.

This follows necessarily from general maxims of international jurisprudence.

Story on Con. of Laws, secs. 18, 20.

In order to ascertain what is or is not real property, we must resort to the lex loci rei.

Story Con. Laws, secs. 382, 447, so as of what is or what is not a corporation; Bank to Augusta v. Earle, 13 Pet. 519.

The Alcyon, although in the port of the United States, was still within the jurisdiction of France.

Children born on board of her while in Boston harbor, would have been French subjects.

Vattel L. of N. b. 1, ch. 19, sec. 216.

In re Bruce, Cromp. & I. 437, and Thompson v. The Advocate-General, 12 Clark & F. 1; U. S. v. Wiltberger, 5 Wheat. 76.

The gaff saddle was rightfully part of the vessel by French laws.

Therefore, if the United States patent law operated to prevent the defendant from using the gaff saddle while in the harbor of Boston, notwithstanding it was a part of his vessel, without plaintiff's permission, it operated just so far to impose a restriction of the implied permission accorded by the United States to all French vessels to enter the ports of the United States, and upon the express permission accorded to all French vessels from Miquelon.

The statutes of the United States relating to patents were not intended to affect, and do not affect, foreign vessels coming into the ports of the United States.

1st. The statutes of a country relating to patents are not such laws as a foreigner visiting this country temporarily, and not to become a resident, is bound to obey, so far as those laws relate merely to the use of articles purchased abroad and brought into the country solely for the personal use of the party in possession while a transient visitor.

Vattel L. of N. b. 2, ch. 8 secs. 101, 106, 109; Boullenois Traite des Statutes, pp. 2, 3, 4; Universities of Oxford and Cambridge v. Richardson, 6 Ves. Jr. 689, which entirely supports this position.

2d. The United States, in granting letters patent, or any other exclusive privilege to a citizen, necessarily always reserve by implication their own rights of sovereignty, which are not to be affected by any individual or private privilege.

Examples of the application of this principle, are as follows:

(a) In regard to the right of eminent domain.

This exists inherently in every government.

Vattel's L. of N. b. l. ch. 20, sec. 244; Bonaparte v. The C. & A. R. R. Co. 1 Bald. 220.

Independently of the principle that the right of eminent domain, being an attribute of sovereignty, could not be conveyed away, the conclusion above stated follows from the rule that in public grants nothing passes by implication.

U. S. v. Arredondo, 6 Pet. 738; Jackson v. Lamphire, 3 Pet. 289.

(b) The constitutional power of Congress over commerce.

This power extends to navigation. 2 Sto. Com. on Con. sec. 1060, and to every species of commercial intercourse.

2 Sto. Com. on Con. 1061.

In the exercise of this power, Congress, in 1845, after the date of the plaintiff's patent, passed the law relating to French vessels coming from Miquelon, which law makes no exception as to the kind of vessel, or the mode of its rig, or the peculiarities of its structure.

As the grant to the plaintiff and the Act of 1845 are in direct opposition, the grant must be construed against grantee.

Mills v. St. Clair County, 8 How. 569.

The defendant does not contend that he would have a right to bring into a port of the United States a cargo or any number of these contrivances for sale; nor even that he had a right to detach and sell that on board of the Alcyon. In this argument the gaff saddle is deemed a part of the schooner, in the same way as fixtures are parts of the realty.

(c) The power of Congress to alienate a portion of its territory.

This power exists in every government.

Vattel's L. of N. b. 1, ch. 21, sec. 263.

It was exercised in the Treaty of Washington, 1842.

8 U. S. Stat. at L. 572.

Every patent right then existing, extended over the whole country as then bounded. The alienation of a portion of the territory, diminished the value, by diminishing the extent of every existing patent right; but they were all granted subject to the implied reservation of power on the part of the government, thus to diminish their value.

(d) The private right of every patentee is subject to the public right of the government to admit into the ports of the United States any foreign vessel, free from any private or public charges, tolls or burdens, other than those imposed by treaty or the laws of nations.

The Attorney-General v. Burridge, 10 Price, 350; Same v. Parmeter, 10 Price, 378; Parmeter v. Gibbs, 10 Price, 412.

The cases cited are exactly analogous in principle to the case at bar.

In the citations, the jus privatum was a grant by Charles I., of his property in land between high and low water mark; and the jus publicum, with which it interfered was the right of the public freely to pass and repass, upon the salt water, between high and low water mark.

In the present case the jus privatum is the exclusive right granted to the plaintiff to use within the jurisdiction of the United States a certain machine; and the jus publicum with which it interferes, is the right the public has to the free admission into the ports of the United States, of all foreign vessels, being such according to the law of the country where they belong.

The grant by Charles I. of land between high and low water mark, was held void so far as it prevented this free passage. By parity of reasoning, the letters patent of the plaintiff must be held void, or rather as never having extended to foreign vessels visiting the ports of the United States, as The Alcyon visited Boston.

The principle here contended for, as it ap-

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plies to ports and harbors, is clearly stated by Lord Hale, in his treatise De Jure Maris, cap. 6, p. 35, and in the Treatise De Portibus Maris, ch. on the jus publicum, p. 84, 89. "When a port is fixed and settled" * * * "though the sole and franchise, and dominion thereof prima facie be in the King, or by derivation from him in a subject, yet that jus privatum is clothed and superinduced with a jus publicum." So in the case at bar, the jus privatum of the patentee is subject to the jus publicum by which foreign vessels, however constructed, may enter our ports. This government, never having undertaken to decide, nor ever having granted to an individual the right to decide for the government, that certain vessels, or vessels constructed partly or wholly in a certain way, shall not enter our ports without paying a toll, or charge or duty not imposed by treaty or special laws relating thereto.

3. The statutes relating to patents cannot properly be so construed as to include machines or contrivances forming a part of the original structure of foreign vessels entering the ports of the United States, as The Alcyon entered Boston harbor.

(a) Because such construction, for the reasons above stated, would introduce public mischiefs and manifest incongruities.

Swain v. Guild, 1 Gall. 485; Talbot v. Seeman, 1 Cranch, 1; Murray v. The Charming Betsy, 2 Cranch. 64.

(b) These statutes were passed alio intuitu.

The reasoning of Judge Curtis in the opinion delivered by him in the case; also Lessee of Brewer v. Blougher, 14 Pet. 178—"The laws will restrain the operation of a statute within narrower limits than its words import, if the literal meaning of its language would extend to cases which the Legislature never designed to embrace in it," 198.

It cannot be supposed that Congress intended the statutes on patents to confer a right on a patentee, to interfere in any way with the exercise of a license conferred by government on a foreign vessel.

The same doctrine in Minor v. Mechanics' Bank of Alexandria, 1 Pet. 64.

4. Letters patent of the United States confer upon the grantee the exclusive right to the subject matter of the patent, to be exercised within their jurisdiction. A foreign ship coming within one of the ports of the United States with their express or implied permission, is without the jurisdiction within which this exclusive right is to be exercised.

(a) Foreigners within the territorial jurisdiction of a country, may yet be within its municipal jurisdiction for no purpose whatever. Such is the status of public ministers (Wheat. Elements on L. of N. part 3, ch. 1, sec. 14; part 2, ch. 2, sec. 9), and of foreign sovereigns entering the territory of another, and of foreign armies marching, etc., through the territory, and of a foreign ship of war.

Wheat. Elements of L. of N. part 3, ch. 1, sec. 14; part 2, ch. 2, sec. 9; The Exchange v. McFadden, 7 Cranch, 135, 147.

(b) Foreigners within the territory may be within the municipal jurisdiction of a country for all purposes. This is the status of foreigners who come into the country animo manendi, becoming inhabitants.

Vattel's L. of N. b. 1, ch. 19, sec. 213.

(c) Foreigners within the territorial, may be within the municipal jurisdiction for some purposes and not for others. This is the case with transient persons and consuls. Vattel's L. of N. b. 2, ch. 8, secs. 205, 206, 208, 209.

Wheat. Elements, part 3, ch. 1 sec. 23.

The same principle applies to a part of a country in temporary possession of the enemy.

U. S. v. Hayward, 2 Gall. 485.

To goods imported and not entered, although within the territorial jurisdiction of the State, they are not subject to its municipal jurisdiction.

Harris v. Dennie, 3 Pet. 292.

This principle applies to a foreign commercial vessel visiting a port of the United States. It is within the jurisdiction of the United States so far that persons on board are bound to do no act against the public peace, or contra bonos mores, or against the revenue laws, etc., etc. But "for all the personal relations and responsibilities existing in the ship at the time she entered a port, and established or permitted by the laws of her own country, her authorities are answerable only at home; and to interfere with them in discharge of the duties imposed upon them, or the exercise of the powers vested in them, by those laws, on the ground of their being inconsistent with the municipal legislation of the country where the ship happens to be lying, is to assert for that legislation a superiority not acknowledged by the law and inconsistent with the independence of nations."

Mr. Legare's opinion, 4 op. of Atty-Gen. 98-102; Same Point, 6 Web. Works, 303.

5. The case of Caldwell v. Van Vlissingen, 9 Hare, 415; 9 Eng. L. & Eq. 51, will be cited by plaintiff in error as deciding the point before the court. On this point the defendants say:

1st. It will be regarded by this court only so far as the reasoning commends itself to the court as sound.

2d. The case was not placed upon the grounds assumed in the case at bar. The principles here contended for were neither considered nor even presented to the court.

3d. The Statute of 15 and 16 Victoria, ch. 83, sec. 26, was passed in evident recognition of the existence and propriety of the principles of international law, contended for by the defendant in error.

Mr. Chief Justice Taney delivered the opinion of the court:

This case comes before the court upon a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The plaintiff in error, who was also plaintiff in the court below, brought this action against the defendant for the infringement of a patent which the plaintiff had obtained for a new and useful improvement in constructing the gaff of sailing vessels. The declaration is in the usual form, and alleges that the defendant used this improvement at Boston without his consent. The defendant pleaded that the improvement in question was used by him only in the gaffs of a French schooner, called The Alcyon, of which

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schooner he was master; that he (the defendant) was a subject of the Empire of France; that the vessel was built in France, and owned and manned by French subjects; and, at the time of the alleged infringement, was upon a lawful voyage, under the flag of France, from St. Peters, in the Island of Miquelon, one of the colonies of France, to Boston, and thence back to St. Peters, which voyage was not ended at the date of the alleged infringement; and that the gaffs he used were placed on the schooner at or near the time she was launched by the builder, in order to fit her for sea.

There is also a second plea containing the same allegations, with the additional averment that the improvement in question had been in common use in French merchant vessels for more than twenty years before The Alcyon was 194*] built, and was the *common and well known property of every French subject long before the plaintiff obtained his patent.

The plaintiff demurred generally to each of these pleas, and the defendant joined in demurrer; and the judgment of the Circuit Court being in favor of the defendant, the plaintiff thereupon brought this writ of error.

The plaintiff, by his demurrer, admits that The Alcyon was a foreign vessel, lawfully in a port of the United States for the purposes of commerce, and that the improvement in question was placed on her in a foreign port to fit her for sea, and was authorized by the laws of the country to which she belonged. The question, therefore, presented by the first plea is simply this: whether any improvement in the construction or equipment of a foreign vessel, for which a patent has been obtained in the United States, can be used by such vessel within the jurisdiction of the United States, while she is temporarily there for the purposes of commerce, without the consent of the patentee.

The question depends on the construction of the patent laws. For undoubtedly every person who is found within the limits of a government, whether the temporary purposes or as a resident, is bound by its laws. The doctrine upon this subject is correctly stated by Mr. Justice Story, in his "Commentaries on the Conflict of Laws" (chap. 14, sec. 541), and the writers on public law to whom he refers. A difficulty may sometimes arise, in determining whether a particular law applies to the citizen of a foreign country, and intended to subject him to its provisions. But if the law applies to him, and embraces his case, it is unquestionably binding upon him when he is within the jurisdiction of the United States.

The general words used in the clause of the patent laws granting the exclusive right to the patentee to use the improvement, taken by themselves, and literally construed without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.

*Neither will the court, in expounding [*195 a statute, give to it a construction which would in any degree disarm the government of a power which has been confided to it to be used for the general good—or which would enable individuals to embarrass it, in the discharge of the high duties it owes to the communities—unless plain and express words indicated that such was the intention of the Legislature.

The patent laws are authorized by that article in the Constitution which provides that Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. The power thus granted is domestic in its character, and necessarily confined within the limits of the United States. It confers no power on Congress to regulate commerce, or the vehicles of commerce, which belong to a foreign nation, and occasionally visit our ports in their commercial pursuits. That power and the treaty-making power of the general government are separate and distinct powers from the one of which we are now speaking, and are granted by separate and different clauses, and are in no degree connected with it. And when Congress are legislating to protect authors and inventors, their attention is necessarily attracted to the authority under which they are acting, and it ought not lightly to be presumed that they intended to go beyond it, and exercise another and distinct power, conferred on them for a different purpose.

Nor is there anything in the patent laws that should lead to a different conclusion. They are all manifestly intended to carry into execution this particular power. They secure to the inventor a just remuneration from those who derive a profit or advantage, within the United States, from his genius and mental labors.

But the right of property which a patentee has in his invention, and his right to its exclusive use, is derived altogether from these statutory provisions; and this court have always held that an inventor has no right of property in his invention, upon which he can maintain a suit, unless he obtains a patent for it, according to the Acts of Congress; and that his rights are to be regulated and measured by these laws, and cannot go beyond them.

But these Acts of Congress do not, and were not intended to, operate beyond the limits of the United States; and as the patentee's right of property and exclusive use is derived from them, they cannot extend beyond the limits to which the law itself is confined. And the use of it outside of the jurisdiction of the United States is not an infringement of his rights, and *he has no claim to any compensation [*196 for the profit or advantage the party may derive from it.

The chief and almost only advantage which the defendant derived from the use of this improvement was on the high seas, and in other places out of the jurisdiction of the

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United States. The plea avers that it was placed on her to fit her for sea. If it had been manufactured on her deck while she was lying in the port of Boston, or if the captain had sold it there, he would undoubtedly have trespassed upon the rights of the plaintiff, and would have been justly answerable for the profit and advantage he thereby obtained. For, by coming in competition with the plaintiff, where the plaintiff was entitled to the exclusive use, he thereby diminished the value of his property. Justice, therefore, as well as the Act of Congress, would require that he should compensate the patentee for the injury he sustained, and the benefit and advantage which he (the defendant) derived from the invention.

But, so far as the mere use is concerned, the vessel could hardly be said to use it while she was at anchor in the port, or lay at the wharf. It was certainly of no value to her while she was in the harbor; and the only use made of it which can be supposed to interfere with the rights of the plaintiff, was in navigating the vessel into and out of the harbor, when she arrived or was about to depart, and while she was within the jurisdiction of the United States. Now, it is obvious that the plaintiff sustained no damage, and the defendant derived no material advantage, from the use of an improvement of this kind by a foreign vessel in a single voyage to the United States, or from occasional voyages in the ordinary pursuits of commerce; or if any damage is sustained on the one side, or any profit or advantage gained on the other, it is so minute that it is incapable of any appreciable value.

But it seems to be supposed that this user of the improvement was, by legal intendment, a trespass upon the rights of the plaintiff; and that although no real damage was sustained by the plaintiff, and no profit or advantage gained by the defendant, the law presumes a damage, and that the action may be maintained on that ground. In other words, that there is a technical damage, in the eye of the law, although none has really been sustained.

This view of the subject, however, presupposes that the patent laws embrace improvements on foreign ships, lawfully made in their own country, which have been patented here. But that is the question in controversy. And the court is of opinion that cases of that kind were not in the contemplation of Congress in enacting the patent laws, and cannot, upon 197*] any *sound construction, be regarded as embraced in them. For such a construction would be inconsistent with the principles that lie at the foundation of these laws; and instead of conferring legal rights on the inventor, in order to do equal justice between him and those who profit by his invention, they would confer a power to exact damages where no real damage had been sustained, and would moreover seriously embarass the commerce of the country with foreign nations. We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish.

The construction claimed by the plaintiff would confer on patentees not only rights of property, but also political power, and enable them to embarrass the treaty-making power in its negotiations with foreign nations, and also to interfere with the legislation of Congress when exercising its constitutional power to regulate commerce. And if a treaty should be negotiated with a foreign nation, by which the vessels of each party were to be freely admitted into the ports of the other, upon equal terms with its own, upon the payment of the ordinary port charges, and the foreign government faithfully carried it into execution, yet the government of the United States would find itself unable to fulfill its obligations if the foreign ship had about her, in her construction or equipment, anything for which a patent had been granted. And after paying the port and other charges to which she was subject by the treaty, the master would be met with a further demand, the amount of which was not even regulated by law, but depended upon the will of a private individual.

And it will be remembered that the demand, if well founded in the patent laws, could not be controlled or put aside by the Treaty. For, by the laws of the United States, the rights of a party under a patent are his private property; and by the Constitution of the United States, private property cannot be taken for public use without just compensation. And in the case I have stated, the government would be unable to carry into effect its treaty stipulations without the consent of the patentee, unless it resorted to its right of eminent domain, and went through the tedious and expensive process of condemning so much of the right of property of the patentee as related to foreign vessels, and paying him such a compensation therefor as should be awarded to him by the proper tribunal. The same difficulty would exist in executing a law of Congress *in [*198 relation to foreign ships and vessels trading to this country. And it is impossible to suppose that Congress in passing these laws could have intended to confer on the patentee a right of private property which would, in effect, enable him to exercise political power, and which the government would be obliged to regain by purchase, or by the power of its eminent domain, before it could fully and freely exercise the great power of regulating commerce, in which the whole nation has an interest. The patent laws were passed to accomplish a different purpose, and with an eye to a different object; and the right to interfere in foreign intercourse, or with foreign ships visiting our ports, was evidently not in the mind of the Legislature, nor intended to be granted to the patentee.

Congress may, unquestionably, under its power to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to enter. Yet it may perhaps be doubted whether Congress could by law confer on an individual, or individuals, a right which would in any degree impair the constitutional powers of the Legislative or Executive Departments of the government, or which might put it in their power to

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embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations. But however that may be, we are satisfied that no sound rule of interpretation would justify the court in giving to the general words used in the patent laws the extended construction claimed by the plaintiff, in a case like this, where public rights and the interests of the whole community are concerned.

The case of Caldwell v. Van Vlissengen, 9 Hare, 416; 9 Eng. L. & Eq. 51, and the Statute passed by the British Parliament in consequence of that decision, have been referred to and relied on in the argument. The reasoning of the Vice-Chancellor is certainly entitled to much respect, and it is not for this court to question the correctness of the decision, or the construction given to the Statute of Henry VIII.

But we must interpret our patent laws with reference to our own Constitution and laws and judicial decisions. And the court are of opinion that the rights of property and exclusive use granted to a patentee does not extend to a foreign vessel lawfully entering one of our ports; and that the use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American Patentee, provided it was placed upon her in a 199*] foreign *port, and authorized by the laws of the country to which she belongs.

In this view of the subject, it is unnecessary to say anything in relation to the second plea of the defendant, since the matters relied on in the first are sufficient to bar the plaintiff of his action, without the aid of the additional averments contained in the second.

The judgment of the Circuit Court must therefore be affirmed.

Aff'g—2 Curt. 371.

TERENCE COUSIN, Plff. in Er.,

v.

FANNY LABATUT, Widow and Testamentary Executrix; Jules A. Blanc, Co-ex'r, et al., Legal Representatives of Evariste Blanc.

(See S. C. 19 How. 202-211.)

Court has Jurisdiction where laws of Congress and acts of officers under them are drawn in question, in state court, and the decision is against the title set up under them—certificate of confirmation of Spanish claim, when surveyed, is evidence of title.

Where laws of Congress and acts of officers executing them in perfecting titles to public lands have been drawn in question and construed by the decision of a state court, and the decision is against the title set up under them, jurisdiction is vested in this court by the 25th section of the Judiciary Act, to examine the judgment of the state court.

A certificate of confirmation of a Spanish claim under the Act of March 3d, 1819, rendered certain by a survey approved at the Surveyor-General's office, is prima facie evidence of title.

But a mere loose prior order of survey held not to have such effect, and the United States could sell the land.

Argued Dec. 30, 1856. Decided Jan. 27, 1857.

IN ERROR to the Supreme Court of the State of Louisiana for the Eastern District.

To give a clear understanding of this case, the opinion of the Supreme Court of Louisiana is given:

"The plaintiff brought an action of boundary against the defendant, respecting two tracts of land adjoining one in the possession of the defendant. The plaintiff avers that one of his tracts contains 1,250 superficial arpents, according to a survey made by order of J. V. Morales, on Sept. 22, 1803, and the other consists of two lots of land containing 222.80 superficial acres, purchased from the United States.

The defendant denies that the plaintiff is owner of these lands or has any title to them, and he claims by reconvention a portion of them as his property, and prays that he may recover them as owner, from the plaintiff. To this reconvention the plaintiff answered, claiming title and calling in warranty his vendors. Damages were claimed and each party, for trespass on the lands of the other. The case was tried by a jury, who gave a verdict for Blanc; and the judgment of the District Court being in conformity to the verdict, the defendant has appealed.

It is characteristic of an action of boundary, that the defendant cannot question the title of plaintiff.

C. C. 825; Sprigg v. Hooper, 9 Rob. 248.

The title of plaintiff being here called in question by defendant's answer and reconvention, and plaintiff having joined issue thereupon and called his vendors in warranty, the action has lost its primitive character and has become a petitory one, in which Cousin, an original defendant, is plaintiff, upon whom the burden of proof is thrown. The evidence adduced by defendant of title to the locus in quo in his ancestor, consists of the documents annexed to his answer and petition in reconvention. They are as follows:

(1) A certificate of confirmation in the following words:

"Commissioner's report letter B. Certificate No. 178, Land Office, St. Helena. In pursuance of the Act of Congress passed March 3, 1819, entitled 'An Act for adjusting the claims to land and establishing Land Offices for the district east of the Island of New Orleans,' we certify that claim No. 255, in the report of the Commissioner marked B, claimed by Francis Cousin, original claimant Stephen Réné, is confirmed as a donation and entitled to a patent, for one thousand arpents, situate in St. Tammany, and claimed under an order of survey, dated Sept. 10, 1798.

Given under our hands this 8th day of June, 1820.

(Signed) Charles S. Cosby, Register.
Fulwer Skipwith, Receiver.
F. Herault, Clerk."

(2) An order of location and survey from the

NOTE.—What adjudication of state courts can be brought up for review in the U. S. Supreme Court by writ of error to those courts.—see note, 62 L.R.A. 513. How and when questions must be raised and decided in the state court in order to make a case for a writ of error from the U. S. Supreme Court—see note, 63 L.R.A. 33.

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Land Office, St. Helena District, in the following words:

"Land Office, St. Helena, Francis Cousin, certificate No. 178, dated June 8th, 1820. St. Tammany Sept. 21, 1826.

Francis Cousin claims a tract of one thousand arpents of land situate in the Parish of St. Tammany, as purchaser from his father, Francis Cousin, deceased, who bought it from Louis Blanc, who bought it from the original owner, Gabriel Bertrand, and in virtue of certificate No. 178 dated 8th June, 1820, and signed Charles S. Cosby, Register, and Fulwer Skipwith, Receiver, in which certificate it is alleged by this claimant that it is erroneously set forth that Stephen Réné was the original claimant. It appearing that this tract of land is fronting on Bayou la Liberté, bounded below by the tract of land of Mr. Girod, and above by a tract of land belonging to claimant, it is ordered that this claim be located and surveyed with the front extending on said Bayou from the land of said Jirod to that of claimant above, and from these points on the Bayou to run back for quantity.

Given under our hands this 21st day of September, 1826.

(Signed) Sam'l J. Rannels, Register.
William Kinchen, Receiver."

(3) A plot of survey made by G. C. Vanzandt, Surveyor, under the order just decided.

The Act of Congress of 25th April, 1812, ch. 67, of the Session Acts, authorized the appointment of a commissioner, for the purpose of ascertaining the titles and claims to land in the district of country west of Pearl River, south of the Mississippi Territory, and east of the Mississippi and the Island of Orleans, within which district of country the land now in dispute lies. By the provisions of the Statute, it was the special duty of the Commissioner to call for, and receive from the inhabitants of said district, notices and evidences of claims and titles to land derived from the French, Spanish, or British Governments, who had formerly held the country—which notices and evidences of claim were directed to be recorded in books to be open for that purpose. It was further made the duty of the Commissioner to report to the Secretary of the Treasury upon the claims thus notified to him and the evidence furnished; which report the Act directed to be laid before Congress at the next session thereafter, for their determination thereon.

On the 2d of January, 1816, the Secretary of the Treasury transmitted to Congress a report made by James O. Crosby, the Commissioner of Land Claims, appointed for the district west of Pearl River, under the Act of 1812. This report is printed in full in the American State Papers. Public Lands, Vol. III.

The report classifies the claims as follows:

A. * * * * * * *

B. Claims founded on orders of survey, requests, permission to settle, or other written evidence of claims, derived either from the French, British or Spanish authorities, which, in the opinion of the Commissioner, ought to be confirmed.

C. * * * * * * *

D. * * * * * * *

In this report, class B, No. 255, reads as follows:

See page 56 of the volume of American State Papers above quoted.

By whom Claimed.	Original Claimant.	Nature of Claim, and from what authority derived.	Date of Claim.	Quantity Claimed.	Where Situated.				
F. Cousin.	Stephen Réné.	Order of Survey.	Sept. 10, 1780.	1,000.	St. Tammany.				
			Inhabited and Cultivated.						
			From —. To —.						
By whom Issued.	When Surveyed.	By whom Surveyed.			General Remarks.				
E. Miro.									

Congress does not appear to have taken any decisive act on this report until the year 1819, when it passed the Act for "adjusting the claims to land, and establishing land offices in the district east of the Island of Orleans."

Ch. 223. Session Acts.

(Here the Court quoted the 2d and 12th sections of the above Act.)

The certificate dated June 8, 1820, numbered 178, offered in evidence by defendant, was given under the above provision of law by the Register and Receiver for that land district, Charles O. Cosby and Fulwer Skipwith.

The first objection made to it by plaintiff's counsel is, that the Statute did not authorize a donation, except the land claimed had been cultivated and inhabited by the claimant previous to Dec. 20, 1803.

It is quite possible that such may have been the intention of Congress. But the section is

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clogged with provisos which confuse its sense, and render it difficult for us to pronounce, that the Register and Receiver were wrong in coming to the opposite conclusion. The Statute itself, however, provided a tribunal of revision for such certificates, to wit: The Commissioner of the General Land Office took that ordeal. The certificate in question does not appear to have been ever submitted, although thirty years and more elapsed between its date and the commencement of this suit. But some six years later, and when other individuals had succeeded to Cosby and Skipwith in the office of Register and Receiver, we find an attempt made to amend the certificate, by correcting what are called errors in the most material parts of the same.

The counsel for plaintiff also objects to the certificate of June 8, 1820, on account of the vagueness of the description of the land donated. We consider this objection to be well founded. The description is "one thousand arpents situated in St. Tammany." It is plainly impossible to locate land by such a description as this, and when such is the case, the grant can produce no effect.

U. S. v. Miranda, 16 Pet. 153; Villalobos v. U. S. 10 How. 541; U. S. v. Delespine, 15 Pet. 319; Lecompte v. U. S. 11 How. 115; Ledoux v. Black, 5 La. An. 510.

It is proper here to mention, that the order of survey of Sept. 10, 1798, mentioned in the certificate, is not produced, although formally called for by the opposite party. Had such an order of survey ever been given in evidence before the Commissioner of Land Claims, it would have been recorded in the archives of the Land Office.

Acts of Congress of 1812 and 1819, above quoted.

But no such record appears.

It was probably a consciousness of this defect in his title which induced the defendant's ancestor to procure from Rannels and Kinchen, the successors of Cosby and Skipwith, in the office of Register and Receiver of the Land Office at St. Helena, the order of location and survey of Sept. 21, 1826, which the defendants offer in evidence.

This paper sets out by declaring that the first certificate had erroneously stated the origin of the defendant's title, gives another and totally different origin to the same as the correct one, and orders a survey to be made, and the defendant's donation to be located on the Bayou Liberté, between the lands of certain proprietors named. The survey of Vanzandt was made in conformity to this order.

We view the amended certificate of Sept. 21, 1826, and the survey under it as nullities, for the certificate of Cosby and Skipwith followed strictly the report of the Commissioner of Land Claims, confirmed by the Act of Congress of March 3, 1819. Therefore, in correcting that certificate, Rannels and Kinchen took upon themselves to correct the report of the Commissioner of Land Claims and to make the Act of Congress apply to a claim which was not mentioned in that report, and which was consequently never before Congress.

The Supreme Court of this State, in the case of Newport v. Cooper, 10 La. decided that the Register and Receiver of the Land Office of St. Helena were without power by law to reverse and annul a certificate granted by their predecessors. By a parity of reasoning, are they without power to make amendments in such a certificate, which falsify the Act of Congress on which the first certificate was based? If the claimant could not locate the land claimed by him under his claim as presented to the Commissioner of Land Claims and reported to Congress, that was a misfortune which the officers of the Land Office of St. Helena had no power to remedy by fabricating for him a new claim seven years after the action of Congress upon the report.

The defendant, plaintiff in reconvention, having failed to prove any title to the land in controversy, the judgment of the District Court must be affirmed.

The case further appears in the opinion of this court.

Mr. **Louis Janin**, for the plaintiff in error.

Mr. **J. P. Benjamin**, for the defendants in error:

It is obvious that the only clause of the 25th section of the Judiciary Act of 1789, on which the jurisdiction of this court can be asserted with any show of reason, is that which gives it power to review the decision of the highest court of the State, "where is drawn in question the construction of any statute of the United States, and the decision is against the title specially set up under such statute."

By a long series of adjudications, this court has established the rule, that in order to give jurisdiction under this statute, "it must appear by the record that one of the questions stated in the 25th section of the Act of 1789 did arise and was decided in the state court; and that it was not sufficient that it might have arisen or been applicable."

Maxwell v. Newbold, 18 How. 516.

The jury found a general verdict in favor of Blanc, on all the issues in the cause, thus deciding that Cousin's claim under the Act of Congress had been lost to him and acquired by Blanc.

This verdict and the judgment rendered in accordance with it, stand unreversed by the Supreme Court of the State, and cannot be reversed by this court, because the decision is not against the title set up under the Act of Congress. The decision, on the contrary, is rather in affirmance of that title, because it asserts that title to be good in the possession of Blanc, who has succeeded to Cousin's rights by prescription, just as he would have done by purchase. The verdict of the jury is conclusive of the case.

Parsons v. Bedford, 3 Pet. 433.

The Supreme Court of Louisiana has not decided against the title of Cousin, as conferred on him by the Act of Congress. The court determines only that the officers of the United States have acted erroneously and without authority of law, in locating and surveying the land confirmed by Congress to Cousin. The decision of the court treats as null and void acts of public officers done since the passage of the law.

The case is entirely analogous with McDonogh v. Millaudon, 3 How. 704.

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Mr. Justice Catron delivered the opinion of the court:

Evariste Blanc sued Terence Cousin, in the Eighth District Court of Louisiana, invoking the aid of that court to settle a disputed boundary between the plaintiff and defendant.

Cousin, instead of responding to the action, for the purpose of settling boundary, filed an answer, denying Blanc's title to the property described in his petition, and setting up title in himself, and claiming damages against Blanc, who joined issue on the answer, and denied the validity of the title asserted by Cousin. This turned Cousin into a plaintiff (as the state courts held), and imposed on him the burden of proof to support his title. It was adjudged in the District Court, on the documents presented by Cousin, that he had no title whatever to any part of the land in dispute; and so the 207*] Supreme *Court of Louisiana held on an appeal to that court, where the cause was reheard.

Pending the appeal, Blanc died, and his widow and heirs were made parties. They prayed the benefit of the judgment of the court below, and also that it might be so amended by the Supreme Court as to give them the benefit of all that Blanc claimed in his petition—that is to say, 222.80 acres, according to certificate No. 1280, showing a regular purchase from the United States; together with 1,240 arpents in superficies, according to a plan annexed to the original petition of Blanc; that they might be quieted in the possession thereof as owners, and that the 1,240 arpents may be bounded according to the plan. And to this effect the court gave judgment.

The laws of Congress, and the acts of the officers executing them in perfecting titles to public lands have been drawn in question, and construed by the decision of the Supreme Court of Louisiana in this case; and the decision being against the title set up by Cousin, under the Acts of Congress and the authority exercised under them, it follows that jurisdiction is vested in this court, by the 25th section of the Judiciary Act, to examine the judgment of the State Court; and in doing so, we refer to the opinion of that court, which is made part of the record by the laws of Louisiana, and is explanatory to the judgment, of which it is there deemed an essential part. We refer to the opinion, in order to show that questions did arise and were decided, as required, to give this court jurisdiction. 9 How. 9. This is necessarily so in cases brought here by writ of error to the courts of Louisiana, because no bill of exceptions is necessary there, when appeals are prosecuted. The court of last resort acts on the law and facts as presented by the whole record.

By relying on this source of information, as to what questions were raised and were decided by the State Court, we are relieved from all difficulty in this instance.

Cousin's claim is assumed to have originated in a Spanish order of survey laid before the proper commissioner appointed under the Act of April 25, 1812, whose duty it was to receive notices and evidences of claims, which were ordered to be recorded by the commissioner. It was made the duty of the commissioner to report to the Secretary of the Treasury upon claims, and the evidences thereof, thus notified to him; which report the Act directed should be laid before Congress by the Secretary.

In January, 1816, the report was transmitted by him to Congress. By the Act of March 3d, 1819, Congress legislated in regard to the claims reported. By that Act, two land *districts were established east of the [*208 Island of New Orleans, and a Register and Receiver were provided for each.

The books of the former commissioners, in which the claims and evidences of claims were recorded, were directed to be lodged with the Register; and the Register and receiver were vested with power "to examine the claims recognized, confirmed, or provided to be granted," by the provisions of that Act; they were instructed to make out, for each claimant entitled in their opinion thereto, a certificate according to the nature of the case, pursuant to the instructions of the Commissioner of the General Land Office; and, on the presentation at that office of such certificate, a patent was ordered to be issued. Francis Cousin's claim was within the above description.

As no provision was made by the Act of 1819, vesting authority in the Register and Receiver to direct in what manner confirmed claims should be located and surveyed, it was (sec. 11) left to the deputies of the principal surveyor south of Tennessee, to find the lands, and survey them according to their own judgment. Then, again, the surveyors had no authority to adjust conflicting boundaries, and therefore further legislation was deemed necessary; and accordingly the Act of June 8, 1822, was passed by Congress, giving the Registers and Receivers power to direct the manner in which claims should be located and surveyed (sec. 4), and power was also given to them to decide between parties whose claims conflicted.

In June, 1820, the Register and Receiver gave Cousin a certificate of confirmation under the Act of 1819. They certify "that claim No. 255 in the report of the commissioner, marked B, claimed by Francis Cousin, original claimant Stephen Réné, is confirmed as a donation, and entitled to a patent for one thousand arpents, situated in St. Tammany, and claimed under an order of survey dated 10th Sept. 1798."

No Spanish survey was found, to aid the foregoing description.

In 1826, the Register and Receiver made an order of survey, as follows:

Land Office, St. Helena.

Francis Cousin, Certificate No. 178, Dated June 8th, 1820.

Francis Cousin claims a tract of one thousand arpents of land, situate in the Parish of St. Tammany, as purchaser from his father, Francis Cousin, deceased, who bought it from Louis Blanc who bought it from the original owner, Gabriel Bertrand, and in virtue of certificate No. 178, dated 8th June, 1820, and signed Charles S. Cosby Register, and Fulwer Skipwith, Receiver, in which certificate it is alleged by this claimant that it is erroneously set forth that Stephen Réné was the original claimant; it appearing that this tract of land is fronting *on Bayou La Liberte, [*209 bounded below by the tract of land of Mr. Girod, and above by a tract of land belonging to claimant.

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"It is ordered that this claim be located and surveyed with a front extending on said bayou, from the land of said Girod to that of claimant above, and from these points on the bayou to run back for quantity."

The Supreme Court of Louisiana held the certificate of 1820 so vague as not to be of any value, and pronounced it void. Furthermore, that the second one of 1826 departed from the confirmation, and was also invalid. The first purported to be the land derived from Stephen Réné, as original claimant; and the second, for land of which Gabriel Bertrand was the original owner.

The Act of 1822 is a supplement to the Act of 1819; when taken together, they gave the Register and Receiver authority to declare what land had been confirmed, and how it should be surveyed. Now, if it be true, as is held by the State Court, that the certificate of 1820 is so vague as to be of no value and void, then it follows, that another could be made in 1826 which would be certain in its description of the land confirmed, accompanied by an order of survey. Whether Réné or Bertrand once claimed the land, is immaterial. The confirmation is an incipient United States title, conferred on Cousin, which our government, in its political capacity, reserved to itself the power to locate by survey, and to grant by the acts of its executive officers; with which acts the courts of justice have no jurisdiction to interfere. 16 How. 403, 414.

It rested with the Register and Receiver to ascertain the location of the land confirmed to Cousin, from the evidences of claim recorded and filed with the Register; and having decided where and how the land should be located and surveyed, the courts of justice cannot reverse that decision; the power of revision is vested in the Commissioner of the General Land Office.

It is proper here to say, we do not hold that the certificate of 1820 was void, because it was too vague to authorize a survey of the land. It established the fact that Cousin's claim was one of those described in the Act of 1819, which had been confirmed. The Act of 1822 was remedial; its main object was to confer power on the Register and Receiver to amend vague descriptions; so vague that patents could not issue on them, as required by the Act of 1819.

The amendment was effectually made in this instance by the order of survey of 1826; and, when the survey was executed according to that order, the United States Government 210*] *was bound by it until it was set aside at the General Land Office.

The Act of March 3, 1831, authorized a surveyor-general to be appointed for the State of Louisiana, whose duty it was to cause confirmed claims to be surveyed; and the Registers and Receivers were again empowered (sec. 6) to decide in cases of contested boundaries, and consequently to control the surveys. On the 22d of December, 1846, the official survey (accompanied by a plat) of the claim of Francis Cousin, was approved at the Surveyor-General's office. This is known as Vanzandt's survey, and is the one relied on by Cousin in his defense. A copy thereof, duly certified as a record of the Surveyor-General's office, is found in the record; and which copy the Act of 1831 (sec. 5) declares shall be admitted as evidence in the courts of Justice.

The Act of 1831 (sec. 6) further declares (as respects interfering claims) "that the decisions of the Register and Receiver, and the surveys and patents that may be issued in conformity thereto, shall not in anywise be considered as precluding a legal investigation and decision by the proper judicial tribunals between the parties to any such interfering claims, but shall only operate as a relinquishment on the part of the United States of all title to the land in question." The foregoing reservation applies here; Cousin's survey extended in depth, from Bayou Liberté, so as to include 222.80 acres of land, which had been purchased of the United States by Francis Alpuente, and on the 4th of March, 1844 (before Cousin's survey was made), duly conveyed to the plaintiff, Blanc, as part of the succession of Alpuente.

Title to this land is claimed by Cousin by force of his confirmation, rendered certain by his survey of 1846; and which claim was rejected by the Supreme Court of Louisiana, when they rejected Cousin's title as set up.

We are of opinion that Cousin's title had no standing in a court of justice until the land was surveyed, and the survey approved as a proper one at the Surveyor-General's office; and that therefore the United States could lawfully sell the land, and give title to Alpuente. 8 How. 306. The mere loose order of survey, made in 1826, by the Register and Receiver, cannot be recognized in this case as conferring any vested interest, as against Alpuente, to the 222.80 acres purchased by him; and to this extent the decision of the Supreme Court of Louisiana is proper. But as respects all other parts of Cousin's survey, it furnishes prima facia evidence of title in him, subject to be contested by the opposing title of Blanc, if he has any by prescription or otherwise.

*We order that the judgment be re- [*211 versed and the cause remanded to the Supreme Court of Louisiana, to be farther proceeded in.

ISAAC HARTSHORN and Daniel Hayward, Plffs. in Er.,
v.
HORACE H. DAY.

(See S. C. 19 How. 211-224.)

Patents—agreements which transfer—failure of consideration of sealed instrument, in action at law, not a defense, as between parties and privies to the deed, when it has been partly executed.

An agreement by the patentee to assign to another a renewed patent as soon as it was obtained, vests in such other equitably the entire interest in the patent during such extended term.

A second agreement made, to place his patent so that it may inure to the benefit of such other and his licensees, and appointing an agent of the latter a trustee and attorney irrevocable to hold said patent, so that no one shall have a license without said trustee's consent, reserving the right to use it in his personal business, transferred the patentee's entire interest and ownership to such other and his licensees.

A personal stipulation in the agreement to pay

NOTE.—Patents. Assignment before issuing and re-issuing patent; when assignment transfers extended term—See note to Gayler v. Wilder, 13 L. ed. U. S. 504.

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the patentee an annuity, not being a condition to the vesting of the interest in the patent in the assignee, the omission to pay the annuity did not give the patentee a right to rescind the contract, or remit to him his interest as patentee.

In a court of law, in an action on a sealed instrument, failure of consideration cannot be shown as between parties and privies to the deed for the purpose of avoiding it, especially where there has been a part execution.

(Mr. Justice Curtis having been of counsel, did not sit in this cause.)

Argued Dec. 24, 1856. Decided Jan. 27, 1857.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

This action was brought in the Circuit Court of the United States for the District of Rhode Island, by the defendant in error, against Isaac Hartshorn and Daniel Hayward, to recover damages for the infringement of a certain patent granted to one Chaffee, which had been assigned by him to the plaintiff.

The defendants pleaded the general issue, and also four special pleas. They also gave notice of several defenses under the plea of general issue. The plaintiff demurred to the four special pleas, and the demurrer was sustained by the court.

The questions at issue were very fully investigated on the trial below, the trial occupying a period of six weeks. It resulted in a verdict and judgment in behalf of the plaintiff for $4,000 damages, with costs.

The defendants then brought the case here on a writ of error.

The record of the case covers over 1,000 printed pages. It would be difficult to give here any adequate idea of its contents, and no attempt is made to do so, as the case sufficiently appears in the opinion of the court.

Messrs. James T. Brady, Chas. O'Conor and Samuel Ames, for plaintiffs in error:

1. The agreement of May 23, 1850, was a valid executory agreement by Chaffee, to sell and convey to Goodyear the renewed patent when it should issue. Upon its issue, the equitable ownership vested in Goodyear.

(a) Such a future possibility may be effectually assigned, and when done fairly for a good consideration, is consistent with the patent laws.

5 Stat. at L. 121, secs. 11, 18; Curtis on Patents, secs. 188, 189. 200; Woodworth v. Sherman. 3 Story, 171; Wilson v. Rousseau, 4 How. 678. 680, 690, 691, 693, 694, 702.

(b) Chaffee had a right to demand the payment of the $1.500 at the very time when the assignment was to be made.

Tompkins v. Elliot, 5 Wend. 498.

2. Chaffee having by the agreement of Sept. 5th, 1850, without notice to Goodyear, without his consent, and, as it would appear, against his will, made another deposition of the patent, and having thereby put it entirely out of his (Chaffee's) power to execute a formal assignment to Goodyear, and thus entitle himself to the payment of the $1,500 by Goodyear, which formed the only condition precedent to the complete investiture of Goodyear with at least the whole equitable ownership of the patent, he, Chaffee, and Day, his assignee, are precluded from availing themselves of such non-payment by Goodyear, as an objection to the use of the patented invention by Goodyear and his licensees.

Hochster v. De La Tour, 2 El. & B. 688, and cases cited.

(a) This proposition is not in any way affected by the circumstances that the agreement of September 5, 1850, recites an agreement between Chaffee and Goodyear, different from that which is contained in the instrument of May 23, 1850.

(b) Neither is the proposition above stated affected by the circumstances of Judson's connection with the agency for Goodyear and his licensee, or by Judson's defects in performing any engagement into which he entered, by the instrument of September 5, 1850.

3. The agreement between Chaffee and Judson, dated September 5, 1850, construed by itself alone or in connection with the supplement thereto, dated November 12, 1851, and whether read in the light of surrounding and attending circumstances or without such aid (6 Pet. 68), was, on the part of Chaffee, an executed contract. No further act of any kind was to be performed on his part; and as it contained no condition subsequent or any clause of cessor, nor any reservation of power to rescind for any cause, the interest vested by it in Judson and his cestuis que trust, could not be devested by Judson's omission to make prompt and punctual payments of the annuity.

Brooks v. Stolley, 3 McLean, 526; Woodworth v. Weed, 1 Blatchf. 165.

(a) The defense rested on the title claimed under an executed contract, and consequently the decisions, touching the performance of a condition precedent, required to be averred and proved in actions at common law to enforce the performance of executory contracts, have no application. But if the principle of those decisions were applied, it would not justify the rescission attempted in the case.

Cunningham v. Morrell, 10 Johns. 338; Tompkins v. Elliot, 5 Wend. 498; Philadelphia, etc., R. R. v. How. 13 How. 339.

(b) The most familiar principles of law were violated by the instruction that Chaffee had a right to rescind this transfer, in case Mr. Judson and the licensees had not lived up to the agreement, by regularly paying the installments, of Chaffee's annuities.

Boone v. Eyre, 1 H. Bl. 273, note; 5 Mees & W. 698.

4. Although it is not deemed material whether the interest acquired by Judson, under the agreements between him and Chaffee, was of an equitable or legal character, it is submitted that the whole legal title to the patent was thereby vested in Judson, subject to the license reserved to Chaffee, to use the invention in his own business.

No particular form of words being required to constitute a legal assignment of a patent, and as Judson was constituted a "trustee to hold said patent and have control of it," it seems clear that the ownership was transferred to him.

Tiernan v. Jackson, 5 Pet. 580; Rogers v. Lindsey, 13 How. 444; Hunt v. Rousmanier, 8 Wheat. 174.

5. If the grant or agreement of Sept. 5, 1850, is to be regarded as having been authenticated by the seal of Chaffee, and the actual execution

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by him, when of sound mind, full age, and with knowledge of its contents was established, neither Chaffee nor Day, the plaintiff, who was his assignee and privy in estate, could be permitted to allege or prove, in a court of common law, for the purpose of defeating such grant or agreement, or for the purpose of varying its effect, that Chaffee was induced to execute it by threats of a lawsuit or of hostility, or by false, deceitful or fraudulent representations.

(a) This proposition is consistent with those decisions, which allow a party to a deed to show that his agent, attorney or trustee by whom it was executed, or the agent of the law for that purpose, transcended or did not pursue his authority, and it is also consistent with the decisions which allow a stranger to a transaction to impeach it for fraud upon him.

Jackson v. Crafts, 18 Johns, 113; Rhodes v. Selin, 4 Wash. C. C. 721; Swayze v. Burke, 12 Pet. 23; Gregg v. Sayre, 8 Pet. 244; Rogers v. Brent, 5 Gill. 579; Krider v. Lafferty, 1 Whart. 314; 10 Johns. 229; 22 Wend. 345; 10 N. H. 365.

(b) It is also consistent with the cases which allow the consideration clause of a conveyance by deed to be contradicted, explained or varied by parol proof.

McCrea v. Purmort, 16 Wend. 473; Wilkinson v. Scott, 17 Mass. 257.

(c) It is consistent with the cases allowing a party to a contract, who had been deceived, to elect that such contract should stand, and maintain an independent action against the deceiver for fraud.

Allaire v. Whitney, 1 Hill, 486; 1 N. Y. 308; Lome v. Tucker, 4 C. & P. 15.

(d) It is well established that such evidence is not admissible for such a purpose in a court of common law.

Legh v. Legh, Bos. & P. 447; 1 Camp. N. P. 393; Mason v. Ditchbourne, 1 Moo. & R. 460; Edwards v. Brown, 1 Tyrw. 182, 196; Van Valkenburg v. Rouk, 12 Johns. 338; Vrooman v. Phelps, 2 Johns. 179; Dorr v. Munsell, 13 Johns. 431; Parker v. Parmele, 20 Johns. 134; Franchot v. Leach, 5 Cow. 507; Stevens v. Judson, 4 Wend. 473; Dale v. Roosevelt, 9 Cow. 311; Slocum v. Despard, 8 Wend. 619; 1 N. Y. 310; Fay v. Richards, 21 Wend. 627.

6. The court below erred in admitting the evidence of Woodman and Chaffee, touching the alleged fraudulent representations, and also in submitting the allegation of fraud to the jury, notwithstanding Woodman's professed non-recollection that the instrument bore a seal when executed, and his asserted but groundless disbelief of that fact.

Deed, or not, was the only question for the jury.

Winchell v. Latham, 6 Cow. 689; Curtis v. Hall, 1 South. (N. J.), 148; Pocock v. Hendricks, 8 G. & J. 427.

The admission in the agreement of Nov. 12, 1851, was conclusive evidence that Chaffee's transfer of Sept. 5, 1850, was under seal.

Carver v. Astor, 4 Pet. 83; Crane v. Morris, 6 Pet. 609; Sprigg v. Bank, 10 Pet. 265; Denn v. Brewer, Coxe, N. J. 172; Lainson v. Tremere, 1 Ad. & E. 792; Hosier v. Searle, 2 Bos. & P. 302; Bowman v. Taylor, 2 Ad. & E. 278; 3 McLean, 526; 20 Johns. 134; Cutler v. Bower, 11 Ad. & E., N. S. 985.

7. Independently of the positions assumed in the preceding fifth and sixth points, the court erred in submitting it to the jury, to find that the instrument of Sept. 5, 1850, was obtained by fraud, because there was no legal evidence in the case to support that allegation.

The party alleging the fraud admitted on his examination that he was not misled or deceived. It was immaterial whether Judson's representations were true or not.

Story's Eq. sec. 203.

Eighth point. The third and fourth pleas were good.

Ninth point. The judgment on the demurrer to the third and fourth pleas, should be reversed, and the verdict set aside.

Messrs. N. Richardson, T. A. Jenckes, F. P. Stanton and R. H. Gillet, for the defendant in error:

The counsel, after discussing the validity of the patent, the claim of infringement, of damages, and the rulings upon the evidence, proceeded as follows:

1. The paper of the 5th of September, 1850, supposing it to have been untainted with fraud, conveyed no interest in the extended patent to Judson, or to Goodyear and his licensees. There is no word of grant or conveyance in it. It does not purpose to give a license directly to Goodyear or his licensees. It gives Judson no power to grant licenses to anyone.

The facts disclosed by the instrument, and with reference to which it was made, are:

First. That Chaffee had procured an extension of his patent.

Second. That previous to the extension, the patent had stood in the name of Charles Goodyear, who held it for the benefit of himself and his licensees.

Third. That Goodyear for himself, and the previous licensees of the Chaffee patent under Goodyear, had agreed to be at the expense of applying for the extension, and to pay an allowance for the use of the patent, if extended.

Fourth. That Goodyear and these licensees have failed to perform this contract, and that William Judson, who had been the managing agent for Chaffee in procuring the extension, had intervened and paid individually, or become liable to pay, the expenses of procuring the extension.

Fifth. That Chaffee was liable to pay these expenses to Judson, the amount of which had been large and was then uncertain.

The object of the paper was twofold:

First. To provide means to pay Judson for his outlay and services.

Second. To provide that Goodyear and the former licensees under Goodyear, should have the benefit of the agreement recited, upon their coming in and performing the conditions required of them. With this view Chaffee appointed Judson his attorney and trustee, to hold and to have control of the patent, so that these objects might be effected. Chaffee agreed that he would not license any others than the former licensees, without Judson's consent.

This contract was entirely executory, and subject to rescission at any time for the failure to comply with its provisions.

2. The paper of Sept. 5, 1850, offered a license to no person, except those who had a

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right to use the Chaffee patent at the time of its extension.

Hartshorn had no license to use the inventions of either Goodyear or Chaffee, during the original term of the Chaffee patent. His license to use Goodyear's inventions, was given on the 1st of February, 1851.

3. The legal title of the patent remained in Chaffee, and any action at law for an infringement, must have been brought in his name before his assignment to the defendant in error.

4. The instrument bearing date Nov. 12, 1851, being between the same parties, and having relation to the same subject matter, and purporting to be made for the purpose of correcting errors and omissions in the instrument of Sept. 5, 1850, the two must be taken together as one instrument, and be so construed.

5. This instrument makes clear what was of doubtful construction in the former paper, and defines and limits the power of Judson, and the rights and interests which Goodyear and his licensees were to receive, and sets forth the conditions on which they were to receive them.

Judson is, for the first time, empowered to grant licenses as Chaffee's attorney, and Goodyear and his licensees are to have licenses through Judson, solely upon the condition of their severally contributing their share of the amount due Judson for services and expenses.

Mr. Judson was not empowered to license any others but the Goodyear licensees.

With respect to all other persons, the power to license was annexed to the legal title which remained in Chaffee. Judson was authorized to sue infringers, but he was not required to do so. If the Goodyear licensees should not comply with the condition on which they were to receive the license to use the Chaffee patent, they might be sued as infringers, and Judson could reimburse himself out of the damages, or by compromising the suit by giving them a license on the terms required. Chaffee had a right to impose this or any other condition, and he was interested in having this condition performed, as he would thereby be relieved from his debt to Judson.

6. So far as regards the rights of Chaffee, Goodyear and his licensees, and Judson, this instrument is a substitute for the provisions respecting the same subject matter in that of Sept. 5, 1850.

These parties are bound by the facts recited in it, or which are necessarily to be inferred from it.

First. That Chaffee was the owner of the extended patent, and had agreed to continue to hold it for the benefit of Judson and of Goodyear and of his licensees, on certain terms.

Second. That the Goodyear licensees had not come in under the previous instrument and paid their respective portions of the expenses in procuring the extension, and consequently Judson's debt was unpaid, and Chaffee was not discharged from it.

Third. That Judson was without power to license anyone under the previous agreement, and had not assumed such power, and that Chaffee and had retained that power, subject to Judson's approval as to other parties than the Goodyear licensees.

Fourth. That Chaffee was still willing that the Goodyear licensees should obtain a license to use his patent upon the terms of the original agreement, notwithstanding they had broken that agreement, and had neglected or refused to perform that part of it for so long a period.

Fifth. That no licensees had, in fact, been given to anyone.

7. Neither of these instruments gives Judson any interest in the patent itself, or in the profits of the patent, nor do they give him a right to use it, or to license others to use it, except upon conditions precedent, clearly and distinctly specified. Chaffee intended to give him security for the debt due him, and pointed out the fund from which the debt was to be paid, if the parties named should keep their agreement, and Judson took for his security a mere power to collect his dues out of this fund, by selling licenses or by suing for damages. The only interest which Judson took, was in the money which might be produced by licenses or by suit, and to the extent of his claim for money advanced for services and expenses.

8. This instrument of Nov. 12, 1851, was also executory, and is governed by the rules of law, applicable to contracts executory in their nature and to powers.

So far as the licenses are concerned, Chaffee was the contracting party on the one part, and Goodyear and his licensees on the other. The contract was not executed until the licensees had complied with the conditions under which they were to have a license, and Chaffee parted with nothing until such performance by them. If they neglected or refused to comply, his right of rescission was perfect.

So far as Judson was concerned, he held merely a power, from the proceeds of the execution of which he was to be paid, and to that extent the power operated as a security, and such power was revocable at any time upon payment of the amount of the debt.

Power to sell on mortgages are declared to be irrevocable in terms, but the deed and power together are canceled by payment of the mortgage debt.

A power taken for security, is revocable by the death of the grantor of the power.

Hunt v. Rousmaniere's Ex'rs, 8 Wheat. 174.

It is also revocable by the party giving it.

Mansfield v. Mansfield, 6 Conn. 559.

In this case, the principles of the former case are adopted and carried out to their legitimate conclusions.

A power is irrevocable only when there is an express stipulation that it shall be irrevocable, and when the agent has an interest in its execution. Both of these circumstances must concur.

Story on Agency, sec. 476.

The interest ceased when Judson was offered the money for all his disbursements and services. There is no stipulation in the power of Nov. 12, 1851, that it shall be irrevocable.

9. If the paper of Sept. 15, 1850, be construed to give a license directly to Goodyear and his licensees, upon their paying the expenses and annuity, then such license is revocable if the conditions be not performed.

The instrument contains no word of grant or conveyance known to the common law. There are no covenants which would create an estoppel. The Goodyear licensees obtained nothing more than a license not connected with any grant or made part of any grant.

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Such a license is revocable at common law. Thomas v. Sorrell, Vaughan, 351.

"A dispensation or license properly passeth no interest, nor alters nor transfers property in anything, but only makes an action lawful, which, without it, would have been unlawful."

Wood v. Leadbitter, 13 Mees. & W. 843.

"A license is in its nature revocable."

In this case, the whole subject of license is thoroughly examined. Licenses to use patented inventions are governed by the rules and analogies of the common law respecting licenses for the use of the subjects of the property.

Brooks v. Byam, 2 Story, 525; Curtis on Pat. sec. 198; Brooks v. Stolley, 3 McLean, 523; Woodworth v. Weed, 1 Blatchf. 165.

10. Hartshorn & Co. were not within the class of persons described in the paper of Sept. 5, 1850, nor in the class to whom Judson was authorized to give licenses, by the paper of Nov. 12, 1851.

They were not licensees under the Chaffee patent in connection with the Goodyear patent, before the extension of the Chaffee patent.

11. The question of the performance of the condition of the papers of Sept. 5, 1850, and Nov. 12, 1851, after the papers had been construed by the court, was a question of fact for the jury; and under the instructions given them in the charge, the jury have found that there was a failure on the part of Judson and of Goodyear and his licensees, to perform their part of the agreement of Sept. 5, 1850, under which their beneficial interest is alleged to have accrued; that the annuity stipulated for by the agreement of Nov. 12, 1851, had not been paid; that the Shoe Associates knew of the nonpayment; that Judson was the agent of Goodyear and his licensees in making the paper on Nov. 12, 1851, and of the Shoe Associates in all matters relating to the Chaffee patent since its extension; and that there had been an offer in good faith to repay Judson all that had been expended by himself or advanced by the Shoe Associates, on account of this extended patent.

12. Upon these facts, the revocation of the powers given to Judson, and the rescission of those contracts was proper on the part of Chaffee.

13. The title did not pass from Chaffee by the contracts of May, 23, 1850, Sept. 5, 1850, and Nov. 12, 1851, in connection with the instrument executed between Goodyear and his licensees, dated July 1st, 1848, in consideration of Judson's agreement in the paper of Sept. 5, 1850.

First. The paper of May 23, 1850, was an executory agreement between Chaffee and Goodyear. So far as the extension of the Chaffee patent was concerned the subject matter was in expectancy; no title passed from Chaffee by this paper.

Second. The paper of Sept. 5, 1850, is between different parties from those of the paper of May 23, 1850.

Its recitals show that the agreement of May 23, 1850, had been abandoned, and no title passed by this paper.

Third. The paper of Nov. 12, 1851, purports to be nothing more than a mere power, and no title passed by that.

Fourth. The paper of July, 1, 1848, is between other parties, and cannot operate upon the extension of the Chaffee patent, unless Goodyear has acquired a title to it. This he would not have done by either of the above papers, nor by anything proved in the cause.

14. One test of the right of rescission or revocation, is to inquire whether the contract is one that a court of equity would specifically enforce under the circumstances existing at the time the rescission or revocation is sought to be made.

"The rules of law relating to specific performance, and those applied to the rescission of contracts, although not identically the same, have a near affinity to each other."

Boyce's Executors v. Grundy, 3 Pet. 210, 216.

The plaintiff in error sets forth no contract under which he claims a license. He is not within the class of persons to whom Judson was authorized to grant licenses, by the paper of Nov. 12, 1851. There is nothing in the case to show that he could state a contract upon which a court of equity could have compelled Chaffee to grant him a license. He offered no evidence tending to prove that he had ever paid anything for such a license, or on account of such a license.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the judgment of the Circuit Court of the United States, holden by the District Judge, in and for the District of Rhode Island.

The action was brought by Day against the defendants below for an alleged infringement of a patent for the preparation and application of India rubber to cloths, granted to E. M. Chaffee, August 31st, 1836, and renewed for seven years from the 31st August, 1850. The plaintiff claimed to be the assignee of the patent from Chaffee. The defendants sought to protect themselves under a license derived from Charles Goodyear, whom they insisted was the owner, and not Day, of the renewed patent. Goodyear became the owner of the unexpired term of the original patent on the 28th July, 1844, and on the same day granted to certain persons, called "The Shoe Associates," the exclusive use of all his improvements in the manufacture of India rubber, patented, or to be patented, during the term of any patents or renewals which he might own, or in which he might be interested, "so far as the same are, or may be, applicable to the manufacture of boots and shoes."

The defendants claimed a license under the Shoe Associates.

Chaffee, the original patentee, made application to the Commissioner of Patents, the 22d May, 1850, for the renewal of his patent, in which he states that the then present owners were willing and desirous that it should be renewed, and in *that event that they [*218 ought to make him further compensation for the invention. And on the next day, 23d May, 1850, he entered into an agreement with Goodyear, in which he stipulated to convey to him the patent, on its renewal for the extended term, in consideration of $3,000.

There seems to have been some agreement or understanding that the then owners of the

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patent, and their licensees, should be at the expense of the renewal.

William Judson had become interested in one eighth of the patent in 1846, by an assignment from Goodyear; and in 1848 he, in conjunction with Seth P. Staples, was appointed by Goodyear his attorney and agent, in taking out, renewing, extending, and defending his patents; and a fund was provided by Goodyear for defraying the expenses of these proceedings, and placed in the hands of Judson. By the consent of Goodyear, Judson subsequently became his sole agent and trustee of the fund for the purposes mentioned.

The patent was renewed in pursuance of the application, on the 30th August, 1850. Soon after this renewal, to wit: on the 5th September, 1850, an agreement was entered into between Chaffee and Judson, which recites the renewal, and that the expenses were large, and also that at the time of the renewal the patent was held by Goodyear for the benefit of himself and his licensees; and further, that he had agreed with Chaffee, for himself and those using the patent under him, that they would be at the expense of the extension, and make an allowance to him, Chaffee, of $1,200 per annum, payable quarterly, during the period of the extension; and reciting also that Judson had had the management of the application for the renewal, and had paid, and became liable to pay, the expenses thereof, and had agreed to guarantee the payment of the annuity of $1,200; and the agreement then provided as follows: "Now, I (Chaffee) do hereby, in consideration of the premises, and to place my patent so that in case of my death, or other accident or event, it may inure to the benefit of said Charles Goodyear, and those who hold a right to the use of said patent, under and in connection with his licensees, according to the understanding of the parties interested, nominate, constitute, and appoint said William Judson my trustee and attorney, irrevocable, to hold said patent, and have the control thereof, so as no one shall have a license to use said patent or invention, or the improvements secured thereby, other than those who had a right to use the same when said patent was extended, without the written consent of said Judson first had and obtained."

At the close of the agreement, Judson stipu- 219*] lates with Chaffee *to pay all the expenses of the renewal, and also the annuity of $1,200; and also to be at all the expense of sustaining and defending the patent; and Chaffee reserves to himself the right to use the improvement in his own business.

This contract was entered into without the privity of Goodyear, and changed materially the terms and conditions of that made by him with Chaffee on the 23d May. He was at first dissatisfied with the change when it came to his notice, but afterwards acquiesced.

The contract continued in operation down to the 12th November, 1851, when a modification of the same took place.

This last contract recites that there was an omission in that of 6th September, in not stating that if the said licensees continued to use the improvements, they should pay their just proportion of the expenses and services in obtaining the renewal, which it was intended they should pay to Judson; and recites also that there was no stipulation on the part of Judson to pay Chaffee $1,500 per annum, as claimed by him; and it is then agreed that the licensees shall pay their share of the expenses to Judson, as a condition to the granting of a license by him to them; and that, on the payment of such share of the expenses, a license shall be granted to them. And it was further agreed, that Judson should pay Chaffee the $1,500 per annum; and also that Judson might use Chaffee's name in the prosecution of infringements of the patent, or for any other purpose in relation to the use of it, he holding Chaffee harmless from all costs, etc., and he, Judson, to have all the benefits to be derived from said suits.

It will be perceived that the only provision in this agreement differing from that of 6th September, in which Chaffee has any interest, is the one providing for an annuity of $1,500, instead of the $1,200. All the other provisions were for the benefit of Judson. This annuity was paid down to the 1st December, 1852, when some difficulty arose between Judson and Chaffee, and the payment ceased.

And on the 1st July thereafter, Chaffee undertook, in consequence of this default, to revoke and annul the power and control of Judson over the patent, and to forbid his acting in any way or manner under the agreements of the 6th September, and of the 12th November, above referred to. And on the same day, for the consideration of $11,000, assigned the renewed patent to Day, the plaintiff in this suit. Day, on the 2d July, 1853, gave notice to Judson of the assignment, offering to pay, at the same time, all sums there might be due him, if any there were, for moneys advanced in procuring the extension of the patent, or in any other way paid for Chaffee on *account [*220 of said patent. The above is the substance of the case, as appears from the written agreements of the parties in the record. The questions involved turn essentially upon the points:

1. As to the operation and effect to be given to the three agreements which have been referred to, and especially of that of the 6th September, 1850, between Chaffee and Judson; and,

2. The force and effect of the attempted rescindment of these agreements by Chaffee, on the 1st July, 1853, on account of the neglect or refusal of Judson to pay the annuity of $1,500.

1. It is not important to examine particularly the agreement between Goodyear and Chaffee, of 23d May, as that was in effect superseded by the one entered into with Judson, the 6th of September, to which Goodyear afterwards assented.

It is important only as leading to the latter agreement, and may therefore assist in explaining its provisions.

By this first agreement, Chaffee bound himself to assign to Goodyear the renewed patent as soon as it was obtained, for the consideration of $3,000. Goodyear became thus equitably entitled to the entire interest in the patent during the extended term, and could have invested himself with the legal title on the payment, or offer to pay the $3,000, had he not subsequently acquiesced in the modification of it with Judson. Judson was the owner, jointly with Goodyear, of one eighth of the patent. He was also the agent and attorney of Good-

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year generally, in his applications for patents, in obtaining renewals, and in the litigation growing out of the business; and was the trustee of a fund provided by Goodyear to meet the expenses. It was, doubtless, on account of this interest of Judson in the improvement, and his general authority from Goodyear in the management of his patent concerns, that led him to enter into the new arrangement with Chaffee, of the 6th September, in the absence of his principal. Goodyear might have repudiated it and insisted upon the fulfillment of the first agreement. He thought fit, however, after a full knowledge of the facts, to acquiesce; and his rights, therefore, and those claiming under him, must depend upon this second agreement.

In respect to this agreement, whether the title which passed from Chaffee, in the renewed patent to Judson, was legal or equitable, the court is of opinion that the entire interest and ownership in the same passed to him for the benefit of Goodyear, and those holding rights and licenses under him. The instrument is very inartificially drawn, but the intent and 221*] *object of it cannot be mistaken. Chaffee, in consideration of the premises, which included the annuity of $1,200, "and (in his own language) to place my (his) patent so that in case of death, or other accident or event, it (the patent) may inure to the benefit of said Charles Goodyear, and those who hold a right to the use of said patent, under and in connection with his licensees," etc., nominates and appoints, "said William Judson, my trustee and attorney irrevocable, to hold said patent, and have the control thereof, so that no one shall have a license, etc., other than those who had a right to use the same when said patent was extended, without the written consent of said Judson;" and at the close of the agreement, he reserves the right to use the improvement in his own business. At this time, as we have seen, Judson was the owner of one eighth of the patent, and was the general agent and attorney of Goodyear in all his patent business transactions. It is apparent that the only interest in the patent, left in Chaffee, was the right reserved for his own personal use. The annuity and indemnity against the expenses of the renewal were the compensation received by him for parting with the improvement. The contract of the 12th November has no material bearing upon this part of the case. Most of the provisions were for the benefit of Judson, in relation to the licensees under Goodyear. The only provision important to Chaffee, is the stipulation for the increased annuity of $1,500.

2. Then, as to the attempted rescindment of the contracts. The agreement of 6th September had been in force from its date down to the 1st July, 1853, a period of two years and nearly ten months. During all this time, the licensees of Goodyear, at the date of the renewal of the patent, and those whom Judson may have granted a license to since the renewal, had a right to use the improvement, and especially the Shoe Associates, referred to in their agreement with Goodyear, 1st July, 1848. Besides this stipulation with Goodyear, their right was expressly recognized by Chaffee himself, in the agreement with Judson of 6th of September.

The effect of the rescindment as claimed, and which would be necessary to enable the plaintiff to succeed in his action against the defendants, would be to break up the business of these licensees, by devesting them of their rights under this agreement—rights acquired under it from all parties connected with or concerned in the patent, and especially from Chaffee, the patentee, who placed it in the hands of Judson, for the benefit of Goodyear and those holding under him. The effect would also be to deprive Goodyear or Judson, or whichever of them had paid the expenses of obtaining the renewal, of the *equivalent for those ex-[*222 penses, except as they might have a personal remedy against Chaffee. To the extent above stated, the agreement of the 6th September was already executed, and, in respect to parties concerned, the abrogation would work the most serious consequences.

As we have already said, the ground upon which the right to put an end to the agreement is the refusal to pay the annuity of $1,500 after December, 1852. Judson proposed to Chaffee to resume the payment in June, 1853, which was declined; but we attach no importance to this fact, especially as we are in a court of law. But, in looking into the agreements of the 6th of September, and also the one of the 12th of November, the court is of opinion that the payment of the annuity was not a condition to the vesting of the interest in the patent in Judson, and of course that the omission or refusal to pay did not give to Chaffee a right to rescind the contract, nor have the effect to remit him to his interest as patentee. The right to the annuity rested in covenant, under the agreement of the 12th of November. One of the objects of that agreement was to obtain from Judson this covenant. From the terms and intent of the agreement, the remedy for the breach could rest only upon the personal obligation of Judson, as, by the previous one of the 6th of September, the interest in the patent had passed to Goodyear and his licensees, and no default or act of Judson could affect them. Chaffee chose to be satisfied with the covenant of Judson, without stipulation or condition as it respected the other parties, and he must be content with it.

The cases of Brooks v. Stolly, 3 McLean, 526, and Woodworth v. Weed, 1 Blatchf. 165, have no application to this case.

The attempt to rescind the contracts, being thus wholly inoperative and void, in the opinion of the court, of course no interest in the patent passed to Day, under the assignment of the 1st July, 1853.

Evidence was given on the trial in the court below, for the purpose of proving that the agreement of the 6th of September was procured from Chaffee by the fraudulent representations of Judson, which was objected to, but admitted.

The general rule is, that in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed; and more especially where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the States where the two systems of juris-

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223*] prudence prevail, of *equity and the common law, a court of law refuses to open the question of fraud in the consideration or in the transaction out of which the consideration arises in, a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed.

Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practised upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence.

2 Johns. 177; 13 Johns. 430; 5 Cow. 506; 4 Wend. 471; 6 Munf. 358; 2 Rand. 426; 10 S. & R. 25; 14 S. & R. 208; 1 Ala. 100; 7 Mo. 424; 4 Dev. & Bat. 436; C. & H. Notes, part 2, p. 612, Note 306, ed. Gould & Banks, 1850.

It is said that fraud vitiates all contracts, and even records, which is doubtless true in a general sense. But it must be reached in some regular and authoritative mode, and this may depend upon the forum in which it is presented and also upon the parties to the litigation. A record of judgment may be avoided for fraud, but not between the parties or privies in a court of law.

The case in hand illustrates the impropriety and injustice of admitting evidence of fraud to defeat agreements of the character in question in a court of law. We have a record before us of 1,055 closely printed pages of evidence submitted to the jury, and a trial of the duration of some six weeks. Goodyear and his licensees had acquired vested and valuable rights under the agreements in this patent, and who were in no way privy to, or connected with, the alleged fraud, nor parties to this suit; and yet it is assumed, and without the assumption the fraud would be immaterial, that the effect of avoiding the agreements would abrogate these rights. They had been in the enjoyment of them for nearly three years, and may have invested large amounts of capital in the confidence of their validity. They were derived from Chaffee himself, the patentee of the improvement. A court of equity, on an application by him to set aside the agreements on the ground of fraud, would have required that these third parties in interest should have been made parties to the suit, and would have protected their rights, or secured them against loss, if it interfered at all, upon the commonest principles of equity jurisprudence.

224*] *Some slight evidence was given in the court below, upon the question whether the agreement of the 6th of September was sealed at the time of the execution. But the instrument produced was sealed, and is recited in the subsequent agreement of the 12th November, as an agreement signed and sealed by the parties.

A question was also made, as to the authority of the Shoe Associates to grant a license to the defendants. But they held under Goodyear the right to the exclusive use of the improvement for the manufacture of boots and shoes. They were competent, therefore, to confer the right upon the defendants. Besides, the point is not material in the view the court have taken of the case, as upon that view no interest in the patent vested in the plaintiff under the assignment from Chaffee.

It will be seen, by a reference to the bill of exceptions, that upon our conclusions in respect to several points raised in the case, the rulings in the court below were erroneous, and consequently the judgment must be reversed, and a venire de novo awarded.

THE NEW YORK AND VIRGINIA STEAMSHIP COMPANY, Owners of the Steamer Roanoke, Appt.,

v.

EZRA CALDERWOOD, Thomas C. Bartlett, Dexter Carleton, Joshua Norwood, Philander Carleton, Enos Cooper, and Seth Cooper, Libelants.

(See S. C. 19 How. 241-246.)

Collision—steamer on meeting schooner bound to take measures to avoid her—what will not excuse steamer if collision occurs.

Neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned and furnished and conducted with caution, will excuse the steamer for coming in collision with the barge or sailing vessel, where the barge or sailing vessel is at anchor, or sailing in a thoroughfare out of the usual track of the steam vessel.

Where a steamer had notice that a schooner was before her and near her track, she is bound to take efficient measures to avoid the schooner.

The absence of a licensed pilot on the schooner, and that she did not show an efficient light, are not, in this case, omissions which are indications of negligence.

But no inference is to be drawn from this case that another vessel will be excused, under other circumstances, for omissions of the same description.

Argued Jan. 9, 1857. Decided Jan. 27, 1857.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court for damages to a schooner occasioned by a collision with the steamship Roanoke.

The District Court decreed in favor of the libelants. On appeal to the Circuit Court, this decree was affirmed.

The case further appears in the opinion of the court.

Messrs. Edgar S. Van Winkle, H. E. Davis and —— Webb, for appellants:

The schooner was negligent; she was proceeding up a narrow river in the night time, without a pilot on board—without a light in her binnacle, and without a light displayed in any part of her hull or rigging. The steamer

NOTE.—Collision. Rights of steam and sailing vessels with reference to each other, and in passing and meeting—see notes, 13 L. ed. U. S. 537; 41 L. ed. U. S. 1053.

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was moving as slowly as she could by steam, had three lights displayed, which were visible for miles; had a competent lookout. and at the approach of the danger in the emergency, ported her helm. If the light first seen on her larboard bow was that of the schooner, she still did all she could do by hugging the easterly side of the channel, so as to pass the schooner on the larboard hand.

Trinity House Rule of Oct. 30, 1840.

2. It is the duty of a sailing vessel in a river or roadstead to carry a light at night, conspicuously displayed in her rigging. Neglect of this duty precludes a recovery, except for willful damage.

The Rose, 2 Wm. Rob. 4; The Columbine, 2 Wm. Rob. 33.

3. If the schooner was not to blame, or not so much so as to render her liable, then it was a case of inevitable accident, and the loss must remain where it fell.

Stainback v. Rae, 14 How. (55 U. S.), 532.

4. The schooner's navigators had no right to persist in their course, when they knew or ought to have known by so doing they incurred the imminent danger of forcing the steamer ashore, in her endeavors to pass to the leeward. It comes within the exceptions laid down in St. John v. Paine, 10 How. 582.

Mr. E. C. Benedict, for appellees:

1. The plan of the position of the vessels at the time of the collision. asserted by the defendants, and proved by them to be a fair plan of the place of collision, exhibits the schooner close in shore in a deep bay, heading along shore, and the steamer far out of the channel —also close in shore, heading at the schooner —a position so surprising as to put the steamer on her defense, with the strongest presumption against her—the wind being about south, and the schooner close hauled on the privileged tack. They do not produce a lookout.

2. Their helmsman, Henson, is called to explain, and he says, "it was a kind of cloudy night; once in a while you would see the stars; it was not very thick or cloudy." This is corroborated by all our witnesses, and is true, although the captain and pilot swear it was pitch dark; could hardly see the width of this room. He says, also, "the steamer was running N. W. 1-2 W., pretty much down the channel, rather more on the east, if anything." "There was ample room to have gone clear of her." Under these circumstances they would never come together.

They, however, came together, the steamer having changed her course before the collision, towards the east shore. "The pilot told me to keep her a little more to the east. He told me to port the helm, to give her more room. The next words he said were, 'hard a-port.'

Before we (steamer) changed our course, she was heading about down the channel. After we changed, she was heading towards the east shore.

The steamer struck the schooner and cut her half in two.

3. The schooner was close hauled, jam on the wind, her starboard tacks aboard, and continued so; and as soon as we saw the steamer's approach, we held up forward a good signal light, and we were as close in shore as possible."

4. By the settled law of navigation, the steamer is always held to have a free wind. She has so in fact, being moved by a force within herself, and under her control. She makes the wind blow as she pleases, and she is therefore bound to avoid a sailing vessel. At this time she had also the outside atmospheric wind free, and the schooner was close hauled on the wind on her starboard tack. On all grounds she had the right to hold her course, and the steamer was bound to avoid her.

5. The alleged declarations of the captain are of no value. They are highly improbable, in the sense in which they are offered.

6. If the steamer had kept the channel, or taken a sheer to the westward a minute before collision, she would have passed clear of us.

Mr. Justice Campbell delivered the opinion of the court:

This is a case of collision, in which the steamship Roanoke is charged with having carelessly and negligently run into and afoul of the schooner Sprightling Sea, in the Elizabeth River, Virginia, in October, 1852.

The facts disclosed by the pleadings and proofs are, that the schooner, was ascending the river between 10 and 11 o'clock P. M., and sailing at a rate of six miles per hour, with the aid of the tide. She was close hauled, on her starboard tack, at a time when she descried the steamship descending the river, on her voyage to Richmond. The collision occurred on the eastern side of the river, "out of the ship channel," "near an edge of shoals," and "within a length or two of them." The object of those who managed the schooner was to avoid all danger, by leaving as large a space as possible for the steamer, whose lights had been seen. For this purpose, they approached as nearly as possible the eastern shore—the usual shore, for vessels navigated as she was, to ascend the river. The schooner did not carry a light in her fore rigging, but one was exhibited from her breast-head, some time before and till the time of the collision; and the steamer was hailed, and told to keep off.

The night was "dark and rainy;" the steamer was not running at any time at an improper rate of speed. The officers of the steamship discovered the light on the schooner, and supposed it to belong "to a vessel at anchor;" but they say the "light disappeared, and the next time they saw it, it was near by, under the bow of the steamer." The probability is, that the officers of the steamship were mistaken in their conclusions *in reference to the course [*246 of the schooner, and under that mistaken impression went to the eastern side, and thus encountered her. No orders were given by the pilot in respect to the management of the steamer till the instant of the collision.

This court has decided that neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned and furnished, and conducted with caution, will excuse the steamer for coming in collision with the barge or sailing vessel, where the barge or sailing vessel is at anchor, or sailing in a thoroughfare, out of the usual track of the steam vessel. In the present instance, the steamer had notice that a vessel was before her, and was near her

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track, and, under the circumstances, she was bound to take efficient measures to avoid the schooner.

The only facts we notice in the management of the schooner, which have occasioned a hesitation to affirm the decree, are the absence of a licensed pilot, and that the schooner did not exhibit an efficient light. The proofs in the case do not allow us to charge these omissions as indications of negligence; but, that the case may not be misunderstood, we assert that the ruling principle of the court is, that an obligation rests upon all vessels found in the avenues of commerce to employ active diligence to avoid collisions, and that no inference can be drawn from the fact that a vessel is not condemned for an omission of certain precautionary measures in one case, that another vessel will be excused, under other circumstances, for omissions of the same description.

The decree of the Circuit Court is affirmed.

JOHN BELL, Plff. in Er.,
v.
COLUMBUS C. HEARNE, Samuel R. Hearne, and Samuel H. Dockery.

(See S. C. 19 How. 252-263.)

Patent for lands, erroneously issued to James Bell, may be canceled and a new one issued to the real purchaser, John Bell—the title vested in John Bell—sale on execution against James Bell gave no title—clerical error—this court has jurisdiction to review state judgment.

Where a patent for land was erroneously issued to James Bell, upon certificates of payment by John Bell, as purchaser, and delivered to him, he having paid the money therefor, and was never delivered to James Bell, the commissioner of the General Land Office has power to cancel such patent and issue a new one to John Bell.

The power thus exercised is the power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department.

Such patent vested the title in John Bell, and the former patent vested no title in James Bell, and title under execution sale against him was invalid.

Where the Supreme Court of Louisiana gave judgment on the ground that John Bell's title was invalid, because the older patent had been issued in favor of James Bell, held, that this court has jurisdiction to review such judgment.

Argued Jan. 13, 1857. Decided Jan. 27, 1857.

IN ERROR to the Supreme Court of the State of Louisiana.

This was a petitory action brought in the District Court of Caddo Parish, Louisiana, by the plaintiff in error, to recover a certain tract of land.

The judgment of the court was in favor of the defendants. This judgment having been affirmed on appeal by the Supreme Court of the State, the plaintiff took an appeal to this court.

A further statement of the case appears in the opinion of the court.

NOTE.—What adjudication of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note, 62 L.R.A. 513.

Messrs. S. S. Baxter and Reverdy Johnson, for plaintiff in error:

The court has jurisdiction of the case, because the judgment of the Supreme Court of Louisiana denies the validity of the patent granted to John Bell on the 22d of June, 1850, and the right of the Commissioner of the Land Office to cancel the patent tendered to John Bell in the name of James Bell.

We shall insist:

1. John Bell was the purchaser of the land from the United States, and James Bell had no right or interest in it.

The receiver's receipt and his certificate prove the purchase was made by John Bell, and vested in him all the inchoate title which could be vested by the purchase.

It was the duty of the Register to issue a certificate conforming to the Receiver's receipt.

On this receipt, no certificate of purchase could lawfully be given to any other person than John Bell or his assignee; and an assignment to be acted on by the officers of the Land Office must be executed before the Register, or a judge, or a justice of the peace; must be preserved in the Register's office until certificate granted, and must then be sent to the department. And in the certificate to the assignee, the name of the original purchaser must be inserted throughout, except in the last entry, preceding the words "shall be entitled."

See Circular to Registers of July 5, 1805; Land Laws, 2d vol. 257, 258; Land Laws May 5, 1821, 307; Land Laws May 29, 1820, 302; May 5, 1831; sec. 19, p. 446, sec. 32, pp. 451, 466.

No assignment by John Bell, the purchaser, to James Bell, exists, nor is it pretended that any ever was made. The insertion of the name of James Bell in the Register's certificate, was a mere misnomer.

The cancellation of this certificate affords stringent evidence that this was a mere error, and it is confirmed by the fact that when the patent was demanded by John Bell held the certificates, on the production of which the patent was to issue.

2. James Bell having no right or interest in this land, the attempted sale under the execution of St. John Fabre & Co. against James Bell was a nullity, and created no estate, right or interest in the supposed purchaser, Smith, or those claiming under him, and gave to him or them no right to demand a patent, either to James Bell, or to them as assignees of James Bell.

Code of Louisiana, art. 2427. "The sale of a thing belonging to another person is null. It may give rise to damages, when the buyer knew not the thing belonged to another."

Under an execution, the interest of the debtor only in the property can be sold. The right of a stranger to the record and proceeding will not pass thereby.

3. James Bell having no title or interest in this land, and the pretended purchasers under the execution not having acquired any right or interest therein, John Bell was the only person who could be recognized by the United States as entitled to a patent, and the act of making a patent in the name of James Bell was an accident, which, if uncorrected, would defeat the

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contract of sale; but which, by the practice of the Land Office and the law of the land, might be corrected as long as the patent was in the power of the Land Office; and is such erroneous patent had been delivered, it might be returned and canceled; and if the holder refuses to deliver it up to be canceled, the United States may institute proceedings to cancel it, or may authorize the party injured to institute such proceedings in the name of the United States.

See Putnam's case, and opinion of Mr. Wirt, 2 Land Laws, 27, 28; opinion of Mr. Wirt, p. 24; Master's case, pp. 32, 34; Opinion of Mr. Butler, 86, 87; Regulations May 4 and 6, 1836, pp. 92, 93; Opinion of Mr. Butler, pp. 123, 124.

For the common law doctrines, reference is made to 17 Vin. p. 78, tit. Prerogative, letter G. B. 2.

The king's grant is void in five cases; 1st, when he is misinformed; 2d, misrecital shall avoid it; 3d, if the king be deceived in a matter of fact or matter of law; 4th, want of form; 5th, when the thing granted is in the king, or comes to him in another manner than he supposes.

In Barwick's case, 5 Coke, 94, it is said: "And it is a maxim, that if the consideration which is for the benefit of the queen, be it executed or be it executory, or be it on record or not on record, be not true or be not duly performed, or if prejudiced, may accrue to the queen, by reason of the non-performance of it, the letters patent are void."

In the case of Alton Woods, 1 Coke, 51, A, it held, if the king's grant cannot take effect, according to h's intent, it is void.

2 Wm. Saund. 72 Q, note 4 to Underhill v. Devereux, where a party is granted to the prejudice of another's right, he may have a scire facias to repeal it at the king's suit, and the king is of right to permit the person prejudiced to use his name.

Dyer, 276, B; 3 Lev. 220; Sir Oliver Butler's case, 2 Vent. 344.

Bill in equity will lie, to decree a patent to be delivered up and canceled in a case of fraud, surprise, or gross irregularity in issuing it.

Atty.-Gen. v. Vernon, 1 Vern. 277, 280, 281; Sawyer, Atty-Gen. v. Vernon, 1 Vern. 370, 386, 392.

In this country, the proper proceeding is probably by bill in equity: but whether by scire facias or bill in equity is only a question of form. In either case the same results may be attained.

But the law forces no man to make a defense against conscience. A party who has wrongfully obtained a patent, may surrender it to be canceled.

Com. Dig. Vol. V. tit. Patent, letter G. p. 388.

"So if a man surrenders his patent and it be canceled and a note of it indorsed, and afterwards the surrender enrolled, it shall be vacated by it."

Dy. 167, A. R. Dy. 179, B.

In Grant v. Raymond, 6 Pet. 218, this court held that a patent for useful invention might be surrendered, and a new patent issue.

See Ch. J. Marshall's opinion, from p. 240 to 244.

In Shaw v. Cooper, 7 Pet. 292, the same doctrine was held. Both cases were before the Act of 1836.

In the case at bar, John Bell had, by his contract of purchase, the only rights which the United States could lawfully recognize and carry into patent. He applied for his patent. A patent in the name of James Bell was tendered to him. He returned it to the Land Office. According to the Regulations of the Land Office and the common law, the commissioner held the patent in the name of James Bell void, canceled it, and issued a corrected patent in conformity with the contract of sale to John Bell.

The Supreme Court of Louisiana has adjudged this canceled patent valid and superior to the corrected patent; and the inquiry is, shall this judgment be reversed.

4. The judgment of the Supreme Court of Louisiana in the case at bar, adopts the decision of that court in Lott v. Prudhomme, 3 Rob. La. 294, and applies it to this case, and carries it to the extent of declaring that the Commissioner of the Land Office has no right to cancel a patent which has passed the seal of the office; intimating the naked act of cancellation is a fraud, and holding that the jurisdiction of the government of the United States over the subject is ended when the patent is sealed, and setting up the canceled patent as superior to the corrected patent issued, to pass the title of the United States.

1st. We insist the Supreme Court of Louisiana erred in the proposition "that the question whether a patent which has issued from the Land Office of the United States may be annulled for mistake or fraud, is, so far as it concerns a citizen of Louisiana, to be solved by the laws of Louisiana."

(a) The State of Louisiana has no laws which regulate the grants of the lands of the United States, and no officers who can grant these lands. Lands of the United States are granted by the officers of the United States acting under the laws of the United States. All questions of the authority of those officers, and of the conformity of their proceedings to law, must be solved by the laws of the United States.

(b) The United States has an interest in the sale of these lands as vendor, and may incur, by the misconduct of her officers, the responsibility of the defaulting vendor. There must therefore be in her jurisdiction as a government, a power to correct the errors of her officers to her prejudice, and to the prejudice of persons contracting with her. And she is not denuded of this jurisdiction, when the question whether a patent issued to her prejudice is to be solved.

(c) In Wilcox v. Jackson, 13 Pet. 498, the court says: The question whether the property has passed is to be resolved by the laws of the United States; but fraud, laches, accident and mistake, may so defeat the intended contract of sale that the patent may be void and the title not pass by it.

Alton Woods' case, 1 Coke, 44, A. B.; Magdalen College case, 11 Coke, 72.

2d. We insist that the proposition of the Supreme Court of Louisiana, that "the moment a patent has passed the great seal, it is beyond the power of the officers of the general government," is erroneous.

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(a) This proposition seems to assume that the seal of the Land Office is analogous to the great seal of England.

In England, the King is the fountain of justice, of honor, of office and of privilege, and the great seal is the emblem of his royal authority and dignity. The powers of the court of chancery flow from the great seal (1 Str. 157), and all grants of land, held by the King in right of his crown, are to be under the great seal.

Lane's case, 2 Coke, 16.

In the Land Office of the United States, there is no seal analogous to the great seal. The public lands are not held jure coronæ, to be disposed of as matter of royal bounty, but are held in trust for the States, (Pollard v. Hagan, 3 How. 212); and are to be disposed of to purchasers by contracts of sale under the laws of the United States.

In England there are many seals.

17 Vin. pp. 67-77.

If an analogy to some of the seals in England must be found, it will best be found in the case of Atty.-Gen. v. Vernon, 1 Vern. 391.

(b) The effect of a patent sealed by the recorder, and the power of he commissioner over it, must be ascertained from our Constitution and laws.

The Constitution makes it the duty of the President to take care that the laws are faithfully executed.

The Act re-organizing the Land Office (1 L. Laws, 533), confers on the commissioner, under the direction of the President, the executive powers and duties prescribed by law and appertaining to the sale and survey of the public lands, and the issuing of all patents for grants. Section 1. Sec. 4 makes it the duty of the recorder, in pursuance of instructions from the commissioner, to affix and certify the seal of the Land Office, to attend to the correct engrossing and transmission of patents.

The act of the Recorder is a ministerial act. The system of disposing of our public lands is a system of bargain and sale. The contract is made by the purchaser from the Receiver; and all the steps subsequently taken in the Land Office are merely to insure to the purchaser a title to the land for which he has paid.

These proceedings are all to be taken under the executive discretion of the commissioner, acting under the direction of the President; and there must be such enlarged discretion as will protect the purchaser from accident or errors occurring in the office.

The purchaser standing in the relation of vendee has the right to see that the title made out for him conveys the thing purchased. He cannot be compelled to accept a patent which does not give him the land which he has bought and paid for.

See Hamilton on Public Credit, reports on finance, note 1, p. 194; Bank of U. S. v. Planters' Bank, 9 Wheat. 904.

From these relations of contracting parties, it follows that the title is consummated by the delivery and acceptance of the patent.

Bagnell v. Broderick, 13 Pet. 450.

We contend, then, that the practice of receiving back and canceling patents which fail from accident or mistake to affect the designed sale, is legal; and the act of cancellation by the commissioner in this case was a legal act.

The judgment of the Supreme Court of Louisiana, setting up the canceled patent, is erroneous and should be reversed.

Messrs. A. H. Evans, A. H. Lawrence and Miles Taylor, for the defendants in error:

1st. It will be maintained. on the part of the defendants in error, that this case does not fall within the provisions of the 25th section of the Judiciary Act.

Downes v. Scott, 4 How. 500.

2d. That if this court should entertain jurisdiction, still the judgment of the Supreme Court of Louisiana must be affirmed.

The introduction of parol testimony to prove the patent to James Bell was proper. It was not within the power or control of the defendants, but had been placed by the plaintiff himself in the hands of the government. A copy had been applied for and refused.

The existence of the patent to James Bell being established, the case then became one of simple priority of title. By the issuance and delivery of the patent, all power over it on the part of the government ceased, except through the judicial tribunals. The cancellation of it was illegal.

Hunt v. Wickliffe, 2 Pet. 201; Carroll v. Safford, 3 How. 441; Stringer v. Young, 3 Pet. 320; 13 Pet. 498; 9 Cranch, 98; 2 How. 117; Lott v. Prudhomme, 3 Rob. 295.

Nor was this a case in which a junior patent with a prior equity will prevail in ejectment over an elder patent. Here no elder equity is shown; no superior equity is shown. If there was any mistake or fraud to the injury of the plaintiff in error (of which there is not a particle of proof), still it was competent for him to have filed his bill against the patentee.

Mr. Justice Campbell delivered the opinion of the court:

This is a writ of error to the Supreme Court of Louisiana, under the 25th section of the Judiciary Act of September, 1789.

The plaintiff commenced a petitory action in the District Court of Caddo Parish, Louisiana, for a parcel of land in the possession of the defendants. He claims the land by a purchase from the United States, and exhibits their patent for it; bearing date in June, 1850, with his petition. The defendant (Hearne) appeared to the action, and answered that the United States had sold the land to James Bell, and as the property of James Bell it had been legally sold by the sheriff of Caddo, under a valid judgment and execution against him, and that a person under whom he (Hearne) derives his title was the purchaser at the sheriff's sale. A number of parties were cited in warranty, and answered to the same effect. A judgment was given for the defendants in the District and Supreme Courts; and upon the judgment in the last, the plaintiff prosecutes this writ of error.

The title of the plaintiff consists of the duplicate receipts of the Receiver of the Land Office at Natchitoches, Louisiana (No. 1270), dated in July, 1839, by which he acknowledges the receipt, from the plaintiff, of full payment for the lands described in the receipt and petition; a patent certificate, of the same date and number, from the Register of that office, certifying *the purchase of the plaintiff [*260

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and his right to a patent; and a patent issued in due form, for the said lands, in pursuance of the Act of Congress and the patent certificate.

The case of the defendants originates in these facts: The Register of the Land Office at Natchitoches, in making up his duplicate certificate of purchase, to be returned to the General Land Office, inserted the name James Bell for that of John Bell. That certificate was sent to the General Land Office, with the monthly returns of the Register, and in July, 1844, a patent was issued in the name of James Bell, and sent to the Register at Natchitoches, who retained it in his office till 1849. In 1849, John Bell sent to the office of the Register his duplicate receipts, and the patent in the name of James Bell was delivered to him. Upon a representation of the facts to the Commissioner of the General Land Office, this patent was canceled, and a new one issued to the plaintiff.

It appears, from the proof in the case, that the plaintiff had a brother, named James Bell, who was his agent for making the entry, and that the land was sold in March, 1844, as his property, by the sheriff of Caddo, as is stated in the answers of the defendants.

The Act of Congress of the 24th April, 1820, providing for the sales of the public lands of the United States, enacts, "That the purchaser at private sales shall produce to the Register of the Land Office a receipt of the Treasurer of the United States, or from the Receiver of Public Moneys of the district, for the amount of the purchase money on any tract, before he shall enter the same at the Land Office." At various times, since the passage of the Act, the modes of conducting sales at the different Land Offices of the United States have been prescribed by the commissioner, and the evidence to be afforded to the purchaser designated. The circular issued in 1831 contains the instructions under which the local officers were acting at the date of this entry. The instructions pertinent to this case are, that "when an individual applies to purchase a tract of land, he is required to file an application in writing therefor; on such application the Register indorses his certificate, showing that the land is vacant and subject to entry, which certificate the applicant carries to the Receiver, and is evidence on which the Receiver permits payment to be made, and issues his receipt therefor: the duplicate of this is handed to the purchaser as evidence of payment; and which should be surrendered when a patent, forwarded from the General Land Office is delivered to him. The other receipt is ended to the Register, who must immediately indicate the sale on his township plat, and enter the same on his tract 261*] book, and is transmitted *to the General Land Office with the monthly abstract of sales and certificates of purchase."

The certificates of purchase are made according to forms furnished by the General Land Office. One is issued to the purchaser, and another is retained, to be sent to the commissioner. They should be duplicates; and the instructions to the Register in regard to them are, "that the designation of the tract, in the certificates of purchases, is always to be in writing, not in figures. The certificates are to be filled up in a plain, legible hand, and great care is to be taken in spelling the names of the purchasers. The monthly return must always be accompanied by the Receiver's receipts and Register's certificates of purchase." From this statement of the Act of Congress and the regulations of the Land Office, it will be seen that the embarrassment in which this title is involved proceeds from an error committed by the Register at Natchitoches in making up the duplicates of his certificate of purchase—the duplicate intended for the General Land Office—and from which the monthly abstract was prepared.

The plaintiff was nowise responsible for this. He had paid his money into the Receiver's office, and obtained the receipt prescribed by the Act of Congress of 1820, before cited.

He had obtained his certificate of purchase, evincing his title to a patent certificate. At this stage of the proceeding, the Register of the Land Office, in completing his office papers, and in making up his returns for Washington City, committed a mistake, which was not detected by the officers at Natchitoches in comparing their returns (as they are ordered to do), and eluded the vigilance of the officers at Washington. It was discovered at Natchitoches, when an agent of the plaintiff applied for the patent, and surrendered his duplicate receipt and certificate.

It was then discovered that the christian name of the plaintiff had been inaccurately set out in the returns at Washington and the patent. The Supreme Court of Louisiana say: "It appears, from the evidence, that the plaintiff and his brother James Bell purchased the land in dispute from the United States on the same day—3d July, 1839—and that the patent certificates were issued in their respective names by the Register of the Land Office at Natchitoches, Louisiana, bearing the same number."

We interpret the papers from the Land Office differently from the Supreme Court. There is no evidence, in our opinion, of more than one sale—that evinced by the Receiver's receipt—and, in that receipt, John Bell, the plaintiff, is named as the purchaser. We think there was but one certificate of purchase *issued to a purchaser—that in favor of [*262 John Bell. The certificate of purchase which contains the name of James Bell is found in the General Land Office. If that was intended for a James Bell, there should have been another for John Bell. But there is only a single certificate there, and the conclusion is irresistible that the name "James" was entered by mistake for "John." We find no evidence in the record to show that James Bell held any evidence of a purchase.

Whatever appearance of a title he had, is owing to the mistake in the duplicate certificate returned to the General Land Office, and the patent issued in his name. But this patent was never delivered to him. The question then arises, had the Commissioner of the General Land Office, authority to receive from John Bell the patent erroneously issued in the name of James Bell, and to issue one in the proper name of the purchaser. And the question, in our opinion, is exceedingly clear. The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his Department, and is clothed with liberal powers of control, to be

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exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake and fraud, in the important and extensive operations of that officer for the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department. Our conclusion is, that the Supreme Court of Louisiana erred in denying the validity of this title, and in conceding any effect or operation to the certificate of purchase or patent issued in the name of James Bell, as vesting a title in a person bearing that name.

It is objected that this court has no jurisdiction over this judgment of the Supreme Court of Louisiana.

The plaintiff claimed the land described in his petition, under a purchase made from the United States, and produced muniments of title issued by their authority, and this title is pronounced to be inoperative by the District and Supreme Courts of Louisiana.

Does this appear by the record before us? The record in the Supreme Court of Louisiana purports to be a true and faithful transcript of the documents filed, orders made, proceedings had, and evidence deduced, on the trial in the District Court. The Supreme Court possesses the right and is under the obligation of examining questions of fact as well as of law, and to state the reasons of their judgment. The statement of the evidence adduced is taken as an 263*] equivalent for a statement *of the facts by the District Judge in the practice of that court. It clearly appears that the ground upon which the judgment in the Supreme Court was given, was the invalidity of the title of the plaintiff, because an older patent had been issued in favor of James Bell. We think this court has jurisdiction.

Armstrong v. Treas. of Athens Co. 16 Pet. 261; Grand Gulf R. R. and B. Co. 12 How. 165; Almonester v. Kenton, 9 H. 1.

Judgment reversed—cause remanded.

Rev'g—10 La. Ann. 515.

WILLIAM R. POST et al., Owners of the Barque Elizabeth Frith, and Nathan Howell et al., Owners of the Ship Panama, Claimants of a portion of the Cargo of the Ship Richmond, Appts.,

v.

JOHN H. JONES et al., Owners of the Ship Richmond and Cargo, Libelants.

(See S. C. 19 How. 150–162.)

Master can sell vessel in cases of absolute necessity—where sale must be—not in distant ocean where there is no market—amount of salvage, not less than a third nor more than half—when right is complete—when freight is also allowed.

A master has power to sell both vessel and cargo in cases of absolute necessity.

The exercise of this power should be closely scrutinized. The sale must be in a civilized country.

The rule has no application to wreck in distant ocean, where the property is derelict or about to become so.

The necessity of such a case is not of that character which permits the master to exercise this power.

The contrivance of an auction sale under such circumstances, where the master was helpless, where there is no market, no money, no competition, where the master must take just what is offered, has no characteristic of a valid contract.

That it was better to get what was offered, than suffer a total loss, would justify every sale to a salvor.

Where property is derelict, as a general rule the amount of salvage should not be less than one-third nor more than a half of the property saved.

The right of salvage is complete, when vessel is brought to a port of safety.

Salvors should also be allowed freight for carrying owner's moiety over twenty thousand miles to a better market, at the home port.

Argued Dec. 31, 1856. Decided Jan. 28, 1857.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel was filed by the owners of the whaling ship Richmond, against the proceeds of certain whale oil and whalebone taken from that ship, while stranded on the Asiatic coast, of Behrings Strait, by the crews of the whalers, The Elizabeth Frith, and The Panama, and brought home in those ships and sold as a part of their cargoes.

The libelants pray to have possession delivered to them of the property in question, or its proceeds, if sold, subject to "salvage and freight." The claimants set up title in themselves, under an alleged sale by the master of the wrecked ship, at the time and place of the disaster.

The District Court sustained the sale and dismissed the libel.

The Circuit Court, on appeal, reversed this decree, pronounced the sale illusory, and awarded a moiety of the proceeds to the claimants as salvage, and decreed payment of the residue to the libelants. From this decree the claimants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. Chas. O'Connor and Stevens O. Hoxie, for the appellants:

1. The decree of the Circuit Court cannot be sustained, unless, by an unbending rule which admits of no exception or qualification, the power of the master to sell is absolutely limited to a sale by auction, with the advantage of free

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NOTE.—See note to Thomas v. Osburn, supra. What is salvage. Who is salvor. Rates of salvage. See note to Stratton v. Jarvis, 8 L. ed. U. S. 846.

Power of master to sell vessel.

The master has power, by virtue of his office, to sell the ship, in cases of extreme necessity, acting in good faith and for the general benefit of all concerned. Robertson v. Clark, 1 Bing. 445; Hayman v. Molton, 5 Esp. 65; Reed v. Darvy, 10 East, 143; Somes v. Sugrue, 4 C. & P. 276; The Fanny and Elmira, Edw. Adm. 118; Allen v. Sugrue, 8 B. & C. 561; Idle v. Royal Ex. Ins. Co. 8 Taunt. 755; Read v. Bonham, 3 Brod. & Bing. 147; Green v. Royal Ex. Ins. Co. 6 Taunt. 68; Jordan v. Warren Ins. Co. 1 Story, 342; S. C. 4 Law Rep. 12; Miston v. Lord, 1 Blatchf. 354; The Amelie, 6 Wall. 18; Copequid Mar. Ins. Co. v. Barteaux, L. R. 6 P. C. 319; 32 L. T. N. S. 510; 23 W. R. 892; Stephenson v. Pis. etc. Ins. Co. 54 Me. 55; The Catherine, 1 Eng. L. & Eq. 67; Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Butler v. Murray, 30 N. Y. 88.

The proof of necessity must be clear, beyond a

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competition between rival purchasers. If in any case or under any circumstances, he may sell by private contract to a single purchaser, the decree is erroneous.

(a) The authority of the master to sell in cases of extreme necessity like the present, is as a general proposition definitely settled. Even where there is only "a probability of loss, and it is made more hazardous by every day's delay," to act promptly and thereby "to save something for the benefit of all concerned, though but little be saved," is his imperative duty.

Abb. Ship. 5 Am. ed. pp. 14, 19; Abb. Ship. note to p. 19; The Sarah Ann, 2 Sumn. 215; N. E. Ins. Co. v. The Sarah Ann, 13 Pet. 387.

(b) The master of the Richmond had no other resort for the purpose of saving anything, than the sale which he made.

Even if transportation to the shore was practicable, every witness who was examined testifies that preservation there, through the long winter then approaching, was not possible.

That freighting or salvage services were unknown in those regions and would not have been undertaken by anyone, is still more distinctly established by the proofs.

1 Seward's Works, p. 242; The Boston, 1 Sumn. 335, 336; Elizabeth and Jane, 1 Ware, 38.

The freight, even as far as the Sandwich Islands, if obtained by a miracle, would have exceeded the alleged maximum allowance in salvage cases.

A salvage service would involve a transportation over 25,000 miles for adjudication. A judgment in rem in a foreign intermediate admiralty, would not be regular or binding; nor if so, would it be beneficial to these libelants.

The Wm. Hamilton, 3 Hagg. 168.

(c) There was no want of ordinary judgment or prudence in the manner of the sale.

Notice was given to every vessel within reach; and considering the season, the little experience yet had in those seas in respect to the time of its closing, and the great danger there was that the Richmond might go to pieces in case of any delay, prudence dictated the earliest possible action.

The event is not the proper test; but if applied here, it would favor the master's decision. He could not have induced these three ships to lie idle, and to lie still in an unlucky spot until the 18th of August, waiting for customers.

The weight of evidence is, that as much was obtained as could have been gotten if there were numerous bidders.

(d) There is not the remotest ground for imputing fraud or ill motive to anyone concerned.

There was evidently a total absence of concert between the three purchasing masters, and the weight of evidence is, that The Junior got the greatest amount of bone.

The small price given for the wreck, is like what frequently happens at regular auction sales with full competition.

7 Law Rep. 378; 6 Cow. 271.

The testimony of Reeve and Cherry should be wholly rejected, as incompetent because of their interest.

The Boston, 1 Sumn. 328.

They are evidently uncandid, self-impeached in a considerable degree, and are contradicted in many particulars.

The Jane, 2 Hagg. 338; The Boston, 1 Sumn. 345.

The decree of the Circuit Court appears to borrow some of its principles from analogy to the position assumed as law, that a contract between salvors and the saved, made at sea, is necessarily and per se void. Such is not the case; and the most that can be said on that head is, that the nature of the subject gives apparently more occasion to the "Chancery of the sea" than the chancery of the land, to vacate oppressive and unreasonable contracts.

There are two obiter dicta to that effect in 1 Bee, pp. 136-139. But the English authorities, and those in the American admiralty, including this court, are merely that such agreements must appear to be fair and reasonable.

The True Blue, 2 W. Rob. 176; The Graces, 2 W. Rob. 294; The Westminster, 1 W. Rob. 235; The Industry, 3 Hagg 203, 205; The Mulgrave, 2 Hagg. 77; The Emulous, 1 Sumn. 210; Houseman v. The N. Carolina, 15 Pet. 45.

3. The libelants err in supposing that the law of nature which enforces the saving of life as a duty, has any force in relation to the saving of property.

The Boston, 1 Sumn. 335; The Zephyr, 2 Hagg. 43; The Ganges, 1 Notes of Cases, 87; The Margaret, 2 Hagg. 48, note.

4. It is not, as claimed by the libelants, a fixed and invariable rule, that salvage in cases of derelict shall not exceed one half the value; and if such appears to be the rule in all former decisions, the present is a new case in all its features, and would require a higher compensation.

(a) This moiety practice has a very barbarous origin, and is entitled to no respect. The authorities all show that it has no binding force, the allowance being merely discretionary.

The Aquila, 1 C. Rob. 41, 47, note; 1 Sumn. 214; 1 Story, 323; 1 Ware, 39; Robson v. The Huntress, 2 Wall. Jr. 70.

(b) The instances of salvage service to be found in the books, are confined to the highways of commerce and within comparatively narrow spaces.

There is no recorded judgment upon the salvage to be allowed for rescuing property from

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doubt. It must be shown not only that there was need of repairs, but also that it was impossible to procure money for that purpose. Read v. Bonham, 3 Brod. & Bing. 147; The Fanny and Elmira, Edw. Adm. 118.

This is now the settled law of England, though there was formerly great doubt of the master's power to sell the vessel under any circumstances. The rule in the United States is substantially the same as in England. Amer. Ins. Co. v. Center, 4 Wend. 45; Patapsco Ins. Co. v. Southgate, 5 Pet. 604; 3 Kent Com. 174, 175; Center v. Amer. Ins. Co. 7 Cow. 564; The Tilton, 5 Mason, 465; Gordon v. Farm. Mut. Ins. Co. 2 Pick. 249; The Sarah Ann, 2 Sumn. 206; Winn v. Col. Ins. Co. 12 Pick. 279; Fountain v. Phœnix Ins. Co. 11 Johns. 293.

Unless the necessity exist, notwithstanding the master may have acted in good faith, and in the exercise of a sound discretion, the title of the owner is not devested; neither presence at the sale of owner's agent, nor abandonment to underwriters will ratify it. The Tilton, 5 Mason, 465; 9 Pick. 466;

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shipwreck, under circumstances at all comparable with the present case.

The Martha, 3 Hagg. 434; The Elliotta, 2 Dod. 75; The Effort, 3 Hagg. 166; L'Esperance, 1 Dod. 49; Sprague v. 140 Bbls. of Flour, 2 Story, 197; Peisch v. Ware, 4 Cranch, 346; The Reliance, 2 Hagg. 90, note; The Jubilee, 3 Hagg. 43, note; The Jonge, 5 C. Rob. 322; Howland v. 210 Bbls. Oil. 7 Law Rep. 377; The Swan, 1 W. Rob. 70.

5. The power of the master to sell in a case of extreme necessity, allows him to sell as he may. In the polar regions, where it is impossible to perform the duty of agent for all concerned in the methods usually employed within the territory of trade and civilization, he may still save what can be saved, by using such means as present themselves.

Mr. Daniel Lord, for appellees:

1. The whole transaction was in its nature a salvage from a ship in hopeless distress on the high seas and near an uninhabited coast, with a master and crew dependent on the other ships, which master was willing, and had offered, to give all the cargo, in order to be taken directly home, after a three years' voyage. It therefore belong to courts of admiralty, to judge it by its own rules of humanity, policy and justice.

In all cases within the admiralty jurisdiction, the court, as the chancery of the sea, supervises all attempted contracts, where distress of a ship or her crew entered into the transaction.

To allow contracts between parties dependent for salvage service and salvors to be valid, would defeat the jurisdiction of admiralty entirely.

Cowel v. The Brothers, Bee, 136; Shutz v. The Mary, Bee 139: The Emulous, 1 Sumn. C. C. 210; The Henry Ewbank, 1 Sumn. 416; Bearse v. 340 Pigs Copper, 1 Story, 323; Laws of Oleron, ch. 4; Godolphin, art. 4; 1 Pet. Adm. App. arts. 4 and 9; The Packet, 3 Mas. 255, 260; La Isabel, 1 Dod. 273; The Augusta, 1 Dod. 283; 8 Jurist, 716; The Westminster, 1 W. Rob. 230.

2. The form of sale attempted to be made the means of devesting the property of the wrecked ship and cargo, was invalid in law; and in substance and in circumstance, fraudulent as to the owners of the property.

There was no market nor any market value at the time and place of sale, whereby the form of a sale could afford any test of actual value. There was no competition or expectation of it by those who were to attend the sale; and the whole question of adequacy of price or reasonableness of conduct, is as open as it would have been without the formality; it remains purely a question of salvage.

The Tilton, 5 Mas. 477; The Sarah Ann, 2 Sumn. 217; S. C. 13 Pet. 402.

The form of the sale was contrived, arranged and conducted, not by the master of the wrecked ship, but by his brother, the master of the saving ship, and his associates, masters of the other ships, to whom the master of the wrecked ship had offered to abandon all, for the sake of a speedy passage home.

The absence of all arrangement to protect the interest of the sellers as to quantity, security for price, means of examination of detail, and mode of selling, would have avoided this form of a sale, if made under any circumstances. The transaction remains wholly open to be adjudged as in a case of salvage.

3. The salvage awarded was liberal, and fully and generously sufficient.

There was no danger worth remunerating; none beyond any shore salvage.

The attempt to show that it was as well to fill up the ships by catching whales and trying out the oil, entirely failed and is intrinsically incredible.

The relations between the parties to the wrecked ship and cargo and the two saving ships, would have prevented and should pre-

U. S. v. The Etta, 4 Am. Law Reg. 38; The Henry, Blatchf. & H. 465; Ward v. Peck, 18 How. 267. The necessity and good faith must concur. The Henry, Blatchf. & H. 465; 4 Camp. 138; 4 Wend. 45; The Amelia, Swavey's Adm. 145; Hunter v. Parker, 7 M. & W. 322; 6 Wall. 18; The William Cary, 3 Ware, 313. It has been held that the master has authority to sell only on a foreign shore, and not in country where owner lives. Scull v. Briddle, 2 Wash. 150.

Mr. Justice Story rejected this distinction, and held that if such an urgent necessity exists as renders every delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore or on a foreign shore; whether the owner's residence be near or at a distance. The Sarah Ann, 2 Sumn. 215. This view was affirmed by the Supreme Court. New Eng. Ins. Co. v. The Sarah Ann, 13 Pet. 387.

If the voyage is broken up in the course of it, by ungovernable circumstances, the master may, in that case, even sell the ship or cargo, provided he act in good faith, for the good of all concerned, and in a case of supreme necessity, which sweeps all ordinary rules before it. Cannon v. Meabern, 1 Bing. 243; Fanny & Elmira. Edw. Adm. 117; Read v. Bonham, 3 Brod. & Bing. 147; Scull v. Briddle, 2 Wash. 150; The Tilton, 5 Mason, 476; Hayman v. Molton, 5 Esp. 65; Mills v. Fletcher, Doug. 219; Idle v. Royal Ex. Ins. Co. 8 Taunt. 755; Freeman v. East Ind. Co. 2 Barn. & Ald. 617; Robertson v. Clarke, 1 Bing. 445.

The necessity is not physical, but moral, amounting to strong and vehement exigency. It may be properly determined by considering whether, under like circumstances, a sale would have been made by a considerate owner, for his own interest, and that of all concerned. Robinson v. Com. Ins. Co. 3 Sumn. 220; Pope v. Nickerson, 3 Story, 465; S. C. 7 Law Rep. 471; see, also, Amer. Ins. Co. v. Ogden, 15 Wend. 532; The Lord Cochrane, 8 Jur. 716.

When nothing better can be done for the owner, or those concerned in the venture. The Amelie, 6 Wall. 18; Fitz v. The Amelie, 2 Cliff. 440; Chambers v. Grantzon, 7 Bosw. 414; Chambers v. Anderton, 2 B. & C. 693; when vessel is total wreck—last case and Ireland v. Thompson, 4 C. B. 149. If the expense of repairs would exceed the value of the vessel when repaired—Gordon v. Mass. F. & M. Ins. Co. 2 Pick. 249.

There must be a moral necessity. The captain is an agent from necessity, and his conduct will be closely scanned. Hariman v. The Will, 4 Pa. L. J. Rep. 350.

If the master can consult the owner within a reasonable time, he is bound to do so. The Amelie, 6 Wall. 18; Gates v. Thompson, 57 Me. 442; N. Eng. Ins. Co. v. The Sarah Ann, 13 Pet. 387; Pierce v. Ocean Ins. Co. 18 Pick. 83.

So the sale by the master of such parts of the vessel as belong to part owners who were not, but might have been notified by telegraph in season to act in the premises before the sale, is void. Miller v. Thompson, 60 Me. 322; see Pike v. Balch, 38 Me. 302.

In the sale of a stranded vessel by the master, there is no implied warranty of his right to sell, if the purchaser has every opportunity of examining her and ascertaining whether she is in such a state as to give the master authority to sell her as a wreck. Page v. Cowasjee Eduljee, L. R. 1 P. C. 127.

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vent the latter from stripping the former, whether by a pretended sale or on a real claim of salvage.

The appellate court will not disturb an adjudication of salvage, unless largely erroneous.

The Sybil, 4 Wheat. 98; Hobart v. Drogan, 10 Pet. 108.

Mr. Justice Grier delivered the opinion of the court:

The libelants, owners of the ship Richmond and cargo, filed the libel in this case for an adjustment of salvage.

They allege that the ship Richmond left the port of Cold Springs, Long Island, on a whaling voyage to the North and South Pacific Ocean, in July, 1846; that on the 2d of August, 1849, in successful prosecution of her voyage, and having nearly a full cargo, she was run upon some rocks on the coast of Behring's Straits, about a half mile from shore; that while so disabled, the whaling ships Elizabeth Frith and The Panama, being in the same neighborhood, and about to return home, but not having full cargoes, each took on board some seven or eight hundred barrels of oil, and a large quantity of whalebone from the Richmond; that these vessels have arrived in the port of Sag Harbor, and their owners are proceeding to sell said oil, etc., without adjusting or demanding salvage, unjustly setting up a pretended sale of The Richmond and her cargo to them by her master.

The libelants pray to have possession delivered to them of the oil, etc., or its proceeds, if sold, subject to "salvage and freight."

The claimants, who are owners of the ships Frith and Panama, allege, in their answer, that The Richmond was wholly and irrevocably wrecked; that her officers and crew had abandoned her, and gone on a barren and uninhab-
157*] ited shore near by; that *there were no inhabitants or persons on that part of the globe from whom any relief could be obtained, or who would accept her cargo, or take charge thereof, for a salvage compensation; that the cargo of The Richmond, though valuable in a good market, was of little or no value where she lay; that the season during which it was practicable to remain was nigh its close; that the entire destruction of both vessel and cargo was inevitable, and the loss of the lives of the crew almost certain; that, under these circumstances, the master of The Richmond concluded to sell the vessel at auction, and so much of her cargo as was desired by the persons present, which was done on the following day, with the assent of the whole ship's company.

Respondents aver that this sale was a fair, honest and valid sale of the property, made from necessity, in good faith, and for the best interests of all concerned, and that they are the rightful and bona fide owners of the portions of the cargo respectively purchased by them.

The District Court decreed in favor of claimants; on appeal to the Circuit Court, this decree was reversed; the sale was pronounced void, and the respondents treated as salvors only, and permitted to retain a moiety of the proceeds of the property as salvage.

The claimants have appealed to this court, and the questions proposed for our consideration are, 1st, whether, under the peculiar circumstances of this case, the sale should be treated as conferring a valid title; and if not, 2d, whether the salvage allowed was sufficient.

1. In the examination of the first question, we shall not inquire whether there is any truth in the allegation that the master of The Richmond was in such a state of bodily and mental infirmity as to render him incapable of acting or whether he was governed wholly by the undue influence and suggestions of his brother, the master of The Frith. For the decision of this point, it will not be found necessary to impute to him either weakness of intellect or want of good faith.

It cannot be doubted that a master has power to sell both vessel and cargo in certain cases of absolute necessity. This, though now the received doctrine of the modern English and American cases, has not been universally received as a principle of maritime law. The Consulado del Mare (art. 253) allows the master a power to sell, when a vessel becomes unseaworthy from age; while the laws of Oleron and Wisby, and the ancient French ordinances, deny such power to the master in any case. The reason given by Valin is, that such a permission, under any circumstances, would tend to encourage fraud. But, while the power is not denied, its exercise should be closely scrutinized *by the court, lest it be abused. [*158 Without pretending to enumerate or classify the multitude of cases on this subject, or to state all the possible conditions under which this necessity may exist, we may say that it is applied to cases where the vessel is disabled, stranded, or sunk; where the master has no means and can raise no funds to repair her so as to prosecute his voyage; yet, where the spes recuperandi may have a value in the market, or the boats, the anchor, or the rigging, are or may be saved, and have a value in market; where the cargo, though damaged, has a value, because it has a market, and it may be for the interest of all concerned that it be sold. All the cases assume the fact of a sale, in a civilized country, where men have money, where there is a market and competition. They have no application to wreck in a distant ocean, where the property is derelict, or about to become so, and the person who has it in his power to save the crew and salve the cargo prefers to drive a bargain with the master. The necessity in such a case may be imperative, because it is the price of safety, but it is not of that character which permits the master to exercise this power.

As many of the circumstances attending this case are peculiar and novel, it may not be improper to give a brief statement of them. The Richmond, after a ramble of three years on the Pacific, in pursuit of whales, had passed through the sea of Anadin, and was near Behring's Straits, in the Arctic Ocean, on the 2d of August, 1849. She had nearly completed her cargo, and was about to return; but, during a thick fog, she was run upon rocks, within half a mile of the shore, and in a situation from which it was impossible to extricate her. the master and crew escaped in their boats to the shore, holding communication with the vessel, without much difficulty or danger. They could probably have transported the cargo to

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the beach, but this would have been unprofitable labor, as its condition would not have been improved. Though saved from the ocean, it would not have been safe. The coast was barren; the few inhabitants, savages and thieves. This ocean is navigable for only about two months in the year; during the remainder of the year it is sealed up with ice. The winter was expected to commence within fifteen or twenty days, at farthest. The nearest port of safety and general commercial intercourse was at the Sandwich Islands, five thousand miles distant. Their only hope of escape from this inhospitable region was by means of other whaling vessels, which were known to be cruising at no great distance, and who had been in company with The Richmond, and had pursued the same course.

On the 5th of August the fog cleared off, and 159*] the ship Elizabeth *Frith was seen at a short distance. The officers of The Richmond immediately went on board, and the master informed the master of The Frith of the disaster which had befallen The Richmond. He requested him to take his crew on board, and said, "you need not whale any more; there is plenty of oil there, which you may take, and get away as soon as possible." On the following day they took on board the Frith about 300 barrels of oil from The Richmond. On the 6th, The Panama and The Junior came near; they had not quite completed their cargoes; as there was more oil in The Richmond than they could all take, it was proposed that they also should complete their cargoes in the same way. Captain Tinkham, of The Junior, proposed to take part of the crew of The Richmond, and said he would take part of the oil, "provided it was put up and sold at auction. "In pursuance of this suggestion, advertisements were posted on each of the three vessels, signed by or for the master of The Richmond. On the following day the forms of an auction sale were enacted; the master of The Frith bidding $1 per barrel for as much as he needed, and the others seventy-five cents. The ship and tackle were sold for $5; no money was paid, and no account kept or bill of sale made out. Each vessel took enough to complete her cargo of oil and bone. The transfer was effected, in a couple of days, with some trouble and labor, but little or no risk or danger, and the vessels immediately proceeded on their voyage, stopping as usual at the Sandwich Islands.

Now, it is evident, from this statement of the facts, that although The Richmond was stranded near the shore upon which her crew and even her cargo might have been saved from the dangers of the sea, they were really in no better situation as to ultimate safety than if foundered or disabled in the midst of the Pacific Ocean. The crew were glad to escape with their lives. The ship and cargo, though not actually derelict, must necessarily have been abandoned. The contrivance of an auction sale, under such circumstances, where the master of The Richmond was hopeless, helpless and passive—where there was no market, no money, no competition—where one party had absolute power and the other no choice but submission —where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract. It has been contended by the claimants that it would be a great hardship to treat this sale as a nullity, and thus compel them to assume the character of salvors, because they were not bound to save this property, especially at so great a distance from any port of safety, and in a place where they could have completed their cargo in a short time from their own *catchings, [*160 and where salvage would be no compensation for the loss of this opportunity. The force of these arguments is fully appreciated but we think they are not fully sustained by the facts of the case. Whales may have been plenty around their vessels on the 6th and 7th of August, but, judging of the future from the past, the anticipation of filling up their cargo in the few days of the season in which it would be safe to remain, was very uncertain, and barely probable. The whales were retreating toward the north pole, where they could not be pursued, and, though seen in numbers on one day, they would disappear on the next; and even when seen in greatest numbers, their capture was uncertain. By this transaction, the vessels were enabled to proceed at once on their home voyage; and the certainty of a liberal salvage allowance for the property rescued will be ample compensation for the possible chance of greater profits, by refusing their assistance in saving their neighbor's property.

It has been contended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit. See 1 Sumn. 210. The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services. We are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors.

2. As to the amount of salvage.

While we assent to the general rule stated by this court, in Hobart v. Drogan, 10 Pet. 119, that "it is against policy and public convenience to encourage appeals of this sort in matters of discretion," yet it is equally true, that where the law gives a party an appeal, he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause. Hence many cases are found where the appellate court have either increased or diminished the allowance of salvage originally made, even where it did not "violate any of the just principles which should regulate the subject." See The Thetis, 2 Knapp, 410.

*Where it is not fixed by statute, the [*161 amount of salvage must necessarily rest on an

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enlarged discretion, according to the circumstances of each case.

The case before us is properly one of derelict. In such cases, it has frequently been asserted, as a general rule, that the compensation should not be more than half nor less than a third of the property saved. But we agree with Dr. Lushington (The Florence, 20 E. L. & C. R. 622) "that the reward in derelict cases should be governed by the same principles as other salvage cases—namely: danger to property, value, risk of life, skill, labor, and the duration of the service;" and that "no valid reason can be assigned for fixing a reward for salving derelict property at a moiety or any given proportion; and that the true principle is, adequate reward, according to the circumstances of the case." See, also, The Thetis, cited above.

The peculiar circumstances of this case, which distinguish it from all others, and which would justify the most liberal allowance for salvage, is the distance from the home port, twenty-seven thousand miles; and from the Sandwich Islands, the nearest port of safety, five thousand miles. The transfer of the property from the wreck required no extraordinary exertions or hazards, nor any great delay. The greatest loss incurred was the possible chance, that before the season closed in, the salving vessels might have taken a full cargo of their own oil. But we think this uncertain and doubtful speculation will be fairly compensated by the certainty of a moiety of the salved property at the first port of safety. The libelants claim only the balance, "after deducting salvage and freight," conceding that, under the circumstances, the salvors were entitled to both. When the property was brought to a port of safety, the salvage service was complete, and the salvors should be allowed freight for carrying the owners' moiety over twenty thousand miles to a better market, at the home port. As this case has presented very unusual circumstances, and as we think the claimants have acted in good faith in making their defense, all the taxed costs should be paid out of the fund in court.

The case is, therefore, remitted to the Circuit Court, to have the amount due to each party adjusted, according to the principles stated.

The following is the order of the court:

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to have the amount due to each party adjusted, according to the principles stated in the opinion of this court, and that the costs of all parties in this and in the Circuit Court and District Courts be taxed and paid out of the net proceeds; and that the residue be divided between the claimants and the owners; subject to the deduction for freight mentioned in the opinion.

*OBADIAH H. PLATT, Plff. in Er., [*384

v.

CHAUNCEY JEROME.

(See S. C. 19 How. 384, 385.)

Attorney's lien on judgment for costs, gives him no control to prevent dismissal.

The fact, that an attorney of a party to the record has a lien on the judgment for his costs, is no objection to a dismissal of the case.

To permit the attorney to control the proceedings, would, in effect, be compelling the client to carry on a litigation at his own expense, simply for the contingent benefit of the attorney.

Argued Jan. 23, 1857. Decided Feb. 2, 1857.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

On Dec. 24, 1856, on motion of Mr. Collamer, of counsel for plaintiff in error, stating that the matter in controversy had been agreed and settled between the parties, it was ordered that this cause be dismissed, each party paying his own costs.

On Dec. 29, the stipulation of the parties was filed. On Jan. 9, Mr. Foster, of counsel for defendant in error, made a motion that the above order be vacated and restored to the calendar for argument, on the ground that the stipulation was signed by the parties only, while the defendant had an attorney of record, and that the motion was made ex parte, without notice; that the judgment below was for costs only; and that the defendant was bankrupt, and all his legal interest in the judgment had passed from him by a decree of insolvency; and that by the dismission of the said cause, the costs not being paid, the lien of the defendant's counsel in this court, and in the court below, for their costs, would be wholly lost.

Messrs. Collamer and Burrill, for plaintiff, error.

Messrs. Foster, Cutting and Staples, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a motion, on behalf of the attorney for the defendant in error, to restore the cause on the docket, which has been dismissed upon a stipulation of a settlement between the parties. The judgment was for the defendant Jerome in the court below, for costs of suit, upon which the plaintiff took out *a [*385 writ of error.

The attorney claims that he had a lien on the judgment for his costs.

It is quite clear that he can have no lien for any costs in this court, as none have been recovered against the plaintiff in error. The suit is still pending; and as to the question of the dismissal of the writ, the court looks no further than to see that the application for the dismissal is made by the competent parties, which are usually the parties to the record. No doubt if either party had assigned his interest to a third person, by which such third person had become possessed of the beneficial interest, and the party to the record merely nominal, the court

Note.—Dismissal of suit to defeat attorney's lien or claim to compensation—see note, 5 L.R.A.(N.S.) 390.

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would protect such interest, and give him the control of the suit. As in the present case, if the application had been made by the insolvent assignee to Jerome, and he had shown that he had succeeded to the interest of the insolvent, the court might protect his rights.

The attorney, however, even if he has a lien on the judgment, according to the course of proceedings in the court where it was recovered, stands in a different situation. He is not a party to the suit, nor does he stand in the place of the party in interest. He is in no way responsible for the costs of the proceedings, and to permit him to control them would, in effect, be compelling the client to carry on the litigation at his own expense, simply for the contingent benefit of the attorney.

We think, therefore, that this cause has been dismissed from the docket by the competent parties, for aught that appears before us, and that the motion to restore it should be denied.

MOSES C. MORDECAI, Isaac E. Hertz, Joseph A. Enslow and Isaac R. Mordecai, a firm doing business under the Name and Style of Mordecai & Co.,

v.

W. AND N. LINDSAY, Owners of the Schooner Mary Eddy, etc.

(See S. C. 19 How. 199-202.)

Appeal can be only from final judgment, either to circuit court or this court—amendment by inserting agreed judgment, not allowable.

It is only upon final judgments or decrees that appeals can be taken.

This rule applies as well to appeals from district to circuit courts, as to appeals to this court.

An amendment of the record by the insertion of a judgment as agreed upon by the parties, cannot be permitted here, without its first having received the judicial sanction of the District Judge.

This court cannot overlook the fact on which its jurisdiction depends, by any action in the case in the Circuit Court upon an irregular appeal.

All that this court can do is to reverse the judgment of the Circuit Court, and send the case back to the Circuit Court, that the appeal may be dismissed in it for want of its jurisdiction, that the parties may carry out the case in the District Court to a final decree.

Argued Jan. 2, 1857. Decided Feb. 2, 1857.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The libel in this case was filed in the District Court of the United States for the District of South Carolina, by the appellants, against The Mary Eddy, and all persons intervening, to recover damages for the non-delivery of certain freight.

The court decreed in favor of the libelants, with costs and referred the case to the clerk of the court, to state the account between the parties upon the evidence in the case, and any further evidence which might be brought before him on the point in question. On appeal to the Circuit Court, this decree was reversed, and the libelants brought the case here on appeal.

A further statement appears in the opinion of the court.

Mr. P. Phillips, for the appellants.

Messrs. Reverdy Johnson and Reverdy Johnson, Jr., for the appellees.

Mr. Justice Wayne delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of South Carolina.

Upon the hearing of this cause in this court, it was suggested that the court had no jurisdiction of the case, on the ground that the District Court, which had original jurisdiction of it, had not given a final decree in favor of the libelants, before the cause was taken by appeal to the Circuit Court: from the decision of which, reversing the decision of the District Judge and dismissing the libel, the appellants appealed to the Supreme Court. No such decree of the District Court is set out in the record; but the court, supposing it might be a clerical omission, gave to the counsel concerned in the cause time to ascertain the fact, in order that it might be made, either by consent of parties or by certiorari, a part of the record, that there might be no delay in the final disposition of the case by this court. The counsel having made the necessary inquiries *from the [*201 clerk of the District and Circuit Courts, and having reported to this court that no final decree had been extended or passed in favor of the libelants by the District Judge, and that the case had been taken by appeal to the Circuit Court upon such imperfect record and decided in that court, without any notice of the omission having been brought to its view, either from the record or in the argument of the case, the counsel have applied to this court to permit them to amend the record by consent, by inserting in it what might be agreed upon by them to be a final decree; urging, as the merits of the case between the parties had been fully discussed here, that the court could proceed upon such amendment to decide the case.

We have examined the proposal of counsel in connection with the laws of Congress regulating appeals from the District Court to the Circuit Court, and from the latter to this court, and also the decisions of this court upon those laws, and we do not find, upon any interpretation which has been or could in our view be given to them, that it is in our power to grant the application of counsel for the amendment of the record as they propose it should be done.

The right of appeal is "conferred, defined, and regulated," by the 2d section of the Act of March 2, 1803 (ch. 20, 1 Stat. at Large, 244). Its language is: "That from all final judgments or decrees in any of the district courts of the United States, an appeal, where

NOTE.—What is a "final decree," or judgment of state, or other court from which appeal lies. See note to Gibbons v. Ogden, 5 L. ed. U. S. 302.

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the matter in dispute, exclusive of costs, shall exceed the sum or value of $50 shall be allowed to the Circuit Court next to be holden in the district where such judgment or judgments, decree or decrees, may be rendered; and the Circuit Court or Courts are hereby authorized and required to receive, hear and determine, such appeal. And that from all final judgments or decrees rendered in any circuit court, or in any district court acting as a circuit court in cases of equity, of admiralty, and maritime jurisdiction, and of prize or no prize, and appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of $2,000, shall be allowed to the Supreme Court of the United States; and that upon such appeal a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court." It is, then, only upon final judgments and decrees that appeals can be taken from either of the courts to the other courts. Without such a decree, neither the Circuit nor the Supreme Courts can have jurisdiction to determine a cause upon its merits, as was done in this case by the Circuit Court, from which decision it has been brought by appeal to this court. The Circuit Court had nothing before 202*] it to make *its decision available for the appellants, if its view of the merits of the case had coincided with the opinion of the District Judge, or upon which its process could have been issued to carry out the judgment given by it in favor of the respondents. Nor could it have permitted an amendment of the record of appeal by the insertion of what the parties might have agreed to be a final judgment as to amount, without its having first received the judicial sanction of the District Judge. And this court is as powerless in this respect as the Circuit Court was, as its jurisdiction depends upon that court having a proper legislative jurisdiction of the case. It cannot overlook the fact upon which its jurisdiction depends, by any action in the case in the Circuit Court upon an irregular appeal. The case in that court was coram non judice, and is so here. The appellants have the right to the execution of the order given by the District Judge to the commissioner and clerk of the court to ascertain the charges to be made against the respective parties to the suit, and to state an account between them; for which purpose he was authorized to use the testimony already reported, and such further testimony as might be brought before him in relation to that point. That the Circuit Court cannot direct to be done, nor can this court do so. All that we can do in the case, as it stands here, is to reverse the decree of the Circuit Court dismissing the appellants' libel, to send the case back to the Circuit Court, that the appeal in it may be dismissed by it for want of its jurisdiction, leaving the case in its condition before the appeal to that court, that the parties may carry out the case in the District Court to a final decree, upon such a report as the commissioner and clerk may make, according to the order which was given by the judge.

The judgment of the Circuit Court is reversed accordingly.

15 L. ed.

FREDERICK SCHUCHARDT and Frederick C. Gebhard, Libts. and Appts.,

v.

WINTHROP S. BABBAGE et al., Claimants of half the Proceeds of the Ship Angelique.

(See S. C. 19 How. 239-241.)

Libel to foreclose a mortgage on vessel, cannot be upheld—proper course for mortgagee—58 U. S. 399, affirmed.

A libel to foreclose a mortgage on a ship, or to enforce payment of the mortgage out of the proceeds of the ship in court, cannot be upheld.

The case of Burchell v. Marsh, 58 U. S. (17 How.) 399, affirmed.

The proper course for the mortgagee was to have appeared as claimant to the libels which had been filed against the vessel by the material men and shippers; or, on the sale of the vessel and the proceeds brought into the registry, the mortgagee might have applied by petition claiming an interest in the fund.

Argued Jan. 8, 1857. Decided Feb. 2, 1857.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. A. Hamilton, Jr., and F. B. Cutting, for appellants:

The libel was dismissed on the ground that the sale by the marshal, and his conveyance of the ship to the purchaser, did not discharge the mortgage, and consequently the libelants had no interest in the proceeds of the sale.

See The Hendrick Hudson, 7 Monthly Law Rep. N. S. 93.

The judgment of the District Court in this respect was erroneous.

5 Monthly Law Rep. N. S. 556.

Although courts of admiralty in the United States have no power to foreclose a mortgage on a vessel by a sale, or to transfer the possession to the mortgagee, Bogart v. The S. B. John Jay, 58 U. S. ante, 17 How. 399, they may entertain an application by the mortgagees after a sale, to be paid out of the proceeds of the sale in the registry of the court.

Propeller Monticello, 58 U. S. (17 How.), 152; Adms. Rule, 43.

The District Court had power to marshal the funds in its possession. It should have ordered that the decrees of the claimants be paid out of the one half of the proceeds of The Angelique belonging to Pelletier, not covered by the mortgage.

Trident, 1 W. Rob. 35; The Constancia, 2 W. Rob. 405; The Mary Ann, 9 Juris. 95.

Mr. E. C. Benedict, for the appellee:

It was never before heard of that a party to a suit, as in this case, having let judgment go against him by default, instead of applying to have the decree opened to let him in, and instead of appealing, allowed the judgment to stand, commenced a new suit against all the other parties, and sought to wrest from them what they held by the decree of the court, and leave them to pay all the expenses which they have incurred in litigations in which they have succeeded.

The Neptune, 3 Hagg. 131; The Mary, 9 Cranch, 144.

NOTE.—Admiralty jurisdiction of contracts—see note, 66 L.R.A. 193.

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Mr. Justice Nelson, delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, sitting in admiralty.

Between sixty and seventy libels had been filed in the District Court by materialmen—men who had furnished supplies; also, by shippers of goods and passengers—against the ship Angelique, of which S. W. Jones was master. These several proceedings were commenced in July and August, 1853, and interlocutory decrees, condemning the vessel, were entered in all of them, and final decrees in some six or seven. One of the parties obtaining a final decree issued execution, and the vessel was sold and the proceeds brought into court. The vessel sold for $6,900.

In this stage of these proceedings, the present appellants filed their libel against the proceeds of the ship in court, setting forth, that, being the owners of the vessel, they sold and delivered her to one A. Pelletier, for the sum of $15,000, on the 7th May, 1853: that of this sum a promissory note of the vendee was given for $5,000, payable in six months, which was secured by a mortgage upon a moiety of the vessel to the vendors, which was duly recorded, in pursuance of the Act of Congress, on the 9th May, 1853, in the office of the Collector of Customs of the port of New York, where the vessel was then registered, and a copy of the mortgage was also filed in the office of the Register of Deeds of the City and County of New York.

The libel prayed process against a moiety of the proceeds of the vessel in court, claiming the same under, and by virtue of the mortgage.

Several of the libelants, who had obtained either final or interlocutory decrees, above re-
241*] ferred to, appeared and put in *answers to this libel of the mortgagees, setting up their proceedings, and the decrees condemning the vessel to pay their respective claims to the proceeds, in defense.

The case went to a hearing, when the District Court decreed to dismiss the libel. On an appeal, the Circuit Court affirmed the decree.

The libel filed in this case is a libel simply to foreclose a mortgage, or to enforce the payment of a mortgage, and the proceeding cannot therefore be upheld within the case of Bogart v. The John Jay, heretofore decided by this court (17 How.) 58 U. S. 399.

The proper course for the mortgagees was to have appeared as claimants to the libels filed against the vessel, in which the questions presented in the case might have been raised and considered; or, on the sale of the vessel, and the proceeds brought into the registry, they might have applied by petition; claiming an interest in the fund; and if no better right to it were shown than that under the mortgage, it would have been competent for the court to have appropriated it to the satisfaction of the claim. As the fund is in the custody of the admiralty, the application must necessarily be made to that court by any person setting up an interest in it. This application by petition is frequently entertained for proceeds in the registry, in cases where a suit in the admiralty would be wholly inadmissible.

The decree of the court below is, therefore, right, and should be affirmed.

HORATIO N. SLATER, Plaintiff in Error,

v.

CHARLES EMERSON.

(See S. C. 19 How. 224-239.)

Time, essence of contract—strict performance necessary.

E agreed with S to finish certain work in constructing a railroad by the first of December, in consideration that $4,400 should be paid in two days, and S's notes given for $10,000 on the completion of the work. S was a stock and bondholder in the road. Held, that time was the essence of the contract, and E was not entitled to recover thereon the amount of said notes, they not having been given, without showing performance on his part of the day agreed.

Argued Jan. 9, 1857. Decided Feb. 10, 1857.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This was an action of assumpsit on a special agreement, brought in the Circuit Court of the United States for the District of Massachusetts, by the defendant in error, to recover damages.

The trial in the court below resulted in a verdict and judgment in behalf of the plaintiff, for $10,199 damages, with costs.

The defendant brought the case here on a writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. S. Bartlett and S. W. Bates, for plaintiff in error:

1. The completion of the work by the time specified in the agreement, is the whole consideration for the promise of the plaintiff in error, and the non-completion within the said time, constitutes a failure of the whole consideration, and is an absolute bar to the recovery of the defendant in error.

The contract in question, construed by its terms, and in reference to the surrounding circumstances, establishes that performance by defendant in error, within the time prescribed, was understood and intended by both parties to be a condition upon which the obligation of plaintiff in error, to give the notes therein referred to, was to depend.

The rules of Williams, in Pordage v. Cole, 1 Saund. 320, and in Peeters v. Opie, 2 Saund. 352, and the early case of Boon v. Eyre, 1 H. Bl. 273, note, seem to hold with strictness that where the consideration could be divided, and the principal part of the consideration was performed, it was sufficient to make the covenants independent; but the later cases, while holding that where the covenants go only to a part of the consideration the covenants are

NOTE.—Time, when of the essence of the contract. The time fixed for the performance of a contract is, at law, deemed of the essence of the contract, and if the vendor is not ready and able to perform on that day, the purchaser may elect to consider the contract at an end, although a court in equity will, in certain cases, carry the agreement into execution even when the time appointed has elapsed. 1 Wheat. Selw. 137; 4 Taunt. 334; 2

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independent, nevertheless, so interpret the whole consideration as to establish the above rule.

Where the consideration consists of the performance of more than one act, all of which are important, then the performance of all the said acts by the one contractor is a condition precedent to his right to recover of the other contractor. The true ground of legal demand is, that the party claiming has done all which on his part was to be performed by the terms of the contract to entitle him to enforce the obligation of the other party; it is not sufficient that he has given to the party contracted with a right of action against him.

Duke of St. Albans v. Shore, 1 H. Bl. 278; Gregory v. Mack, 3 Hill, 380; Stark v. Parker, 2 Pick. 268; Moses v. Stevens, 2 Pick. 332; Olmstead v. Beal, 19 Pick. 528; Smith v. Gugerty, 4 Barb. 615; Smith v. Scott's Ridge School Dist. 20 Conn. 313; Phillips v. Rose, 8 Johns. 393; Linningdale v. Livingston, 10 Johns. 36; Jewell v. Schroeppel, 4 Cow. 565.

The courts say: "It is abundantly settled that the plaintiffs, as they had not performed within the time stipulated in the contract, cannot recover on the covenants contained in it."

Ladue v. Seymour, 24 Wend. 61; Allen v. Cooper, 22 Me. 133; Kemp v. Humphreys, 13 Ill. 573.

The fact that part payment by contract was to be made before the time fixed for the completion of the work, does not make the agreement for the final payment independent, as it is clearly settled that one covenant may be dependent, while another is independent.

Couch v. Ingersoll, 2 Pick. 292; Knight v. N. Eng. Worsted Co. 2 Cush. 287; Kane v. Hood, 13 Pick. 281; Lord v. Belknap, 1 Cush. 284.

2. However true it is that assumpsit for a quantum valebant or quantum meruit will lie, where the terms of a special contract have not all been complied with, to recover the value of the labor and materials held and enjoyed by the defendant, yet nothing is better settled than that no action can be maintained on the contract itself, without alleging, with exactness, performance in entire accordance with the terms of the contract, including that in relation to time of performance.

Smith, Leading Cases, 5th Am. ed. note to Cutter and Powell, Vol. II., pp. 49, 50; Bank of Columbia v. Hagner, 1 Pet. 455; Washington etc., Packet Co. v. Sickles, 10 How. 419; Marshall v. Jones, 11 Me. 56; Jewett v. Weston, 11 Me. 340; Wadleigh v. Sutton, 6 N. H. 15; Britton v. Turner, 6 N. H. 483; Dyer v. Jones, 8 Ver. 206; Gilman v. Hall, 11 Ver. 513; Taft v. Montague, 14 Mass. 282; Hayward v. Leonard, 7 Pick. 181; Snow v. Inhabitants of Ware, 13 Met. 43; Londregon v. Crowley, 12 Conn. 558; Smith v. Scott's R. School Dist. 20 Conn. 312; Smith v. Gugerty, 4 Barb. 615; Pullman v. Corning, 14 Barb. 175; Phillips v. Rose, 8 Johns. 392; Alexander v. Hoffman, 5 Watts & S. 382; Porter v. Beltzhoover, 2 Harr. Del. 484; Baldwin v. Lessner, 8 Ga. 71; Brown v. Gouss, 10 Mo. 265; Fowler v. Austin, 1 How. (Miss.) 156; Morrison v. Ives, 4 Sm. & Mar. 652; Thomas v. Ellis, 4 Ala. 108; Hawkins v. Gilbert, 19 Ala. 55; Simpson v. McDonald, 2 Ark. 371; Newman v. McGregor, 5 Ohio, 349; Taylor v. Beck, 13 Ill. 376; Eldridge v. Rowe, 2 Gilm. 91; Lomax v. Bailey, 7 Blackf. 599; Morford v. Mastin, 6 Monroe, 609.

Here the question is upon the construction of a contract collateral to another between other parties, which may be called the principal contract, and the entire direct fruits of performance are to be enjoyed by one of those other parties.

The extrinsic evidence shows, that at the time of making the contract in question, another negotiation was, with the knowledge of all parties, pending between one of the parties to the principal contract and a third party, of great pecuniary importance, the consummation of which was entirely dependent on the ability of one of the parties to open its road at a fixed time. That fixed time was the precise period prescribed for the completion of the work by the contract in question.

The terms of agreement by defendant in error are, "that he will complete all the bridge work to be done by him for the Boston and

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Sch. & L. 347, 684; Bank of Columbia v. Hagner, 1 Pet. 455; Dumond v. Sharts, 2 Paige, 182; Getchell v. Jewett, 4 Greenl. 350; Runnels v. Jackson, 1 How. (Miss.) 358; Wells v. Wells, 3 Ired. 596.

Equity will not interpose to relieve a party in default, where it appears that the sale was conditional upon the prompt fulfillment of any of the terms, as where, in case of failure, vendor might declare contract void. Stinson v. Donsman, 20 How. 461.

Time is never important unless made so by the very terms of the contract, or from the very nature of the property about which the contract is made. Fletcher v. Wilson, 1 S. & M. Ch. 376.

Where time has not been made of the essence of the contract, relief will, in equity, be decreed to a party if he comes in a reasonable time, although he has not complied with the strict terms, provided a material change of circumstances has not taken place by the delay. 8 Cranch, 471; 9 Cranch, 456, 493, 494; Brashier v. Gratz, 6 Wheat. 528; 7 Ves. 265; 13 Ves. 73, 225, 289; 1 You. & C. 415; Taylor v. Longworth, 14 Pet. 172, Affg. S. C. 1 McLean, 395; Hepburn v. Auld, 5 Cranch, 262.

Time, held to be of the essence of the contract; in a contract relative to partition of real estate; fixing time for payment for certain improvements. Hollingsworth v. Fry, 4 Dall. 345.

Time of payment is part of contract. Where no time is expressed, the money is payable immediately. Thompson v. Ketchum, 8 Johns. 189 Bailey v. Clay, 4 Rand. 346.

Time for payment may be rendered immaterial by consent or acquiescence of the parties. Campbell v. Worthington, 6 Vt. 448.

In an executory contract, if no time is fixed for doing some stipulated act, it is to be done within a reasonable time. Roberts v. Beatty, 2 Pa. 63; Hartman v. M'Alister, 1 Mur. 207; Butler v. O'Hear, 1 Desaus. 382.

What is a reasonable time is a question of law when the contract is silent. Atwood v. Clark, 2 Greenl. 249.

When goods are to be delivered within a certain time, and at a certain place, they must all be delivered within the time and at the place; part delivered within the time and part after, is not sufficient. Davenport v. Wheeler, 7 Cow. 231.

When a person agreed to make and deliver goods at a specified time and place, and delivered them after the expiration of the time, it is sufficient, if the other party agree to a postponement, or accept the articles, or knowing of the delivery, do not dissent. Flagg v. Dryden, 7 Pick. 52.

If the day named in a contract for delivery fall upon Sunday, the day of delivery, by analogy to the usage in other commercial cases, is Saturday. Kilgour v. Miles, 6 Gill & Johns. 268.

Time is not generally of the essence of a contract, but where it appears to be really material to the parties, the right to specific performance may depend on it. Garnett v. Macon, 2 Brock. 185; S. C. 6 Call. 308.

Time is of the essence of a contract where the

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New York Central Railroad, ready for laying down the iron rails for one track on the first day of December next."

The agreement on the part of the plaintiff in error is, "that in consideration of the premises he will pay within two days from the date hereof the sum of $4,400 in cash, and that he will give said Emerson on the completion of the bridges, and when the rails for one track are laid to the foot of Summer Street, his five notes for $2,000 each, payable in six months, said notes, when paid, to be applied toward the indebtedness of said railroad company to said Emerson."

1. The agreement on the part of plaintiff is "in consideration of the premises," and technically these are apt words to create a condition.

Thorpe v. Thorpe, 1 Ld. Raym. 665; Acherley v. Vernon, Willes, 157.

It falls clearly within the technical rule. "When a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can lie.

Bean v. Atwater, 4 Conn. 9; Pordage v. Cole, 1 Saund. 320; Dey v. Dox, 9 Wend. 129.

Nor does the fact that payment of part of the consideration (viz.: the $4,400) was to be made before performance, affect the question whether the agreement for the final payment was dependent or independent. The old case of Terry v. Duntze, 2 H. Bl. 389, from which the opposite doctrine was derived, was unfounded in reason, and has been declared not to be law here and in England.

Cunningham v. Morrell, 10 Johns. 203; Tompkins v. Elliott, 5 Wend. 496; Grant v. Johnson, 5 N. Y. 247; Johnson v. Reed, 9 Mass. 78; Lord v. Belknap, 1 Cush. 279; Watchman v. Crook, 5 G. & J. 254; Bean v. Atwater, 4 Conn. 4; Kettle v. Harvey, 21 Vt. 301; McLure v. Rush, 9 Dana, 64.

It would seem to be the settled rule, both here and in England, that if plaintiff has not performed the work in exact accordance with the contract, and there has been no waiver, he cannot recover on the contract, but must recover, if at all, on the common counts for his labor and materials.

2. Greenl. Ev. secs. 104, 136; Chapel v. Hicks, 2 Cromp. & M. 214; Read v. Rann, 10 B. & C. 440; Alexander v. Gardner, 1 Bing. N. C. 671; Chanter v. Leese, 4 M. & W. 295, 311; Jewell v. Schroeppel, 4 Cow. 564; Ladue v. Seymour, 24 Wend. 62; Britton v. Turner, 6 N. H. 481.

Unless, therefore, time of performance might, in a declaration on the contract, be wholly omitted, this case falls within the rule, and plaintiff would be remitted to his common counts; that it could not be so omitted, plaintiff in error refers to Phillips v. Rose, 8 John. 393; Jewell v. Schroeppel, 4 Cow. 565; Smith v. Gugerty, 4 Barb. 615; Ladue v. Seymour, 24 Wend. 61; Gregory v. Mack, 3 Hill, 380; Watchman v. Crook, 5 G. & J. 254; Farnham v. Ross, 2 Hall, 167.

As to the right of defendant in error to recover on common counts, no discussion is necessary. The ruling excepted to, declares the agreements to be independent, and that recovery may be, and it was in fact, had upon the counts on the special contract.

3. But besides and beyond the artificial rules above adverted to, and under which it is submitted plaintiff in error is safe, there are others founded on the plainest principles of equity and justice.

Of these the principal ones are:

1st. Where non-performance by plaintiff deprives the defendant not of part, but of the entire consideration of the contract, the agreement of defendant shall be deemed dependent.

Pordage v. Cole, 1 Saund. 320; Duke St. Albans v. Shore, 1 H. Bl. 270; Dakin v. Williams, 11 Wend. 67; Atkinson v. Smith, 14 M. & W. 695.

2d. Where defendant, in case of plaintiff's non-performance, has no other remedy for the injury he sustains, except by declaring his agreement dependent.

Pordage v. Cole, 1 Saund. 319.

3d. Where the amount of the consideration which defendant will be absolved from paying plaintiff, if his agreement be deemed dependent, is not or may not be commensurate with the injury sustained by plaintiff; or in the language of this court, "there is no natural connection" between the two; in such case, defendant's contract shall be construed to be independent.

As to the first of the above rules, plaintiff in error submits that the failure to perform by

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vendee has purchased to sell; such a purpose is lawful. McKay v. Carrington, 1 McLean, 50.

Though time is not made material in the inception of a contract, if it becomes so by the conduct of the parties, the party in default is not entitled to demand specific execution. Jackson v. Ligon, 3 Leigh. 161.

In the sale of lands, time may be of the essence of the contract; and in the absence of just excuse for default at the day, and of any acquiescence or waiver by the other party, the court will not aid the party in default. Benedict v. Lynch, 1 Johns. Ch. 370.

Where a certain act is to be done to complete the contract itself, as giving security within a fixed time, a party will not be relieved against his failure to perform such act within the specified time. Doar v. Gibbes, 1 Bailey, ch. 371.

Time is essential, in a parol contract, for the sale of land in respect to the specific performance of it by a court of equity. Goodwin v. Lyon, 4 Porter, 297.

Time is of the essence of a contract where the subject of such contract is of such a nature as to be exposed to a daily variation in its value. Deloret v. Rothschild, 1 Sim. & Stu. 490.

Parties entering into a contract, may make time the essence of it. When it is a distinct and substantive part of it, it must be kept. Wells v. Smith, 2 Edw. 78. And it is never to be wholly disregarded. But where the same justice can be done between the parties, and neither has sustained inconvenience by the delay, and the property has not changed value, the court will not consider time essential. Longworth v. Taylor, 1 McLean, 395. In contracts for the sale of lands, time is of the essence of the contract, as well as the price paid. Criffin v. Heermance, 1 Clarke, 133; Falls v. Carpenter, 1 Dev. & Bat. 277; Rogers v. Saunders, 16 Me. 92; Page v. Hughes, 2 B. Mon. 441.

Time, when not of the essence of a contract, is no excuse for a non-performance unless it amount to anabandonment. Sarter v. Gordon, 2 Hill, Ch. 126. Considerable delay without reason will be considered an abandonment. Bellas v. Hays, 5 S. & R. 427.

See further on the subject, Avery v. Kellogg, 11 Conn. 562; Atty.-Gen. v. Purmont, 5 Paige, 620; Wells v. Smith, 7 Paige, 22; More v. Smedburgh, 8 Paige, 600; Leggett v. Edwards, Hopk. 530; Botts v. Cozine, 1 Hoff. 79; Wiswall v. McGowan, 1 Hoff. 125; Hundley v. Lyons, 5 Munf. 342; Williams v. Champion, 6 Ham. 169; Rector v. Price, 1 Miss. 373.

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defendant, although it left the fruits of his labor in the hands of the railroad with whom he contracted to do it, and who are fully bound to pay him for it, yet deprived plaintiff in error of the whole consideration for which he made the contract, viz.: the time within which performance was to take place.

It is important to note that the doctrine regards merely the question of consideration moving from plaintiff to defendant, not the consideration arising from plaintiff's altered condition in consequence of the contract. It seeks to avoid circuity of action, which would arise if plaintiff recovered the agreed sum, and defendant by cross action recovered it back.

Duke of St. Albans v. Shore, 1 H. Bl. 270; Pordage v. Cole, 1 Saund. 319; Dakin v. Williams, 11 Wend. 67; Atkinson v. Smith, 14 M. & W. 695.

Unless time was the whole consideration, moving from defendant in error to plaintiff in error, there was no consideration at all.

His relation to the railroad was merely that of an officer, a creditor and a stockholder, and it is believed that upon no known principles of law could damages be ascertained and assessed in his favor, for a deprivation of such a remote benefit, if defendant in error had failed to perform.

This last suggestion, if well founded, emphatically supports the second of the above grounds, viz.: that the only remedy plaintiff in error can have for the breach of his agreement by defendant, is to construe his covenant to give his notes, to be dependent on complete performance by defendant.

The last ground which is often relied on to show the covenants to be independent is, that there is no natural connection between the sum which is claimed to be paid defendant in error, and which plaintiff seeks to withhold, and the amount of damages which plaintiff may sustain by defendant's non-performance.

But, however this may be in other cases, in this case plaintiff in error does not hold and enjoy the benefit of defendant's labor and materials, but a third party, who has contracted with defendant to pay for them.

4. The remaining exception is to the ruling of the court, compelling plaintiff in error to prove and adjust his damages for breach of the contract by way of offset, recoupment, or reduction of damages of defendant in error in this action, and thus depriving him of his election to bring a cross action.

Plaintiff in error has been able to find no case in which the doctrine is established that it is compulsory on a defendant to come prepared with his proofs of such damage, or have the damages assessed at a nominal sum, and be barred of his cross action.

The statement of counsel to Emerson should have been admitted to show that in the opinion of Emerson, the work could have been done by December 1st.

Messrs. **Rufus Choate** and **Henry C. Hutchins**, for defendant in error.

1. The first exception is as follows: "The defendant offers to prove that just prior to the signature of the contract, both parties being present, the counsel for the plaintiff told him, that unless he was sure that he could complete the bridges by December first, he ought not to sign the contract, and could not recover if he did not complete them by December first. But the court refused to admit the same"—to which refusal the defendant excepted.

Such testimony was clearly inadmissible. The contract must speak for itself. The conversation of the parties, their understandings and expectation, and the suggestions of counsel, cannot affect or control the construction of this contract. This would be to vary or modify its terms by parol.

1 Greenl. Ev. sec. 275, p. 327; Weatherhead's Lessee v. Baskerville, 11 How. (52 U. S.), 329, 18 Curt. 647; Van Buren v. Digges, 11 How. (52 U. S.), 461; Curt. 683; Grant v. Naylor (8 U. S.) 4 Cranch, 224, 2 Curt. 84.

2. The second exception is as follows: "The defendant offers to prove that at the time the contract was drawn up, the element of time was talked over by the plaintiff and the defendant, and that the plaintiff assented that time was the essence of the contract; but the court refused to admit the same"—to which refusal the defendant excepted.

The same answer may be made to this as to the first exception; when the contract is reduced to writing, all the conversations of the parties leading up to it, are merged in it.

1 Greenl. Ev. sec. 275, p. 327.

3. The third exception is as follows: "The defendant moved the court to rule and instruct the jury, that by the true construction of said contract declared upon, the plaintiff would not be entitled to recover without showing that the work was completed, ready for laying down the rails for one track by the first day of December, 1854; but the court refused so to instruct the jury, but did instruct them, that the agreement on the part of the defendant to give the notes in said agreement mentioned, was not dependent upon the completion of said work, ready for laying down said rails for one track at the time limited by said contract"—to which ruling the defendant excepted.

It is sometimes difficult to determine whether covenants and promises are dependent or independent. Some rules of construction are laid down in the books, but after all, each case is to be governed by its own circumstances.

Phila. W. & B. R. R. Co. v. Howard, 13 How. (54 U. S.) 307, 19 Curt. 512, 521.

The courts incline to consider covenants and promises independent rather than dependent, to save forfeitures. The burthen is on him who alleges dependency.

Platt on Covenants, 35, 78, 79; Law Lib. Vol. I.

If there are no terms which import a condition, or which expressly make one promise dependent on another, they are construed to be independent, and in this contract there are no such.

Platt, Cov. Law Lib. Vol. III., pp. 32, 72, 73.

More than this, the terms import the contrary. In that part containing the promise, the condition of time is wholly omitted; thus indicating an intention not to make it dependent on time, but on work done.

The failure to perform on the day does not go to the whole consideration, and there is no

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natural connection between the amount to be paid for the work done after the day, and the injury or loss inflicted by a failure to perform on the day.

Platt, Cov. Vol. III., Law Lib. pp. 40-90, 94; Phila. W. & B. R. R. Co. v. Howard, 13 How. (54 U. S.), 307, 19 Curt. 522.

The forfeiture of the amount to be paid for the whole work, in consequence if its not being completed by the day, would be unreasonable in this case. By construing the promises as independent, the plaintiff can recover his exact damages, if any, or have them recouped. Thus the rights of both parties are secured.

Platt, Cov. Vol. III., Law Lib. pp. 40-90.

The defendant in error completed the bridges. The plaintiff in error has the benefit of his labor: the objection is, that it was not done at the day, for which, however, the plaintiff in error claimed no damages. It would be manifestly inequitable for the plaintiff in error to receive the benefit of this labor without paying for it. The objection taken is technical, and ought not to be sustained unless the language is clear and the rule of law imperative.

Phila. W. & B. R. R. Co. v. Howard. 13 How. (54 U. S.), 307. 19 Curt. 512-521; Van Buren v. Digges, 11 How. (52 U. S.), 461, 18 Curt. 683.

The promise of the plaintiff in error was not dependent upon the completion of the bridge work by December 1st, because the notes were not to be given upon the completion of the bridges. Something more was to be done, to wit: the laying of the rails by another party. How can the promise of the plaintiff in error be said to be dependent upon the completion of his work by December 1st, when the completion of the work at that time would not then entitle the defendant in error to his notes?

When the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other.

Goldsborough v. Orr, 8 Wheat. (21 U. S.), 217.

Taking this decision as a guide, these promises must be construed as independent; for the promise of the defendant in error was to complete the bridges by Dec. 1, whereas the promise of the plaintiff in error was not to give the notes at that time, but when the rails were laid.

The plaintiff in error promised to pay the defendant in error $4,400 in cash within two days from the date of the contract, and to give his notes upon the completion of the bridges and laying the rails. So far as this cash payment is concerned, the promise is clearly independent, as it necessarily preceded the completion of the work. If the construction contended for by the plaintiff in error be adopted, the same promise will be construed both as dependent and independent.

Platt. Cov. Law Lib. Vol. III., pp. 43, 96.

4. The fourth exception is as follows: "The defendant further requested the court to rule and instruct the jury, that if the plaintiff failed to complete said work ready for laying down the iron rails for one track by the said first day of December, there was thereby a failure of the consideration of said contract, and the plaintiff would not be entitled to recover the amount claimed by him or any part thereof; but the court refused so to instruct the jury"—to which refusal the defendant excepted.

Very clearly these instructions ought not to have been given. The consideration of the plaintiff in error's promise to pay the money and to give the notes, was the promise of the defendant in error to do the work, and not merely his promise to do it by Dec. 1. He having completed the work to their acceptance, there was clearly not a total failure of consideration.

5. The last exception is as follows: "His Honor, the Judge, having first called upon the defendant to offer evidence if he saw fit, of any actual damage by him sustained by the non-performance of said work within the time limited by said contract, and the defendant declining to offer any such evidence, and admitting that no such actual damage was claimed by him in this suit, the court thereupon instructed the jury to deduct from any sum they might find for the plaintiff the sum of $1, as nominal damages for the non-performance of plaintiff"—to which direction the defendant excepted.

It is difficult to discover what there is objectionable in this direction. Undoubtedly the plaintiff in error was entitled to have deducted in this suit any damage which he could show that he had sustained from the non-performance of the work within the time limited by the contract, and if the court had refused to admit testimony of such damage, he might well have excepted; but he expressly waived all claim to damage in this suit. In the absence of any proof or claim by him, the court directed the deduction of nominal damages. What more or different could the plaintiff in error require?

Winder v. Caldwell, 14 How. (55 U. S.), 434, 20 Curt. 272.

Mr. Justice **McLean** delivered the opinion of the court:

This case is before us on a writ of error to the Circuit Court of Massachusetts.

The action was brought by Emerson against Slater, on an agreement made the 14th day of November, 1854, in which Emerson, "in consideration of the agreement of said Slater, *hereinafter contained, and of one dol- [*234 lar to him paid, covenants and agrees, with said Slater, that he will complete all the bridge work to be done by him for the Boston and New York Central Railroad Company, ready for laying down the iron rails for one track, by the 1st day of December next."

"And the said Slater, in consideration of the premises, hereby agrees, with said Emerson, that he will pay him, within two days from the date hereof, the sum of $4,400 in cash. And the said Slater further agrees, that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer Street, in Boston, from Dedham, his (said Slater's) five notes, for $2,000 each, dated when said notes were given, as above provided, and payable in six months from their date, to the said Emerson or his order. Said notes, when paid, are to be applied toward the indebtedness of said Boston and New York Central Railroad Company to said Emerson; it being understood that this agreement is in no way to affect any contract of said Emerson with said Company, or any action now pending."

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The execution of this agreement was admitted, and that the work upon the bridges, in said agreement set forth, was completed, ready for laying down the iron rails for one track, about the middle of December, 1854, and that the rails were laid to the foot of Summer Street, in Boston, from Dedham, about the last of the same month.

It was proved that the defendant was President of the Boston and New York Central Railroad Company, and a stockholder and bondholder in the same. The Corporation failed on or about the 2d of July, 1854. The Company was then indebted to the plaintiff, and did not pay him. In the second week of July, there was a crisis in the affairs of the Company, and Emerson suspended his work, so far as regarded new outlays. In August a new arrangement was made, and he went on till the first or second week in November, and then he kept a force on the great bridges sufficient to retain possession of the work, and would not surrender it; the witness (Willis) then made an effort to get the bridges completed. The question was, how much Emerson would take. The Company owed him some $10,000 to $15,000, and was then insolvent as respected meeting its engagements.

The defendant then introduced an agreement between the Boston and New York Central Railroad Company, a Corporation, and Charles Emerson, of Boston, in which Emerson agreed to build and complete, sufficient for the passage of an engine over the same, on or before 235*] the first day of May next, *all the bridging as now laid out and determined upon by the engineer of said railroad, from the wharf near the foot of Summer Street, in Boston, and from South Boston across the South Bay, so called, to the Dorchester shore, in Dorchester, in the manner and with the materials hereinafter described, and to finally complete the same to the satisfaction of the State Commissioner and the engineers of said railroad, as soon after the first day of May next as may be. Several other bridges were required to be built on the road, Emerson furnishing all the materials, excepting the iron rails, chains, and spikes, which were to be furnished by the Railroad Company. This contract was dated the 23d of December, 1853, and signed by the parties.

A receipt, dated November 15th, 1854, signed by Emerson, acknowledged the payment of $4,400, by Slater, on the contract first above stated.

E. B. Ammidown, a witness, stated he was a director on the railroad, and that in November, 1854, there were negotiations pending for a contract for a through route from Boston to New York, between the Boston and New York Central Railroad Company and the Norwich and Worcester Railroad Company, and the Steamboat Company plying between Norwich and New York. The contract then existing between said Steamboat Company and Norwich and Worcester Railroad Company with the Boston and Worcester Railroad Company would expire about December 1st, 1854. It was necessary that said Steamboat and Norwich and Worcester Railroad Companies should make a new contract. They preferred to contract with us instead of the Boston and Worcester Railroad Company, provided our road could be ready to run by December 1st, 1854. The only part of our road as to which there was any doubt of its completion, was the bridges, which the plaintiff was making. The whole matter was talked over in the presence of the plaintiff. We regarded it as of very great importance. I considered the loss of that contract equal to a quarter of a million of dollars, and the plaintiff said half a million. Committees from Norwich and Worcester Railroad and Steamboat Companies came on, to make the arrangement, and went over part of the road. Whether this was before or after the contract, the witness cannot say, but he has little doubt that it was before.

J. C. Hurd, a witness, and who was also a director, and as a committee, about the 14th of August, 1854, made a parol contract with Emerson to pay him $17,000, and secure to him $6,000 of Farnum, with indorsements. A larger sum than $17,000, he thinks, was paid at the time of the contract. *Emerson agreed [*236 to go on and finish the work, but he declined to sign a written agreement.

On the above evidence the defendant moved the court to rule and instruct the jury, that by the true construction of said contract declared on, the plaintiff would not be entitled to recover without showing that the work was completed, ready for laying down the iron rails for one track by the first day of December, 1854; but the court refused so to instruct the jury, and did instruct them that the agreement on the part of the defendant to give the notes in said agreement mentioned was not dependent on the completion of said work, ready for laying down said rails for one track, at the time limited by said contract. To which ruling and refusal the defendant excepted.

And the defendant further requested the court to rule and instruct the jury, that if the plaintiff failed to complete said work, ready for laying down said iron rails for one track, by the said first day of December, there was thereby a failure of the consideration of said contract, and the plaintiff would not be entitled to recover the amount claimed by him, or any part thereof; but the court refused so to instruct the jury. To which refusal the defendant excepted.

The judge having first called upon the defendant to offer evidence, if he saw fit, of any actual damage by him sustained by the non-performance of said work within the time limited by said contract; and the defendant declining to offer any such evidence, and admitting that no such damages were claimed by him in the suit, the court thereupon instructed the jury to deduct, from any sum they might find for the plaintiff, the sum of one dollar—as nominal damage for the said non-performance of plaintiff. To which the defendant excepted.

The jury found for the plaintiff $10,199.

The declaration contains four counts. The first one alleges the work was completed by the 1st of December, 1854; the second, on the 20th of December; third, the same time; the fourth, the same as the second, with an allegation that the defendant waived the time fixed for the work to be completed to the 20th of December.

This contract cannot be satisfactorily understood or construed without reference to the cir-

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cumstances under which it was made. From the evidence, it appears that the work to be completed by the 1st of December was provided for by a previous contract, dated 17th of December, 1851, in which the details and prices of the work were especially stated to be so constructed as to admit of an engine to run over 237*] it on or before *the 1st of May ensuing, and the whole to be completed as soon after that period as practicable.

The Company, it seems, had become embarrassed, and were unable to make payment for the work as it progressed; still the contractor, Emerson, was unwilling to give up the contract, and retained a few hands in his employ on different parts of the work, so as to retain the possession of it.

Another fact to be noticed as important was, that if the road could be completed by the 1st of December, the Company had an assurance that a contract could be made with the Steamboat Company plying between Norwich and New York, making a continuous line between Boston and New York. This was considered an object of great importance—equal, as was supposed by a witness, to a quarter of a million of dollars, and, as the plaintiff supposed, to half a million.

The defendant was President of the Boston and New York Central Railroad—a stockholder and a bondholder in the same; but it does not appear that he had any authority to bind the Company, as he entered into the contract in his individual capacity.

Under these circumstances, the contract on which the action is prosecuted was made. It will be at once perceived there was a strong motive to have the work completed by the 1st of December ensuing, by all who had an interest in the Central Railroad. The sum to be paid by Slater was not in addition to the price stipulated in the former contract, but in discharge of so much of that contract.

All these facts being admitted or undisputed, we will consider the language of the contract. It states "that the said Emerson, in consideration of the agreement of said Slater, hereinafter contained, and of $1 to him paid, the receipt whereof is acknowledged, covenants and agrees with said Slater, that he, the said Emerson, will complete all the bridge work to be done by him for the Boston and Central Railroad Company, ready for laying down the iron rails for one track, by the 1st day of December next."

There is no ambiguity in this language. No one can misconstrue it. The work specified was to be completed by the 1st day of December. And the said Slater, "in consideration of the premises," that is, the completion of the work, "hereby agrees with said Emerson, that he will pay him, within two days from the date hereof, the sum of $4,400 in cash; and the said Slater further agrees that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the front of Summer Street, in Boston, from Ded- 238*] ham, his (said Slater's) five *notes for $2,000 each, dated when said notes are given, as above provided, and payable in six months."

The notes were to be given on the completion of the bridges, and when the rails for one track are laid to the front of Summer Street, in Boston; and from this it is argued that the covenants in the agreement are independent. Much is found in the opinions of courts and elementary writers in regard to dependent and independent covenants. And it is said, "where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other." This, as a general rule, is correct, but it is subject to the intention of the parties, as signified in the language of the contract. The great rule is to ascertain the intent of the parties from the language used.

The work was to be done by the 1st day of December; and Slater agreed to give his notes, payable in six months after the work was completed; the time of giving the notes, therefore, is referable to the time fixed for the completion of the work. In no just or legal sense can this language be held to enlarge the time limited in the contract.

It is said by some writers, that it is impossible to make time of the essence of the contract where damages may compensate for the delay. But this is not correct as a general proposition. And a more fit illustration of this can scarcely be found than the contract under consideration. The amount of compensation for the work is not increased or diminished by the new contract. The first contract stands in all its force, unaffected by the second, except that the payments made under the second shall be applied as a credit on the first. The obligation assumed by Emerson in the new contract was, to finish the work, as stated, by the 1st of December, in consideration that $4,400 should be paid to him in two days, and notes given for $10,000 on the completion of the work. Slater, having no other interest in the work than any other stockholder and bondholder of similar amounts, paid the $4,400, and agreed to give his individual notes for the $10,000. In this contract he stands in the relation of a surety, and can only be held responsible under his agreement.

That time was an essential part of this contract, is clear from the circumstances under which it was made, and the intent of the parties, as expressed. The continuous line to New York was the strong motive to Slater, and that could be secured only by the completion of the work on or before the 1st of December.

The defendant prayed the court to instruct the jury that the *plaintiff could not re- [*239 cover without showing the work was completed, ready for laying down the iron rails for one track, by the 1st day of December, 1854, which the court refused to do. In this, we think, there was error. On a contract where time does not constitute its essence, there can be no recovery at law on the agreement, where the performance was not within the time limited. A subsequent performance and acceptance by the defendant will authorize a recovery on a quantum meruit.

It is difficult to perceive any satisfactory mode by which the defendant in the Circuit Court could recoup his damages for the failure of the plaintiff to perform in that action, or by bringing another suit. As a stock and bondholder, his damages would be remote and contingent. To ascertain the general damage of

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the Company by the failure, and distribute that amount among the members of the Company in proportion of their interests, would seem to be the proper mode; and this would be complicated, and not suited to the action of a jury.

The judgment of the Circuit Court is reversed, with costs.

MARIA A. FLETCHER HIPP et al., Heirs of James Fletcher, Compts. and Appts.,

v.

CELINE BABIN, Widow of Ursin Joly, et al.

(See S. C. 19 How. 271-279.)

Equity has no jurisdiction if the remedy at law is plain and adequate—bill to recover land.

Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.

So held of a bill which is in substance and effect an ejectment bill, being a bill by heirs to establish their title, and recover land.

Argued Feb. 3, 1857. Decided Feb. 17, 1857.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The bill in this case was filed in the Circuit Court of the United States for the Eastern District of Louisiana, by the appellants, to recover certain lands with rents and profits.

The court below having dismissed the bill for want of jurisdiction, the complainants took an appeal to this court.

A further statement appears in the opinion of the court.

Messrs. J. M. Smiley and F. Perin, for appellants:

No objection is raised in this case by the defendants to the jurisdiction, neither in the pleadings nor upon the argument. It was not raised in the Circuit Court, and we are assured by the opposing counsel that it will not be in this.

In the case of U. S. v. Sturges, et al. 1 Paine C. C. 525, it was objected at the hearing for the first time (not by the court, but by the party) "that there was a want of equity apparent on the face of the bill in two particulars, etc."

The court observes:

"There are several answers to be given to these objections. If, admitting the charges or facts stated in the bill to be true, there is no foundation in equity for the relief prayed. It was a proper cause for a demurrer, and the objection comes now with less weight than it would at an earlier stage of the proceedings."

See p. 531.

The case of Pierepont v. Fowle, 2 W. & M. 24, we conceive to be quite as far from establishing the doctrine upon which this bill was dismissed. After a thorough examination of a great many authorities on the point, the Judge says (p. 35):

"But the correct rule probably is, that a respondent may and usually should demur, if it appears on the face of the bill that nothing is sought which might not be had at law.

There are many distinct and separate grounds of chancery jurisdiction in the record. Although no ground for the interference of a court of chancery is shown by the bill, yet, if it appear in the supplemental bill, replication, answer, or any subsequent proceeding, the jurisdiction will be maintained.

Craft v. Bullard, 1 Sm. & Mar. Ch. 373; Lafayette Ins. Co. v. French, 59 U. S. (18 How.) 404.

Among the undoubted grounds of jurisdiction presented by the record, are:

First. To avoid a multiplicity of suits. It appears in the original bill that five persons and others were sued in the State Court in 1824. On filing the record from that court, it was shown that five separate suits at law were brought for the land included in the bill. The fact is admitted in the plea, and also in the answer of the defendants, by setting out the subdivisions of the lands, and the parcels held by them respectively.

This is one of the exceptions in the case of Welby v. Duke of Rutland, 2 Bro. P. C. 39, to the general rule that chancery will not entertain suits upon legal titles merely.

The remedy, then, as it appears by this view of the case, not being as full and complete at law, the court would entertain jurisdiction on the rule established in Boyce's Ex'r v. Grundy, 3 Pet. 215; 9 Wheat. 842; 4 Wash. 202, 205.

Second. Another class of cases in which chancery will lend its aid for relief, is in matters of trust.

Thus: "If a man intrudes upon the estate of an infant, and takes the profits thereof, he will be treated as a guardian, and held responsible therefor to the infant in a suit in equity."

2 Sto. Eq. sec. 1356; 2 Sto. Eq. sec. 511; 1 Madd. Ch. 91; Carmichael v. Hunter, 4 How. (Miss.) 315; Nelson v. Allen, 1 Yerg. 360; 8 Beav. 159.

Third. For discovery.

The discovery by defendants of their titles, the particular portions of the plantation claimed by them, and the time their possession and liability for rents and profits commenced, was material to complainants in making out their case.

Fourth. For partition.

"The necessity for the discovery of the titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial process of courts of equity, and their ability to clear away all intermediate obstructions against complete justice," are grounds upon which "these courts have assumed a general concurrrent jurisdiction with courts of law, in all cases of partition. So that it is not now deemed necessary to state in the bill any ground of equitable interference."

1 Sto. Eq. sec. 658.

Fifth. The remedy at law is not plain, adequate and complete.

The record shows that there are five sets of defendants, each claiming separate and distinct subdivisions of the plantations in controversy. At law, complainants would have to commence by five distinct petitory actions against the five sets of defendants. In such

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cases, courts of equity may decree a sale, or pecuniary compensation for owelty or equality of partition, which a court of law is not at liberty to do.

1 Sto. Eq. secs. 654, 656, 657.

The long and difficult accounts to be taken on one side for rents and profits, and for the value of improvements on the other, make the case more suitable for a master in chancery than a jury.

Catharine Hipp was the owner of one undivided fourth of the lands in controversy; that portion she could and did sell to Daniel Clark. Not having complied with the formalities required by law, she could not and did not sell the other three fourths belonging to the defendants.

C. C. 2427; 12 Rob. 552; Fletcher v. Cavelier, 4 La. 267.

Clark never was in actual possession of any part of the land, and could only be in the constructive possession of the one fourth conveyed by Mrs. Hipp; and he could only convey the one fourth that belonged to him.

C. C. art. 2427.

There is, therefore, no question of legal title properly in controversy in this suit. The defendants having illegally taken possession of the whole estate, while complainants were infants, and received the rents and profits for a series of years, the whole scope of the bill is substantially a bill for partition and account between tenants in common.

"This court has been called upon to consider the 16th section of the Judiciary Act of 1789. It is not plain that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

Boyce's Ex'r v. Grundy, 3 Pet. 215.

In Louisiana the distinction between courts of law and equity is unknown. All remedies are in fact, both in form and in substance, equitable. We look to the English chancery practice, at the date of the adoption of the Constitution, for the equity remedies of the United States courts. Otherwise the equity jurisdiction of the United States courts would be abolished in half the States of the Union.

Gordon v. Hobart, 2 Sumn. 401; Mayer v. Foulkrod, 4 Wash. 354; Fletcher v. Morey, 2 Story, 567; Hawkshaw v. Parkins, 2 Swanst. 546.

Courts of equity refuse to decide upon legal titles, and all cases when there is an adequate remedy at law; because such cases are properly triable by a jury. The reason of the rule does not exist in Louisiana, for the trial by jury is not respected there, and is not allowed, except on the application of one of the parties. And it is the universal practice of the Supreme Court of the State to render final judgments, on appeal upon the law and the facts, without a venire facias de novo.

1 Hen. La. Dig. p. 95, No. 5.

Many courts of the highest respectability have held that questions of jurisdiction, founded solely on the fact that there was an adequate remedy at law, must be presented by the pleadings.

Wiswall v. Hall; 3 Paige, 313; Bank of Utica v. City of Utica, 4 Paige, 399; 2 Johns. Ch. 339; 4 Paige Ch. 77; 1 Bail. Ch. 62, 113; 1 Sm. & Mar. Ch. 5, 13.

The jurisdiction of the court in this case has been admitted during a litigation of more than ten years. No objection to it is raised by the pleadings, or on the argument in the Circuit Court, or in this court. There can be no doubt that a final decree would be binding and conclusive on all the parties.

Mr. Miles Taylor, for appellees.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellants filed their bill to recover land within the district, in the possession of the defendants, and for an account of the rents, profits and receipts, during the period of their occupancy. They allege that James Fletcher, their ancestor, died in 1804, leaving a valid will, by which he devised to his widow and three children the principal portion of his succession, and appointed the former the executrix. The property described in the bill had been sold in 1801, but the purchaser had not paid the price stipulated at this time. The testator directed, that if the purchaser should complete the purchase, the sum received should be put to interest, on good security, for the mother and children, until the children should attain the age of sixteen years, when the succession should be divided. In May, 1806, the executrix agreed with the purchaser to rescind the contract of sale, received a conveyance of his title to the heirs of Fletcher, and refunded to him the money he had paid, being near $4,000.

In June, 1806, the executrix filed her petition in the Superior Court of the Orleans Territory, being the court of general law, equity, and probate jurisdiction for the Territory, in which she declares the cancellation of the contract of sale aforesaid; and to enable her to refund the money, she had borrowed that sum from Daniel Clark; that the land was unproductive, and that she was unable to pay the debt. She prayed an order for the sale of the property, to provide for the education and maintenance of her minor children, and the discharge of her debt, and to carry the will of her husband into effect respecting the disposition of the remainder of the purchase money. The *court [*277 made the necessary order, to empower the executrix to sell and convey the lands for such price as she could obtain, and to receive the money therefor; also to appropriate the sum necessary for the payment of her debt, and to put out the remainder at interest, as required by the will.

Daniel Clark became the purchaser at private sale from the executrix, for the sum of $9,000, and received her conveyance.

The appellants impeach this sale as unauthorized and illegal, and insist upon their title under the conveyance to them.

The defendants claim by their answers as bona fide purchasers from persons deriving their title by valid conveyances in good faith from Daniel Clark, and affirm that the family of Fletcher left the United States in 1807, and enjoyed the benefit of the money paid to the executrix; that the lands have become valuable by their improvements, and that they, and the persons under whom they claim, have held the possession since 1806. The bill was dismissed by the Circuit Court, on the ground that

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the remedy at law is plain, adequate and complete, and from this decree this appeal is prosecuted.

The Supreme Court of Louisiana, in a contest between the appellants and other parties, for other lands, have decided that the executrix was not authorized to convey the shares of her minor children by private act. Fletcher v. Cavelier, 4 La. 268; S. C. 10 La. 116.

But we are relieved from the duty of applying these decisions, or inquiring into the validity of the pleas of the appellees, by the opinion we have formed concerning the jurisdiction of the court of chancery over the cause. The 16th section of the Judiciary Act of 1789, declares "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."

The bill in this cause is, in substance and legal effect, an ejectment bill. The title appears by the bill to be merely legal; the evidence to support it appears from documents accessible to either party; and no particular circumstances are stated, showing the necessity of the courts interfering either for preventing suits or other vexation, or for preventing an injustice, irremediable at law. In Welby v. Duke of Rutland, 2 Bro. P. C. 39, it is stated, that the general practice of courts of equity, in not entertaining suits for establishing legal titles, is founded upon clear reasons; and the departing from that practice, where there is no necessity for so doing, would be subversive of the legal and constitutional distinctions between the different jurisdictions of law and 278*] equity; and though *the admission of a party in a suit is conclusive as to matters of fact, or may deprive him of the benefit of a privilege which, if insisted on, would exempt him from the jurisdiction of the court, yet no admission of parties can change the law or give jurisdiction to a court in a cause of which it hath no jurisdiction.

Agreeably hereto, the established and universal practice of courts of equity is to dismiss the plaintiff's bill, if it appears to be grounded on a title merely legal, and not cognizable by them, notwithstanding the defendant has answered the bill, and insisted on matter of title. In Foley v. Hill, 1 Phil. 399, Lyndhurst, Lord Chancellor, dismissed a bill upon an appeal from the Vice-Chancellor upon the same grounds. He said "it was a point of great importance to the practice of the court." The objection was not made in the pleadings nor presented in the decree of the Vice-Chancellor.

This decree was affirmed by the House of Lords. 2 H. L. cas. 28. The practice of the courts of the United States corresponds with that of the chancery of Great Britain, except where it has been changed by rule, or is modified by local circumstances or local convenience. This court has denied relief in cases in equity where the remedy at law has been plain, adequate and complete, though the question was not raised by the defendants in their pleadings, nor suggested by the counsel in their arguments. 2 Cranch, 419; 7 Cranch, 70, 89; 5 Pet. 496; 2 How. 383. In Parsons v. Bedford, 3 Pet. 433, the court insists on the necessity imposed on the Circuit Court in Louisiana, to maintain the distinction between the jurisdiction in which legal rights are to be ascertained, and that where equitable rights alone are recognized and equitable remedies administered.

And the result of the argument is, that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.

The appellants contend, that upon the pleadings and evidence, a proper case for the jurisdiction of chancery appears, and that the Circuit Court mero motu was not warranted in dismissing the bill: 1st. Because it is shown that in 1806 the children of Fletcher were minors, and they are authorized to call upon the defendants for an account as guardians. 2d. That the defendants being entitled to the estate of the executrix and widow, under her conveyance, the plaintiffs can maintain the bill for a partition. 3d. That the Court of Chancery is better *fitted to take an account for rents, [*279 profits, and improvements, and may decide the question of title as incident to the account. 4th. That a multiplicity of suits will be avoided.

There are precedents in which the right of an infant to treat a person who enters upon his estate with notice of his title, as a guardian or bailiff, and to exact an account in equity for the profits, for the whole period of his occupancy, is recognized. Blomfield v. Eyre, 8 Beav. 250; Van Epps v. Van Deusen, 4 Paige, 64. But in those cases the title must, if disputed, be established at law, or other grounds of jurisdiction must be shown. In the present case, the defendants have all entered upon the lands since the plaintiffs arrived at their majority. They are purchasers of adverse titles under which possession has been maintained for a long period. The bill does not recognize their title to any part of the land, and there has been no unity of possession; so that the bill cannot be maintained, either as a bill for an account on behalf of minors or for a partition. Adams' Eq. sec. 229; 4 Rand. Va. 74, 493.

Nor can the court retain the bill, under an impression that a court of chancery is better adapted for the adjustment of the account for rents, profits and improvements. The rule of the court is, that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause.

But when a party has a right to a possession, which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained, are those in which special grounds have been stated, to show that courts of law could not give a plain, adequate and complete remedy. No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him, or in which the complexity of the account has afforded a motive for the interposition of a court of chancery to decide the title and to adjust the account. Dormer v. Fortescue, 3 Atk. 124; Barnewell v. Barnewell, 3

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Ridgw. P. C. 24. Nor does the case show that a multiplicity of suits would be avoided, or that justice could be administered with less expense and vexation in this court than a court of law.

Decree affirmed.

THE COMMERCIAL MUTUAL MARINE INSURANCE COMPANY, Appts.,
v.
THE UNION MUTUAL INSURANCE COMPANY OF NEW YORK.

(See S. C. 19 How. 318-323.)

Parol agreement to insure, good—State of Massachusetts—time when insurance commences depends on the contract—proof of authority of president of company to make insurance—giving premium note not necessary to valid contract—promise to give is sufficient consideration for promise to insure.

An agreement by parol to make an insurance, is good.

Statute of Massachusetts, which provides that insurance corporations can make valid policies of insurance only by having them signed by the President and Secretary (Rev. Stat. ch. 37, secs. 12, 13), only directs the formal mode of signing policies, and has no application to agreements for insurance.

A promise for a valuable consideration to make a policy of insurance is no more required to be in writing than a promise to execute and deliver a bond, bill of exchange or note.

Whether the risk shall commence from a past day, depends on the terms of the contract.

Proof that the presidents of the insurance companies in a city had been accustomed to contract orally, is competent evidence to show authority to do so.

It is not essential to a binding contract to make insurance, that a premium note should have been actually signed and delivered.

The promise to give such note is a sufficient consideration for the promise to make a policy.

Argued Jan. 22, 1857. Decided Feb. 17, 1857.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

This case is stated by the court.

Messrs. R. Choate and George T. Curtis, for the appellants:

A corporation cannot be charged by an act or agreement of its officers or other agents, when it has a fixed usage in the making of the particular contract sought to be enforced, unless the contract was made in the mode prescribed by the usage.

Head v. Prov. Ins. Co. 2 Cranch, 127; Beatty v. Marine Ins. Co. 2 Johns. 109; Cape Sable Co.'s case, 3 Bland. Ch. 606; Fulton Bank v. N. Y. etc., Co. 4 Paige, 127; The State v. Com. Bank of Manchester, 6 Sm. & Mar. 237; Foster v. Essex Bank, 17 Mass. 505; Bulkley v. The Derby Fishing Co. 2 Conn. 252.

As the Statute prescribed the mode in which policies were to be executed before the Corporation can be charged upon a parol agreement to insure, the authority of some officer to bind the Company in that mode must be shown, and it is not shown by the mere fact that the officer was the President of the Corporation.

To sustain this bill, it must appear affirmatively that the President was authorized to make a parol contract of insurance that should be immediately binding, either by a vote of the directors, or by a course of business and usage sufficient to warrant the presumption that such authority had been conferred.

Authorities above cited.

Mr. C. B. Goodrich, for appellees:

An offer accepted before withdrawn, constitutes a contract.

Tayloe v. Mer. Fire Ins. Co. 9 How. 390.

Dunlop v. Higgins, 1 H. of L. Cas. 381.

The parties having concluded and agreed upon the terms, an agreement to issue a policy is implied.

Henley on Bank Laws, 3d London Ed. 291.

The proof shows an acceptance by the appellees of the offer made by the appellants. It shows the mutual understanding of the parties, that a policy would be ready for delivery as soon as the same could be prepared. The delay in its issuance was for the convenience of the appellants.

Bodle v. Chenango Mutual Ins. Co. 2 Comst. (N. Y.), 53; Neville v. Mer. & Man. Ins. Co. 17 Ohio, 192.

A contract to reinsure, and agreement to issue a policy, if the terms are admitted or established in proof, they are valid, although not in writing. Such contracts are not within the Statute of Frauds, and are not, by any statute of Massachusetts, required to be in writing.

McCulloch v. Eagle Ins. Co. 1 Pick. 278; N. E. Ins. Co. v. De Wolf, 8 Pick. 63; Thayer v. Middlesex Mut. Ins. Co. 10 Pick. 326; Sandford v. Trust. Fire Ins. Co. 11 Paige, 550; Kohne v. Ins. Co. of N. A. 1 Wash. 97; Tayloe v. Mer. Fire Ins. Co. 9 How. 390; 2 Phill. on Ins. 3d ed. sec. 1936; Graves v. Boston Mar. Ins. Co. 2 Cranch, 419; Perkins v. Wash. Ins. Co. 6 Johns. Ch. 485.

The appellees are entitled to a specific performance of the agreement of the appellants to execute and deliver a policy of reinsurance.

2 Phil. on Ins. 3d ed. 575, sec. 1936; Tayloe v. Mer. Fire Ins. Co. 9 How. 390; The Mech. Bank of Alexandria v. Seton, 1 Pet. 299; Andrews v. Essex F. & M. Ins. Co. 3 Mas. 10; Ex parte Wright, 19 Ves. 255.

They are entitled to a decree for the payment of the loss sustained.

Tayloe v. Mer. Fire Ins. Co. 9 How. 390. Opinion of the Circuit Court herein, Boston Law Rep. March, 1856.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Massachusetts, in a suit in equity, to compel the specific performance of a contract to make reinsurance on the ship Great Republic. The Circuit Court made a decree in favor of the complainants, and the respondents appealed.

It appears that the complainants, a Corporation established in New York, having made insurance of the ship Great Republic to a large amount, authorized Charles W. Storey, at Boston, to apply for and obtain from either of the Insurance Companies there, reinsurance to the extent of $10,000. Pursuant to this author-

NOTE.—Validity of oral contract of insurance—see notes, 22 L.R.A. 768; 24 L. ed. U. S. 291.

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ity, on the 24th of December, 1853, Mr. Storey made application to the President of the defend-
319*] ant *Corporation for reinsurance, at the same time presenting a paper, partly written and partly printed, as embodying the terms of the application. The paper was as follows:

"Reinsurance is wanted by the Union Mutual Insurance Company, New York, for $10,000, on the ship Great Republic, from December 24, 1853, at noon, for six months ensuing.

This policy is to be subject to such risks, valuations, and condition, including risk of premium notes, as or may be taken by the said Union Mutual Insurance Company, and payment of loss to be made at the same time. 3 per cent. Binding, —— ——, President.

New York, December 24, 1853."

The President, after consultation with one of the directors of the Company, declined to take the risk for a premium of three per cent. but offered to take it for three and a half per cent.

Mr. Storey replied, that was more than he was authorized to give, and left the office. He immediately apprised his principals, by a telegraphic dispatch, that the risk could be taken for three and a half per cent. for six months, or six per cent. a year. The reply, on the same day, was: "Do it for six months, privilege of canceling if sold." This reply did not come to the hands of Mr. Storey until Monday, the 26th day of December, when he went to the office of the respondents, and found there the President of the Company, but not any other person, as the day was generally observed by merchants, bankers, and insurers, a holyday, Christmas having fallen on Sunday.

Mr. Storey informed the President he was willing to pay three and a half per cent. for the reinsurance described in the proposal, took a pen and altered the three per cent. to three and a half per cent. by adding ½ to 3 on the paper, and it is admitted by the answer that the President thereupon assented to the terms contained in the paper, but informed Mr. Storey that no business was done at the office on that day, and that the next day he would attend to it. The President then took the paper and retained it.

To a special interrogatory contained in the bill, the defendants answer:

"That its President did assent to the terms and provisions in said paper, as the terms and provisions of a reinsurance to be completed and executed by this defendant, by the making and execution of a policy in due form, according to the requisitions of the laws of Massachusetts, and the by-laws of this defendant, but they were not assented to as a present insurance."

320*] *Upon these facts, we are of opinion there was an agreement to reinsure according to the terms contained in the proposal, concluded by and between Mr. Storey and the President at this interview on Monday, the 26th of December. The paper contained every particular essential to a contract to make reinsurance. It ascertained the subject of insurance, the commencement and duration of the risk, the parties, the interest of the assured, and the premium; and for the special risks, the valuations and conditions, it referred to the original contract of insurance made by the complainants, by reason of which they were seeking reinsurance.

On Saturday the President had offered to contract in accordance with the paper, saving a difference of one half per cent. on the premium.

It was argued that it could not be considered an acceptance, on Monday, of a continuing offer made on Saturday, because, when the complainants authorized Mr. Story to give three and a half per cent., they at the same time imposed a new condition by the words, "privilege of cancelling if sold." But Mr. Storey testifies, and this is not denied by the answer, or by any witness, that when he made the application on Saturday, and before the President had named the premium which he was willing to take, the President said he supposed that they would have to cancel the policy, if the vessel should be sold within the time; and that he (Storey) assented thereto; and that at the interview on Monday, when this point was referred to, the President said the usage in Boston would settle it, and he would not put anything concerning it into the policy; and after some conversation concerning the usage, Mr. Storey agreed to take the policy without any mention of the privilege of cancellation. Under these circumstances, we do not perceive that the requirement of this privilege can be considered as at all varying, in the apprehension and meaning of the parties, the terms of the acceptance on Monday, from the terms of the proposal on Saturday. But whether, under all the circumstances, this should be deemed to have been a continuing offer, we do not think it necessary to determine; because, on Monday, either the President's offer of Saturday was accepted by Mr. Storey, and its acceptance made known to the President, or the proposal was renewed by Mr. Storey, and accepted by the President. The fact that others chose to abstain from business on that day did not prevent these parties from contracting, if they saw fit to do so; and when one of them either accepted a continuing offer, or renewed a proposal which was accepted by the other, they made a binding contract. Nor do we think the allegation of the answer, that the President informed *Mr. Storey that no business was done [*321 in the office that day, but the next day he would attend to it, can reasonably be interpreted to mean that he had not made, or intended to make, a contract for a policy. Their fair meaning is, that though he had agreed to make the insurance, as the Secretary and clerks were not there, and the books not accessible, any action on the agreement must be deferred to the next day. The words cannot be understood to mean, that he would on the next day attend to what he had already done; and he had already made a contract for reinsurance, to be executed on the next day, by issuing a policy in due form to carry that agreement into effect.

On leaving the office of the defendants, Mr. Storey immediately informed the plaintiffs that he had effected this contract, and on the night of the same day the ship Great Republic was destroyed by fire, while lying at a wharf in the City of New York. On the twenty-seventh of December, the complainants tendered their note for the agreed premium, and demanded the policy of reinsurance. The defendants declined to

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make the policy. Several grounds have been insisted on in support of this refusal.

The first is, that by force of a statute of the State of Massachusetts, Rev. Stats. ch. 37, secs. 12, 13, insurance corporations can make valid policies of insurance only by having them signed by the President and countersigned by the Secretary. But we are of opinion that this Statute only directs the formal mode of signing policies, and has no application to agreements to make insurance.

Such we understand to be the view taken of this Statute by the Supreme Court of Massachusetts.

New England Ins. Co. v. De Wolf, 8 Pick. 63; Stat. 1817, ch. 120, sec. 1; McCullock v. The Eagle Ins. Co. 1 Pick. 278; Thayer v. The Mid. Mut. Ins. Co. 10 Pick. 326; see, also, Trustees v. Brooklyn Fire Ins. Co. 18 Barb. 69, and Carpenter v. The Mut. Safety Ins. Co. 4 Sandf. Ch. 408.

It is further insisted, that by the law merchant insurance can be effected only by a contract in writing. We do not doubt that the commercial law of all countries has treated of insurance as made in writing by an instrument, denominated by us a policy; and there may be provisions of positive law, in some countries, requiring an agreement to make a policy to be in writing. But there is no such statute of frauds in the State of Massachusetts.

The common law must therefore determine the question; and under that law a promise for a valuable consideration to make a policy of insurance is no more required to be in writ- [*322*] ing *then a promise to execute and deliver a bond, or a bill of exchange, or a negotiable note. So it has been held by other courts, and, we think, on sound principles. 18 Barb. 69; Hamilton v. The Lycoming Company, 5 Barr. 339; see, also, Sanford v. The Trust Fire Ins. Co. 11 Paige, 547.

The respondents' counsel has argued that their President had not authority to enter into an oral contract binding the Company to make insurance. They admit it has been usual for the President to make such contracts; but they say that when he has done so, the policy was not issued until the next day, and no risk is understood to have commenced under such an undertaking until the policy issues. Whether a risk be commenced when the contract for insurance is made, or only when the policy issues, must depend on the terms of the contract. Where, as in the present case, there is an express contract to take the risk from a past day, there is no room for any understanding that it is not to commence until a future day. Such an understanding would be directly repugnant to the express terms of the contract. And if the defendants have held out their President as authorized to make oral contracts for insurance, no secret limitation of this authority would affect third persons dealing with him in good faith and without notice of such limitation. Besides, the supposed limitation would be inconsistent with the authority itself. It is, in effect, that though the President is authorized to make oral promises to effect insurance, the Company are at liberty to execute those promises, or to refuse to do so, at their option.

The power of the President to enter into this contract to make insurance is nowhere denied in the answer. All that can bear on this subject occurs in certain statements concerning the usual course of business of the Company. It seems to have been assumed by both parties, that whatever the President actually did in this transaction, he did for the Company, and so as to render them responsible for his acts. And no question was raised on this point in the court below. Still it is incumbent on the complainants to offer competent and sufficient evidence of the authority of the President to bind the Company, though less evidence may be reasonably sufficient when no issue concerning it is made on the record.

We think such evidence is in the case. Mr. Storey deposes, that during the three years next preceding this transaction, he had effected upwards of three hundred contracts for reinsurance, with the presidents of ten different insurance companies of Boston; and that one, or possibly two, of these presidents, usually signed an accepted application—the others all contracted orally. Considering that all the incorporated insurance *companies in Bos- [*323 ton have similar charters, and the same kind of officers to conduct their business, we think this is competent evidence, that presidents of such insurance companies in that city are generally held out to the public as having the authority to act in this manner. And upon a point not put in issue in the record, and on which no more than formal proof ought to be demanded, we hold this evidence sufficient. Fleckner v. The Bank of the U. S. 8 Wheat. 360; Minor v. The Mechanics' Bank of Alexandria, 1 Pet. 46.

The fair inference is, that if the general authority of the President to contract for the Corporation had been put in issue, it could have been shown, by the most plenary proof, that the presidents of insurance companies in the City of Boston are generally held out to the public by those companies as their agents, empowered to receive and assent, either orally or in writing, to proposals for insurance, and to bind their principals by such assent.

Nor do we deem it essential to the existence of a binding contract to make insurance, that a premium note should have been actually signed and delivered. The promise of the plaintiffs to give a note for the premium was a sufficient consideration for the promise to make a policy. It is admitted that the usage is to deliver the note when the policy is handed to the assured. If the defendants had tendered the policy, we have no doubt an action for not delivering the premium note would have at once lain against the plaintiffs; and we think there was a mutual right on their part, after a tender of the note, to maintain an action for non-delivery of the policy. In Taylor v. The Merchants' Fire Ins. Co. 9 How. 390, it was held that a bill in equity for the specific performance of a contract for a policy could be maintained. And it being admitted that in this case the defendants would be liable as for a total loss on the policy, if issued in conformity with the contract, no further question remained to be tried, and it was proper to decree the payment of the money, which would have been payable on the policy, if it had been issued.

The decree of the Circuit Court is affirmed.

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THOMAS RICHARDSON, Plff. in Er.,
v.
THE CITY OF BOSTON.
(See S. C. 19 How. 263-271.)

Nuisance—record of former recovery, evidence, but not conclusive—if there be evidence, case should be submitted to the jury—Boston v. Lecraw, 58 U. S. ante, commented on—right of adjoiners to a street—anything which obstructs such right is a nuisance—courts construe instruments—their application to external objects is for the jury—instances.

In an action for damages from a nuisance, a record of a former recovery by plaintiff against defendant, for damages from the same nuisance, is admissible in evidence.

Such record is not conclusive on the second trial for a different trespass.

If there be no evidence to prove the averments of the declaration the court should so instruct the jury.

But if there be some evidence tending to support the averment, its value must be submitted to the jury, with proper instructions from the court.

The nuisance which is the subject of complaint in this case is the same as that in the case of Boston v. Lecraw, U. S. ante.

That case commented on, and the rights of owners of land between high and low water mark stated.

If the defendant laid out a street on its land between high and low water mark, the right to use it as a street became appurtenant to the property of the adjoiners.

Anything which obstructs such right is a nuisance.

It is the duty of the court to construe written instruments, but the application of their provisions to external objects described, is the peculiar province of the jury.

Thus, the situation of the points called for as the boundary of a street, is a question for the jury and not for the court.

Whether a drain constructed by defendant was not carried out sufficiently to discharge its contents so as to be swept off by the tides; or whether it caused an accumulation of matter at the end of plaintiff's wharves, so that vessels could not approach them with the same depth of water as formerly, were questions which should have been submitted to the jury.

Argued Jan. 26, 1857. Decided Feb. 18, 1857.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

This is an action of trespass for maintaining a drain in the City of Boston, extending from the foot of Summer Street towards the sea. It is the same structure from the erection of which the suit of The City of Boston v. Lecraw was commenced, which was decided by this court in 1854, and is reported in 58 U. S., 17 How. 426.

The first and third counts in the declaration aver that plaintiff is seised and possessed, etc., of his wharves, each being the subject of a separate count, and has a right of way for egress and regress with vessels over the "dock" or "way and dock" on which his wharves are bounded, and which constitutes the interval between said wharves as an appurtenance to the same, respectively.

The second and fourth counts aver that the plaintiff is seised and possessed, etc., that his wharves are bounded on the "town dock" and "town way or dock," which it alleges to be and have long been a "public dock, slip or way," and that by reason thereof plaintiff ought to have free access with boats and vessels over the same to and from his respective wharves.

The fifth count, like the first and third, avers the right of way with vessels to be appurtenant to plaintiff's wharves respectively; set forth the possession of tenants of plaintiff, and claims damages for injury to the reversion. The sixth count proceeds like the fifth for injury to the reversion, alleging the "public or town dock," on which plaintiff's wharves are bounded, to be and have long been a public way, slip or dock, and that by reason thereof plaintiff ought at all times to have access over the same with boats and vessels to his respective wharves. The seventh count is founded on plaintiff's possession, and avers the plaintiff's wharves to be bounded respectively on a "highway, town way or public way" to the sea, extending from a corner of Summer and Sea streets to the channel or low water, which was duly laid out and established pursuant to law, and that by reason thereof, plaintiff ought at all times to have access over the same with vessels to his respective wharves.

The case was tried under the general issue, and the plaintiff offered in evidence the record of a former verdict and judgment rendered in his favor, in an action brought by plaintiff against defendant, to recover damages for the erection of the same nuisance, the continuance of which is the subject of the present suit.

Plaintiff requested the court to rule and instruct the jury separately as to each of the counts in his said declaration in this suit: first; that said former judgment was and is conclusive evidence as against the defendants, of the rights and interests of the plaintiff, as set forth in said count in his declaration in this suit: second; that said judgment was and is conclusive evidence as against the defendants, of the existence of the rights and interests of plaintiff as set forth in such count at the time embraced by said judgment, and prima facie evidence of the continuance of said rights and interests in the plaintiff at the time set forth in said count: third; that said judgment was and is conclusive evidence as against the defendants, of the existence of the rights and interests of plaintiff, as set forth in such count at the time embraced by said judgment: fourth; that said judgment was and is admissible in evidence in support of said count.

The court refused to rule and instruct the jury in conformity with either of said requests, but did rule and determine that said judgment was not admissible in evidence for any purpose, and refused to admit the same to be put in evidence, to which refusals and ruling the plaintiff then and there excepted. The plaintiff also offered in evidence an agreed statement of facts made in said former case between said parties, signed by the counsel for plaintiff and defendant. The court ruled that said agreement was not admissible.

After the introduction of various other evidence, the plaintiff rested.

Thereupon the defendants introduced, by leave of the court, the Ordinance of the City of Boston of June 18, 1849, a copy of which is as follows:

Order on Mayor and Aldermen. June 18, 1849. City of Boston. An Ordinance instituting the Board of Health for the City.

Note.—Nuisance, when injunction against will be granted,—see note to Irwin v. Dixon, 13 L. ed. U. S. 25.

Injunction against nuisance maintained by municipal corporation—see note, 23 L.R.A. 301.

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Be it ordained by the Mayor, Aldermen and Common Council of the City of Boston, in City Council assembled, as follows:

The Mayor and Aldermen shall constitute the Board of Health of the City, and shall exercise all the powers and perform all the duties, now vested in the City Council as a Board of Health, with the right of carrying into execution such powers and duties, through the agency of any persons whom they may select, or in any manner which they may prescribe.

In Common Council, June 14, 1849. Passed: sent up for concurrence.

Benjamin Seaver,
President.

In Board of Mayor and Aldermen, June 18, 1849. Passed.

John P. Bigelow,
Mayor.

A true copy.
Attest: S. F. McCleary,
City Clerk.

And without offering any further evidence on their part, did request the court to rule and instruct the jury, that there was not sufficient evidence in the cause to authorize the jury to find the rights claimed by the plaintiff, and the violation of those rights by the defendants, such as to sustain the plaintiff's action. The plaintiff, on his part, did request the court to rule and instruct the jury as follows:

1st. That there is evidence in the case competent to go to the jury, and to be judged and weighed by them, that at the time of the grants by the town to Gridley & Baxter of their estates or possessions, there existed a town or public way between those possessions, for access to and from the sea in boats and vessels, upon which those possessions were bounded, and that the right to use and enjoy said way passed to said grantees by the grant of those possessions, and is an appurtenance thereto and to their heirs and assigns.

4th. That if the jury shall find that at the time of the staking out of said highway, Oct. 31, 1683, the same extended below high water mark, and that the possessions of said Baxter bounded on said way, then by virtue of the liberty to wharf, granted at the same time to the proprietors of lands on Sea Street, the right to use said way for access of boats and vessels to and from such wharf, became, by virtue thereof, annexed or appurtenant to the possession of said Baxter, his heirs and assigns.

Thereupon His Honor, the Judge, did decline and refuse to make and give either of the said rulings and directions so prayed by the plaintiff, but did rule and instruct the jury as prayed by the defendants.

The counsel for the plaintiff did then and there except to each of the aforesaid rulings and refusals and to said directions of the court, and thereupon the jury returned a verdict for the defendant. The plaintiff then brought the case here on a writ of error.

Mr. S. Bartlett, for the plaintiff in error:

The plaintiff submits, that in an action on the case for the continuance of a nuisance, a verdict and judgment for plaintiff in a former suit brought by him against the same defendant for the original erection of the nuisance, was not only competent to be read in evidence, but is, when offered under the general issue by plaintiff, conclusive evidence as against defendant of the existence of the rights and interests claimed by plaintiff in such former action as averred therein, and prima facie evidence of the continued existence of such rights up to and during the period set forth in the pending suit. In this case, the former judgment could not be pleaded by plaintiff, and it is settled by this court that if a party have not opportunity to show an estoppel by pleading, he may exhibit the matter thereof in evidence, and the court and jury are bound thereby.

P. W. & B. R. R. Co. v. Howard, 54 U. S. 13 How. 307.

The true rule is, that a verdict is in all cases conclusive, whatever the form of the issue, upon any matter within it which must have been necessarily and directly found by the jury, and it has been frequently applied in actions for continuance of a nuisance.

1 Greenl. Ev. sec. 534; Rex v. St. Pancras, Peake, 220; Shafer v. Stonebraker, 4 G. & J. 345; Parker v. Standish, 3 Pick. 288; Smith v. Elliott, 9 Pa. St. 345; Rockwell v. Langley, 19 Pa. St. 502.

Parol evidence may be resorted to, to show the nature of the dispute, and thus the matter be brought within the estoppel of the judgment.

Young v. Black, 7 Cranch. 565; Wood v. Jackson, 8 Wend. 9; Lawrence v. Hunt, 10 Wend. 80; Young v. Rummell, 2 Hill. 478.

The rights of the plaintiff, supported by the former judgment, are presumed to continue up to and during the period covered by the declaration in the present suit.

Brimmer v. Prop. Long Wharf, 5 Pick. 131; 1 Phil. Ev. 457; 2 Greenl. Ev. sec. 555.

The judgment offered in evidence in this case is clearly within the rule, and binding upon the parties in all future controversies relating to the same matter.

Hopkins v. Lee, 6 Wheat. 109; 2 Phil. Ev. 142; Gratz v. Lancaster Bank, 17 S. & R. 278; Preston v. Clark, 9 Ga. 244; Gardner v. Buckbee, 3 Cow. 120.

The ruling of the court below, at the defendant's request, that there was not sufficient evidence to sustain the plaintiff's case, was upon the facts shown upon the principles settled by this court the withdrawing questions of fact from the appropriate tribunal, the jury.

Greenleaf v. Birth, 9 Pet. 292; U. S. v. Laub, 12 Pet. 1; Bank of Washington v. Triplett, 1 Pet. 25; C. & O. Canal Co. v. Knapp, 9 Pet. 541; Scott v. Lloyd, 9 Pet. 418; Roach v. Hulings, 16 Pet. 319.

Messrs. P. W. Chandler, Loring and Ames, for the defendants in error:

The judge correctly ruled out the agreed statement of facts used in a former trial of another cause.

1 Greenl. on Ev. sec. 179; Baker v. Harrison, 5 Litt. 59; Baylor v. Smithers, 1 Mon. 6; Elting v. Scott, 2 Johns. 157.

The judgment in the former case between these parties was rightly rejected as incompetent evidence. It was not upon the same subject matter. The variation of time is material in distinguishing one cause of action from another.

Aslin v. Parkin, 2 Burr. 665.

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The former judgment is not binding or admissible in evidence, because in that suit the defendant had not the same means of defense as in other suits.

1 Greenl. Ev. 524; 1 Stark. Ev. 214.

One cause of action was subject only to the legal decision of an inferior tribunal, while the other, by reason of its greater worth or interest, was subject to another higher and supreme jurisdiction.

Small v. Haskins, 26 Vt. 209; Gurnsey v. Edwards, 6 Fost. N. H. 229; Harlow v. Pike, 3 Greenl. 438.

The former judgment, if admitted, could prove nothing, and was therefore wholly rejected. Being founded upon an erroneous opinion in point of law, the court would have been bound to instruct the jury that it was of no avail.

Parker v. Standish, 3 Pick. 288; Vooght v. Winch, 2 B. & A. 662; Young v. Black, 7 Cranch, 565.

To constitute an estoppel by a former judgment, the precise point which is to create the estoppel must be put in issue and decided, and this must appear from the record alone.

Smith v. Sherwood, 4 Conn. 276; Ryer v. Atwater, 4 Day, 431; Cowles v. Harts, 3 Conn. 516; Standish v. Parker, 2 Pick. 20; Parker v. Standish, 3 Pick. 288.

Mr. Justice Grier delivered the opinion of the court:

This is an action of trespass on the case brought by the plaintiff in error against the City of Boston, for the erection and maintenance of a drain at the foot of Summer Street, which, it is alleged, is a nuisance and injurious to the property of plaintiff. He is owner of two wharves, called the Price and the Bull wharf, which are extended from high to low water mark, from the lots which adjoin Sum-[*267] mer Street on each side. *The nuisance, which is the subject of complaint in this case, is the same as that in the case of Boston v. Lecraw, decided in this court, and reported in 17 How. 426.

The declaration contains seven counts, in four of which the plaintiff, as owner of the several wharves, and having the seisin and possession, claims a right of way, as appurtenant to the same, over the "dock" or "way and dock," which constitutes the interval between the wharves; also, that his wharves are bounded on the "town dock," "town way or dock," which he alleges to have been long used as a "public dock, slip or way."

The fifth and sixth counts are for injuries to the reversion, with like averments. A seventh count avers the wharves to be bounded, respectively, "by a highway, town way, or public way, to the sea, extending from the corner of Summer and Sea streets to the channel, or low water mark, which was duly laid out and established pursuant to law."

The defendant pleaded the general issue, and on the trial the plaintiff offered in evidence the record of a former verdict and judgment rendered in his favor in an action against defendant for the erection of the same nuisance, the continuance of which is the subject of the present suit. The rejection of the evidence by the court is the subject of the first bill of exceptions.

It is contended that this record was not only evidence, but conclusive of the right of the plaintiff, and prima facie evidence of the continuance of such right; and that plaintiff, having no opportunity to plead it as an estoppel, may exhibit it as matter of evidence.

It may be admitted that numerous decisions may be found in many of the state courts affirming this proposition; nevertheless, it has not been universally adopted. The leading case of Outram v. Morewood, 3 East, 346, establishes the following proposition, in which all concur: "That if a verdict be found on any fact or title distinctly put in issue in any action or trespass, such verdict may be pleaded, by way of estoppel, in another action between the same parties or their privies, in respect to the same fact or title." But estoppels, which preclude the party from showing the truth, are not favored. To give the verdict the effect of an estoppel, the facts must be distinctly put in issue.

The plea of the general issue, in actions of trespass, or case, do not necessarily put the title in issue; and although the judgment is conclusive as a bar to future litigation for the thing thereby decided, it is not necessarily an estoppel in another action for a different trespass. The judgment can *only give the [*268 plaintiff an ascertained right to his damages, and the means of obtaining them. These principles seem to have been adopted by the courts of Massachusetts, and applied to cases like the present. In the decision of this point, we must be guided by the decisions of the courts of that State.

In the case of Standish v. Parker, 2 Pick. 20, which was an action for a nuisance, the court says: "We think it very clearly settled that nothing is conclusively determined by the verdict but the damages for the interruption covered by the declaration. In actions for torts, nothing is conclusively settled but the point or points put directly in issue. By the plea of the general issue, the title is not concluded, because it cannot be made to appear upon the general issue that the title ever came in question." See, also, 15 Pick. 564.

Nevertheless, though a verdict in such case is not conclusive it is permitted to go to the jury as prima facie or persuasive evidence. 3 Pick. 288. If the evidence of the facts involved in the first trial are still doubtful, if witnesses were then examined whose testimony cannot now be obtained, for these and many other reasons the former verdict may have the effect of highly persuasive evidence on another trial of the same question. But if on the last trial new evidence has been discovered, or if the question of title submitted on the first trial was connected with instructions in law which have since been found to be erroneous; or if a different verdict on the same evidence would have resulted from the different instructions given on the last, it is plain that the first verdict could have but little or no persuasive effect. Title is often a question of mixed law and fact, and a party is not concluded by an erroneous opinion of the court pronounced in a former case.

We are of opinion, therefore, that the court erred in not permitting the record of the former suit to be given in evidence to the jury.

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2. At the conclusion of the trial, the court, at the request of defendant's counsel, instructed the jury "that there was not sufficient evidence in the cause to authorize the jury to find the rights claimed by the plaintiff."

As it is the duty of the jury to decide the facts, the sufficiency of evidence to prove those facts must necessarily be within their province. The jury cannot assume the truth of any material averment without some evidence; and it is error in the court to instruct the jury that they may find a material fact of which there is no evidence. An instruction like this is imperative on a jury; it has taken the place, in practice, of a demurrer to evidence, and must be governed by the same rules. If there be "no evidence whatever," as in the case of 269*] *Parks v. Ross, 11 How. 362, to prove the averments of the declaration, it is the duty of the court to give such peremptory instruction. But if there be some evidence tending to support the averment, its value must be submitted to the jury with proper instructions from the court. If this were not so, the court might usurp the decision of facts altogether, and make the verdict but an echo of their opinions.

The court below seem to have considered the decision of this court in the case of Boston v. Lecraw, 17 How. 426, as requiring them to give the instruction demanded by the defendant. The action in that case was for the same alleged nuisance by a tenant of the present plaintiff. But the plaintiff in that case claimed no other right of way over the lands of defendant, save the public right of navigation; and this court decided that the public right of navigation, between high and low water mark, was defeasible at any time by the owner of the subjacent land. That, as the space between the plaintiff's wharves had been converted into a dock by the accident of its position, so long as it remained unreclaimed, every person had a right to pass and repass over it. The exercise of this public right, for any length of time whatever, would, therefore, form no grounds of presumption either of a public dedication or a private grant to the owners of the adjoining wharves. While it remains unreclaimed, it is a public highway or dock, by a paramount but defeasible title. The adjoining wharves may receive much more advantage than others from the use of it, but they cannot convert it to a private use under color of a public right.

The public officers of a town have no right to lay out a town way between high water and the channel of a navigable river, or appropriate the shore or flats to the use of the inhabitants of town in the form of a way or road. 1 Pick. 179; 5 Pick. 494. But in the present case the City of Boston is owner of the land and has the same right to reclaim their flats which other owners have. Before they are so reclaimed the public and the adjoiners may exercise their paramount right of navigation. But if the City elects to reclaim its portion of the shore, and extend Summer Street to low water, it has a right so to do. And if the street should be less beneficial to the adjoiners in this form than when they could use it as a dock under the public right of navigation, they cannot complain. The absence of these advantages may be a loss to them, but if incurred by the defendants' exercise of their own rights, it is no wrong to them.

But if the City has determined to reclaim this land, and has laid out a street thereon, or continued Summer Street to low water mark, the right to use it as a street or highway on land *becomes appurtenant to the prop- [*270 erty of the adjoiners. It may be the duty of the City to make drains along or under the streets, but they cannot construct them so as to hinder the public use of them as streets, or erect thereon a nuisance to the adjoiners. If Summer Street be extended to low water, the plaintiff has a right to pass along and across the same, and anything which obstructs such passage is a nuisance, and injurious to his rights.

The seventh count of plaintiff's declaration claims a right of way as appurtenant to his land or wharves, on the ground that Summer Street extends to low water. In support of this allegation, the following entry in the town records was given in evidence: "October 31, 1683. The selectmen all met this day, staked out a highway for the town's use, on the southerly side of the land belonging to the late John Gill, deceased, being thirty foot in breadth from the lower corner of said Gill's wharf next the sea."

It is the duty of the court to construe written instruments; but the application of their provisions to external objects described therein is a peculiar province of the jury. Whether this document describes Summer Street as it was afterwards laid out from high water mark; whether "the lower corner of Gill's wharf next the sea" was at that time (in 1683) at low water mark; whether this street was staked out to low water, were questions which should have been submitted to the jury. The fact that the learned counsel differ so widely as to the situation of the points called for as the boundary of the street next the sea, shows conclusively that it is a question for the jury, and not for the court.

Moreover, the court were requested by plaintiff's counsel to instruct the jury, "that if the jury shall find that, by reason of the acts of defendants complained of in the declaration, that part of plaintiff's wharf below low water mark held by him under a grant of the Legislature, has been injured in the manner set forth in the declaration, then the plaintiff is entitled to recover."

There was some evidence that the drain constructed by defendant was not carried out sufficiently to discharge its contents so as to be swept off by the tides; but that it caused an accumulation of matter at the outer end of plaintiff's wharves, insomuch that vessels could not approach them with the same depth of water as formerly. If this be so, it was an injury to the plaintiff, for which he was entitled to recover damages.

This question should have been submitted to the jury, and this instruction given, as requested by plaintiff's counsel. The *oth- [*271 ers are disposed of by the opinion of this court in Boston v. Lecraw, 17 How. 426.

For these reasons the judgment is reversed, and venire de novo awarded.

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280*] *JOHN D. WOLFE, Exr., and Maria D. L. Ronalds, Executrix of Thomas A. Ronalds, Deceased, Appts.,

v.

JOHN H. LEWIS.

(See S. C. 19 How. 280-283.)

Mortgage foreclosure—proceeds of cannot be ordered paid to plaintiff's attorney for general balance due for services.

After the proceeds of sale on mortgage foreclosure have been brought into court, it is irregular to allow the attorney for the plaintiff to have an order in the action for a general accounting of the balance due him from his client for professional services, and to direct their payment out of the fund, the attorney not being a party.

It is error in the court to order any part of the original decree to be paid to one who was not properly before it as a party.

Argued Feb. 4, 1857. Decided Feb. 18, 1857.

APPEAL from the District Court of the United States for the Northern District of Alabama.

On Nov. 15, 1841, complainants, executor and executrix of Thomas A. Ronalds, deceased, filed their bill in the District Court against one Bartley Cox, to foreclose a mortgage. In 1844 a final decree was made ordering a sale of the mortgaged premises, and on Nov. 30, 1848, the report shows $8,318.47 balance in the hands of the commissioner, proceeds of the mortgage. Upon the next day a motion was made to discharge Lewis as complainant's solicitor, Lewis claiming to have claims against complainants, and complainants insisting that Lewis was overpaid and owed them.

The matter, by consent, was referred to the standing master. Various orders of continuance were entered, and on Nov. 25, 1850, the master's report was filed. Plaintiffs excepted to the master's report. The case was continued from term to term until May, 1855, when the final decree was entered, which is as follows:

"The controversy between these parties originated in an order of this court at its November Term, 1848, and is as follows: Come the parties by their solicitors, and by their consent it is ordered by the court that all matters of account between Jno. H. Lewis, Esq., and his late client, Thos. A. Ronalds, deceased, and between the said John H. Lewis and the said John D. Wolfe, executor, and Maria D. L. Ronalds, executrix, of the last will and testament of the said Thomas A. Ronalds, deceased, be referred to the master in chancery; and it is further ordered, that the said master report a statement of his proceedings relative thereto at the next term of this court."

From the master's report it appears that Lewis for a number of years had been the attorney at law for the plaintiffs and their testator, in his life time, in attending to, receiving and collecting sundry large demands held by them on citizens of Alabama. In the case of these plaintiffs against Bartley Cox, a decree in chancery had been rendered in their favor; and there was then in the hands of the marshal, or about to be collected by him on said decree, a sum of about $8,000. With the view to remove Lewis out of their way and to obtain possession of this sum, they entered a motion to remove him as their attorney, and from this motion arose the order of reference before referred to. The decree then reviewed the master's report and concluded:

It is therefore ordered and decreed that the exceptions to the master's report be overruled, and the said report be confirmed.

It is further ordered that the marshal who was appointed receiver, pay to John H. Lewis, out of the money in his hands as such receiver, the sum of $4,336.41; that he pay the balance in his hands, to wit: $3,982.05, to plaintiffs.

It is further ordered, that the parties pay their own costs, and that the same be retained from the sums herein directed to be paid by the receiver; and it is further ordered, that this decree shall be without prejudice to the parties, and that the same shall not be pleaded in bar in any litigation they may have involving the same subject of dispute.

The case further appears in the opinion of the court.

Mr. J. H. Thomas for appellants.

Messrs. Reverdy Johnson and Reverdy Johnson, Jr., for the appellees.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the District Court for the Northern District of Alabama.

The bill was filed to foreclose a mortgage given to secure the payment of $12,000. Payments on this debt were made amounting to the sum of $8,527, the last payment being made the 9th of October, 1839. An account was prayed, and that the mortgaged premises might be sold.

A supplemental bill was filed on the 30th of November, 1843, stating that the last installment of the mortgage debt had become due, and praying that the premises might be sold to satisfy that payment also.

The answer admitted the allegations of the bill, but claimed an additional credit of $600 on the mortgage. On the 23d of May, 1844, a final decree was entered, directing a sale of the mortgaged premises to pay the amount due, stated to be $10,077.68, with interest to the time of sale. Afterwards, at November Term, 1848, the commissioner who had been appointed to make the sale, returned that Cox, the defendant, had, without sale of the property, paid him the balance due under the decree, after deducting certain payments made before his appointment, which amounted to the sum of $8,318.47, which was brought into court.

At that term an entry in the cause was made, by consent of the solicitors of the parties, that all matters of account between John H. Lewis and his late client, Thomas A. Ronalds, deceased, and between the said Lewis and John D. Wolfe, executor, and Maria D. L. Ronalds, executrix, of the last will and testament of Thomas A. Ronalds, be referred to the standing master in chancery, "who was directed to report a statement thereof, and of all his proceedings relative thereto, to the next term of the court."

At November Term, 1850, the master filed his report, which was exceedingly voluminous covering more than two hundred and sixty pages of the record.

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282*] *The master states an account, in which he charges Lewis with all sums, and interest, from the time he became chargeable up to the date of the report, 25th of November, 1850, amounting to the sum of $63,461.71. He shows the amount of credits claimed by Lewis, to same date, amounting to the sum of $55,966.-82. Exceptions were filed to this report by both parties; and at May Term, 1854, the court made a final decree on the master's report; in which is set out the manner in which the controversy arose, and referring to the order of November Term, 1848, founded upon the motion in the Cox case, to remove Lewis from his capacity as attorney, so as to procure the payment to the claimants directly of the proceeds under the decree brought into court. And the court states that it considers the proceedings as presented, not within its cognizance, inasmuch as no writ had been issued as between these parties, no bill filed, and no suit in any form commenced; there was no allegation or charge on the one side, or response or denial on the other; nor was the matter collateral to, or growing out of, any case pending.

On consideration, the court, though disposed to strike the matter from the docket, yet decreed, that, as a large sum of money had been paid in under its order, it must be, in the language of the court, in some way paid out; and the exceptions to the master's reports were overruled, and the same was confirmed; and the marshal, as receiver, was ordered to pay over to Lewis the sum of $4,336.42 of the proceeds in his hands, and the residue, $3,982.05, he was directed to pay to the complainants. From this decree the complainants appealed.

This was an irregular proceeding, and without the authority of law. The bill was filed originally against Bartley Cox, the defendant against whom the decree for the sum of $10,-077.68 was entered. This being done, Lewis procured an order for his dismissal from the case, that he might bring up an account against Thomas A. Ronalds in his lifetime, and his executors since his decease, for professional services. And this was done without the form of suit, or the matter having any relation to the case before the court. And when it is considered that Ronalds was a citizen of New York, and that his representatives are citizens of New York, and do not seem to have had any notice of this illegal procedure, it can receive no sanction from this court.

It is contended that Lewis, as counsel, had a right to receive and receipt for moneys in the case; and whether he was entitled to reserve any portion thereof or not, can be properly tested only by a bill filed by the appellants 283*] against him to account. *But the whole proceeding in behalf of Lewis, as against the complainants, was irregular and void, the court having no jurisdiction of the matter. The order was of no importance that the decree should be without prejudice to either party, and pleadable in bar to any subsequent litigation between them upon the same subject matter, as the proceedings were invalid. But, as regards the complainants, it was error in the court to order any part of its original decree in their favor to be paid to one who was not properly before it as a party. For this purpose neither complainants nor the defendant, Lewis, were before the court, or amenable to its jurisdiction.

The decree is, therefore, reversed, with costs. And the court direct that an order be transmitted to the Circuit Court, to require the defendant, Lewis, to pay over any money received by him under the decree to the proper officer of the court that it may be paid to the complainants.

ARCHIBALD BABCOCK, Appt.,
v.
EDWARD WYMAN.

(See S. C. 19 How. 289–303.)

Deed may be shown by parol to be a mortgage —grantee cannot claim by adverse possession.

Where a deed of land was made under a parol agreement that it was to be for security for all the grantor owed the grantee:

Held, that such agreement or trust could be established by parol evidence.

The trust being established, there was no adverse possession in favor of which the statute could run.

Nor can the Statute of Limitations bar the right of the complainant to the proceeds of the land, as defendant was bound to apply these to the payment of the debt.

(Mr. Chief Justice TANEY did not sit in this case, being absent, from indisposition, nor did Mr. Justice DANIEL sit in the case.)

Argued Jan. 19, 20, 21, 1857. Decided Feb. 18, 1857.

THE bill in this case was filed in the Circuit Court of the United States for the District of Massachusetts, by the appellee, to have a certain conveyance, absolute on its face, dedeclared to have been a mortgage, and for an accounting. The court below having decreed in favor of the complainant, the defendant took an appeal to this court.

The case is very fully statel in the opinion of the court.

Messrs. C. G. Loring and E. Merwin, for appellant:

The case made in the bill is, that the absolute conveyance of November 20, 1828, made by Nehemiah Wyman to the respondent, was intended only as a mortgage security for the several debts he then owed the respondent, and "that the said Nehemiah was to have the land again at any time, upon payment to said Babcock of the amount thus secured upon it."

The deed is absolute upon its face, and contains covenants of warranty by the said Nehemiah against the lawful claims of all persons; and no written defeasance was executed between the parties. To prove this averment, the complainant relies upon the oral testimony of the witnesses, Nehemiah and William Wyman.

1. The first question is, whether, under the circumstances of this case, it is competent to show by parol evidence that a deed absolute in terms was intended to operate only as a mort-

Note.—Parol evidence is admissible to prove an absolute deed, a mortgage. Action to have deed declared a mortgage. Where deed is absolute, but is, as between the parties, a mortgage, a bone fide purchaser is protected, but a purchaser with notice stands in place of the equitable mortgagee. See note to Conway v. Alexander, 3 L. ed. U. S. 321, and note to Hughes v. Edwards, 5 L. ed. U. S. 142. Parol evidence to show trusts as to lands; to show mistake, or explain, etc.—see note to M'Iver v. Walker, 3 L. ed. U. S. 696.

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gage. The respondent contends that it is not competent, but is in direct violation of the Statute of Frauds.

The well-settled rule in equity is, that it is not competent to show by parol evidence that an absolute deed was intended only as a mortgage, except upon the ground that the written defeasance was omitted by fraud, accident or mistake.

1 Sto. Eq. Jur. secs. 153-156; 4 Kent's Com. 142.

It is clear, upon the facts, that in this case a written defeasance was not omitted through any accident, mistake, ignorance or fraud. The parties executed all the papers they intended to, and the form of the conveyance was precisely what they intended it should be.

Hunt v. Rousmaniere's Ex'rs, 1 Pet. 1.

The proposition which the complainant must maintain in this case is, that it is competent by parol evidence of the admissions of the grantee at the time the conveyance was made, to convert an absolute deed into a mortgage, although the grantor, well knowing their different legal effect, deliberately, and in defiance of the Statute, gave an absolute conveyance.

Such a proposition is not warranted by the decisions, and is entirely subversive of the Statute of Frauds.

"Where there is no fraud, and the party relies upon the honor, word or promise of the defendant, the Statute making that promise void, equity will not interfere."

Lord Hardwicke, in Montacute v. Maxwell, 1 P. Wms. 618.

If, however, parol evidence should be admitted and the mortgage established, yet the equity of redemption is barred by the exclusive possession of the premises by the respondent and his grantees, for more than twenty years after condition broken.

Hughes v. Edwards, 9 Wheat. 489; Elmendorf v. Taylor, 10 Wheat. 152; Willison v. Watkins, 3 Pet. 52; Dexter v. Arnold, 3 Sumn. 152; Demarest v. Wynkoop, 3 Johns. Ch. 129; Bond v. Hopkins, 1 Sch. & Lef. 429; Beckford v. Wade, 17 Ves. 99; Hansard v. Hardy, 18 Ves. 455; Barron v. Martin, 19 Ves. 327.

There is no competent or sufficient evidence of any acts done or acknowledgments made by the respondent, recognizing his title as mortgagee, merely so as to except the case from the operation of the Statute of Limitations. Moreover, after twenty years' possession, a court of equity will not decree a redemption upon parol proof of admissions of a subsisting mortgage.

Dexter v. Arnold, 3 Sumn. 152; Whiting v. White, 2 Cox, 290; Reeks v. Postlethwaite, Coop. 161; Barron v. Martin, 19 Ves. 329; Marks v. Pell, 1 Johns. Ch. 594.

In 1844 the respondent sold the land to a purchaser without notice. According to the complainant's theory, this was a constructive fraud upon the mortgagor's right to redeem, and turned it into a claim against the respondent personally. This claim would be barred in equity as well as at law in six years, unless the fraud was unknown to the aggrieved party.

Stearns v. Page, 7 How. 829; Carr v. Hilton, 1 Curt. 390; Fisher v. Boody, 1 Curt. 206; Farnam v. Brooks, 9 Pick. 212.

The complainant, therefore, must aver and prove, not only the fraud, but when and by what means it was discovered.

Stearns v. Page, 7 How. 829.

Mr. S. Bartlett, for the appellee:

As to the twenty years' bar of the Statute of Limitations, (Mass. Rev. Stat. ch. 119, sec. 1), it is clear that the Statute has propriore vigore no application to bills in equity to redeem. It merely furnishes an analogy upon which courts of equity act. The analogy rests entirely upon adverse possession, and can never be applied to a case like this, where the possession, instead of being adverse (at least up to the time of sale in 1844), was in accordance with the trust.

Hughes v. Edwards, 9 Wheat. 497.

As to the limitation of six years to plaintiff's claim for the proceeds of the violation of the contract, the fact on which it is founded is negatived entirely by the appellant's additional answer.

The proof in this case, that the discovery of the fraud was not made until 1851, was complete. The lapse of time as an equitable bar cannot be set up, since it is not set forth as a defense in the answer.

Piatt v. Vattier, 9 Pet. 413; Story, Eq. Pl. sec. 503.

Upon the question whether oral evidence is admissible, to show that a deed absolute on its face was in fact given as security for a debt and is a mortgage, the authorities cited in the opinion of the Circuit Court seem conclusive, and are as follows:

Taylor v. Luther, 2 Sumn. 229; Jenkins v. Eldredge, 3 Story, 293; Conway v. Alexander, 7 Cranch. 236; Sprigg v. Bank of Mt. Pleasant, 14 Pet. 201; Morris v. Nixon, 1 How. 126; Russell v. Southard, 12 How. 139.

To extend the doctrine beyond this, and to allow a party to offer parol evidence of an agreement, on the ground that the mere refusal to acknowledge or perform that agreement (which the Statute itself declares is void), is such a fraud as will avoid the Statute and render the parol evidence competent, amounts to a judicial repeal of the Statute.

Upon this ground, there can be no case to which the Statute of Frauds can possibly apply.

In England it has been uniformly held that parol evidence was inadmissible, except to show that the defeasance was omitted through fraud, accident or mistake.

Walker v. Walker, 2 Atk. 99; Young v. Peachy, 2 Atk. 257; Joynes v. Statham, 3 Atk. 389.

And the great preponderance of authority in this country is to the same effect.

4 Kent's Com. 142; 2 Sto. Eq. sec. 1018; Marks v. Pell, 1 Johns. Ch. 594; Stevens v. Cooper, 1 Johns. Ch. 429; Strong v. Mitchell, 4 Johns. Ch. 167; James v. Johnson, 6 Johns. Ch. 417; Rathbun v. Rathbun, 6 Barb. 98; Webb v. Rice, 6 Hill, 219; Lloyd v. Ex'rs of Inglis, 1 Des. 337; Fitzpatrick v. Smith, 1 Des. 345; Bond v. Susquehannah Co. 6 Harr. & J. 128; Watkins v. Stocket's Admr. 6 Harr. & J. 435; Washburn v. Merrills, 1 Day, 139; Brainerd v. Brainerd, 15 Conn. 586.

In Massachusetts the decisions are very pointed.

Walker v. Locke, 5 Cush. 90; Peabody v. Tarbell, 2 Cush. 226-232.

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The decision of Judge Story, in Taylor v. Luther, 2 Sumn. 228, is inconsistent with the doctrine stated by him in 2 Sto. Eq. sec. 1018.

And in 3 Story, 203, he said: "In Taylor v. Luther I had occasion to carry the doctrine one step farther."

No decision of this court authorizes the doctrine which the complainant must maintain in this case.

Conway's Ex'rs v. Alexander, 7 Cranch, 218, simply decided that the court in construing an instrument may read it in the light of the extrinsic circumstances.

Morris v. Nixon, 1 How. 118-133, was decided on the ground that the letter of Nixon to the complainant either showed that transaction was intended as a mortgage, or that Nixon had a design to mislead the complainant into that belief.

In Russell v. Southard, 12 How. 139, a written memorandum was given by the grantee, and the question was whether the transaction was a mortgage or a conditional sale.

According to the understanding of this respondent, the ground of that decision was, either that the parties did intend a mortgage in due form, and that through mistake, or the fraud of Southard, the memorandum failed to be so expressed, or else that if the transaction, as really understood by the complainant at the time was a conditional sale, yet that the bargain was so unconscionable, and took such advantage of the complainant's necessities, that it amounted in equity to a fraud; otherwise, if the memorandum did show a conditional sale, if the complainant so understood it, and the bargain was a fair one, it would be difficult to conceive upon what ground it could be set aside and held to be a mortgage only.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court for Massachusetts.

The bill states the following facts: Nehemiah Wyman was seised in fee of about eleven and a half acres of land in Charleston, purchased by him of Tuft's administrator, one acre of which he sold to Foster, who gave a mortgage to secure the payment of the consideration of $600, which sum was not paid when due, and he entered to foreclose. The entire tract, on the 1st of December, 1820, had been mortgaged by him to Francis Wyman, his brother, to secure three notes of that date, one for $676, payable in one month; another for $650, payable in six months; the third for $704.39, payable in one year; interest to be paid on each note semi-annually.

Shortly after this, Francis Wyman, by his will, dated 14th June, 1822, devised to defendant, Babcock, all his estate, including said notes and mortgage, in trust for testator's wife and children, and made Babcock his executor. The testator died in August, 1822. On the 1st of December, 1824, Nehemiah paid Babcock, as trustee and executor, the note for $704 and interest; and from time to time paid the interest on the other notes, up to December, 1826.

In 1825 or 1826, Nehemiah became embarrassed, and having entire confidence in his brother-in-law, Babcock, he, by deed, 26th April, 1826, mortgaged the eleven acres of land as security of a note to Babcock of that date, for $1,200, payable in one year, with interest. At this time, little, if anything, was due to Babcock, but it was understood, between them, that Babcock would become security for him, or advance money to him, the mortgage to stand as a security. Before the 20th of November, 1828, Babcock did become bound for and advanced *to him upwards of $400. [*294 In addition to this, there was due to Babcock as executor, for rent, $136.71. On a settlement, Nehemiah executed to Babcock three notes, one dated 7th November, 1828, for $486.79, of which $400.08 were due Babcock individually, and $86.71 to the heirs of Nehemiah Wyman, Sr.; another note for $8.10, and third for $50, due to the heirs of the same, were given.

Nehemiah being thus indebted to Babcock, as trustee and executor, and not being able to pay the interest, Babcock and William Wyman, brother of Nehemiah, urged him to make a clear deed in fee for the land aforesaid, to Babcock, that he might manage and improve the same, and apply the rents and profits to pay interest on the incumbrances, and to the gradual liquidation of the principal. And finding that this conveyance to Babcock was made a condition of further advances, he eventually conveyed the estate to Babcock, it being expressly agreed by Babcock, that, notwithstanding the form of the conveyance, it should stand as security only for the sums due to him.

That on the 20th of November, 1828, a memorandum was made out of the sums thus due, and handed to Nehemiah, as evidence of the amount for which the land was held.

At the time this deed was executed, no one of the notes held by Babcock was surrendered, nor the mortgage to Francis Wyman, deceased. All the evidences of indebtedness remained in the hands of Babcock, Nehemiah holding only the memorandum of the sums. The total amount of the notes in said memorandum, with interest to the 20th November, 1828, amounted to the sum of $2,033.87.

Upon receiving the above deed, Babcock took possession under it, not only of the eleven acres, but of the adjoining acre. Babcock, it is alleged, received annually, from sales of clay, grass, and ledge stone, from the land, more than enough to pay interest and taxes. Nehemiah having removed to the West, regardless of his trust, Babcock sold the land at private sale, without notice to the said Nehemiah, and in fraud of his rights, for $8,000.

In the sale, Babcock represented himself to be the sole owner of the premises. On the 4th of February, 1853, Nehemiah conveyed his right to redeem to Edward Wyman, the complainant, etc. Within two years, Babcock has promised William Wyman, acting for his brother, that he would come to an account with Nehemiah for the price of the land, and pay him the proceeds of the sales, deducting the debts aforesaid, if he would take his notes on time; and would refer the question of amount of rents and profits to the arbitrament of neighbors. *Babcock has frequently, [*295 recently, admitted that it was originally intended that said deed should stand as security for the amount set forth in the memorandum; and that he always intended to do right in the matter, but that he had been advised by coun-

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sel, that the agreement, not being in writing, could not be enforced, and this was the reason he refused to perform it.

The bill prays for an account, and the defendant in his answer admits the conveyance stated in the bill, and that the land was subject to the mortgages. He avers the consideration named in the deed was the amount then due defendant in his own right, and as executor and trustee; and the further sum of $8.10, due the defendant, and $50 due as agent. He admits no additional consideration was paid; but he states the land was not worth more than $1,900; that he consented to receive the deed in payment of the sums due him personally, and upon an agreement that if he should be able to obtain therefrom, in addition, enough to pay the sums due to him as executor and trustee, he would pay these sums, and upon no other trust or confidence whatever.

That upon the delivery of the deed, he canceled the notes of Nehemiah held in his own right, and either surrendered them to him or destroyed them. That he did not cancel the notes held by him as executor or trustee, because he was not satisfied that he should receive enough from the land to pay the same; and in order to prevent the presumption that he had so agreed absolutely, he made a minute thereon to the effect that he did not guaranty the payment thereof, it being the understanding between him and Nehemiah, that Nehemiah should be personally liable therefor.

That he made no other agreement, and he denies that it was understood or agreed that the land was conveyed to him on the trust set forth in the bill; but insists that the conveyance was absolute, in payment of the sums due him, and liabilities incurred; and the only understanding was, that if the defendant should realize therefrom more than enough to pay his own claims, he would pay the debts due him as executor and trustee.

Defendant took possession of the land, and for eight years occupied it, Nehemiah never claiming any interest in it. He denies the allegations of the bill, as to the trust; sets up the defense, that the agreement, not being in writing, cannot be enforced. He denies that he proposed a compromise, if his notes would be taken on time, as alleged, and he pleads the Statute of twenty years' limitation, etc., and avers the profits of the land did not exceed the taxes, etc.

Three points may be considered as embracing the merits of this case:

296*] *1. Was the deed, executed by Nehemiah Wyman to Babcock for the eleven and one half acres of ground, given in trust?

2. Can this trust be established by parol evidence?

3. Does the Statute of Limitation or lapse of time affect the complainant's rights?

No one can read the history of this case, as stated in the bill, without being impressed with the confidential relations of the parties. The grantor and the grantee were brothers-in-law, and the advisers bore the same relation to the grantee. It was a family concern, designed, as it would seem from the bill, to aid an embarrassed member of it, without a probability of a loss by the other members.

The bill charges, when the deed in question was executed, the sums which it was intended to secure were stated, and handed to Nehemiah. This is not denied in the answer, and William Wyman, the brother, being present, swears, as a witness, to the sums so stated, amounting in the whole to the sum of $2,033.87, the consideration named in the deed. This list was in the handwriting of the son of Babcock, and the paper was delivered to Nehemiah in the presence of the witness. The deed was drawn by the witness, and he knows that the sums named included all the debts which Nehemiah owed to Babcock individually, or as trustee. The witness remembers Babcock said, after the statement was made, add sixty-two cents for recording the deed, which made the sum inserted as the consideration of the deed. Nehemiah hesitated to sign the deed, when Babcock said, he can have the land again, at any time he shall pay the debts secured by it.

The answer avers, when the deed was executed, the defendant gave up the notes of Nehemiah held in his own right, and either surrendered them to him or destroyed them. But it is proved by the same witness that he did neither. These notes were given to the witness without explaining to whom they belonged. Witness supposed they belonged to the estate of Nehemiah Wyman, Sr.

The witness says, the property, at the time it was sold, was worth thirteen or fourteen thousand dollars, and that it was sold greatly below its value.

The bill charges, that the defendant promised William Wyman, acting for his brother, that he would come to an account with Nehemiah for the price of the land, and pay him the proceeds of sales. This is denied in the answer. William Wyman swears, that on the 8th of November, 1851, he showed to Babcock the memorandum of the sums named, to secure the payment of which the deed was executed. He was much embarrassed, and admitted the handwriting was his son's, then *deceased. [*297 He then expressed a willingness to settle it up, and asked the witness how shall this be done? Witness replied that he should first charge Nehemiah with all his notes and interest, and then credit him with the proceeds of the land, and what he received from the land, with interest, and be allowed a fair compensation for his trouble. He then said, I can't tell how much I have received from the land, but we will leave it to two good men; and that he would give his note for what should be due.

A short time after this, Babcock told witness that he had consulted counsel, who advised him to pay the amount due the estate of Nehemiah, Sr., and no more; and this he offered to do, if the witness would execute a bond of indemnity against any further claim. He said that he had been advised, as the deed was absolute on its face and no writing showed that the land was conveyed in security of a debt, the obligation could not be enforced.

The witness signified to Babcock, some time before the sale of the land, that he would redeem it for his brother.

Nehemiah Wyman, having transferred all his interest to the complainant, was examined as a witness, who stated, at the time he executed the deed to Babcock, who owed him as an individual, as executor and agent, the sum of

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$2,033.87, which included sixty-two cents for recording the deed: and that sum was stated as the consideration in the deed. Of this sum, only $408.18 and interest were due to Babcock in his individual capacity.

In his answer, the defendant states that the conveyance was made in payment of the sums due him personally; that he did not cancel the notes held by him as executor or trustee, because he was not satisfied that he should receive enough from the land to pay those debts. But the proof shows, that the debt due him as executor and agent, and also his individual debt, were all included in the consideration named in the deed.

The defendant made no advance to the witness on the note and mortgage for $1,200; but, at the date of the subsequent conveyance, the defendant had advanced to him $400.08, and $8.10, which, as above stated, constituted the debt due to the defendant on his personal account.

The conveyance was made to the defendant, the witness swears, with the express understanding that Babcock was to have the entire management of the land, so as to apply the proceeds in payment of the interest, and witness was to have the land again on paying the sums specified. He was induced to make the conveyance by the urgent request of his brother William, and Babcock; his brother told him, 298*] if he did not *make it, he would not assist him in his pecuniary matters. On the execution of the deed, none of the notes held by Babcock were canceled, or surrendered to the witness; but they are still held against him.

The witness says that Babcock promised to keep an account of the receipts of the land conveyed to him; but in his answer he says he kept no account, "because the land and rents and profits were his own, without any liability to account to anyone."

Such a transaction as set out in the bill, between brothers-in-law, in the nature of things, might be supposed to have taken place in the mutual confidence of the parties; and in the final adjustment there should be no evasions or subterfuges to gain an advantage. So far as regards the deed under consideration, all the material allegations of the bill are proved, and all the material averments of the answer seem to be unfounded. In coming to this conclusion, we do not rest alone on the witnesses, Nehemiah and William Wyman. There are strong circumstances which corroborate the witnesses, and satisfy the mind beyond a reasonable doubt.

In his answer, the defendant avers that the land was conveyed to him in payment of the sums due him personally. It appears from the oaths of both the Wymans that this is not correct; and in addition, it is shown by the memorandum made out at the time, stating the sums for which the land was conveyed, in the handwriting of the son of the defendant.

Taking the statement of the defendant as true, that he did not intend to make himself responsible for the debt due to him as executor and agent at the time the deed was executed, presents him in an unfavorable light. The land for which he received a deed from Nehemiah Wyman, he was aware, had been previously mortgaged to secure the debt in his hands as executor of Francis Wyman. Could he have carried out this declared intention, he would have been unfaithful to the trust committed to him.

William Wyman seems to be a man of business. He drew the conveyance from his brother Nehemiah to his brother-in-law Babcock, and he took, in other respects, an active agency in the transaction; and he states the facts as alleged in the bill, and his statement is in every respect corroborated by his brother Nehemiah, and although the trust is denied in the answer, there are circumstances in the case which go strongly to establish it.

The defendant admitted all the facts to William Wyman, and promised to settle the account, and spoke of the principles on which it should be adjusted, but eventually he took refuge *under the Statutes of Frauds, of [*299 Limitations, and the lapse of time. We think there can be no reasonable doubt that the deed in controversy was intended to be a mortgage. And this brings us to the second point in the inquiry:

Can the trust be established by parol testimony?

If the doctrine of this court is to be adhered to, as laid down in the case of Russell v. Southard, 12 How. 154, this is not an open question. In that case the court say: "To insist on what was really a mortgage, as a sale, is in equity a fraud." And in Conway v. Alexander, 7 Cranch, 238, Chief Justice Marshall says: "Having made these observations on the deed itself, the court will proceed to examine those intrinsic circumstances which are to determine whether it was a sale or a mortgage." In Morris v. Nixon, 1 How. 126, the court say: "The charge against Nixon is substantially a fraudulent attempt to convert that into an absolute sale which was meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face."

In Edrington v. Harper, 3 J. J. Marshall, 355, the court say: "The fact that the real transaction between the parties was a borrowing and lending, will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised."

In Jenkins v. Eldredge, 3 Sto. 293, Mr. Justice Story said: In 4 Kent, 143, 5th edit., it is declared, "a deed absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been admitted by fraud or mistake." In 2 Sumn. 228, 232, 233, Judge Story said: "It is the same, if it be omitted by design upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice."

In Foy v. Foy, 2 Hayw. 141: "In North Caro-

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lina, it is said the law on this subject is the same as the English law was before the Statute of Frauds, and parol declarations of trust are valid." "Where a testator gave by will all his estate to his wife, having confidence that she would dispose of it according to his views communicated to her, and it being alleged 300*] *that the testator, at the time of making the will, desired his wife to give the whole of the property to B, and that she promised to do it, it was held, that the allegation being proved, a trust would be created as to the whole of the property in favor of B." Podmore v. Gunning, 7 Simons, 644.

Parol proof is admissible to show fraud, and consequently a resulting trust, in a deed absolute on its face, notwithstanding any denial by the answer.

Lloyd v. Spillet, 2 Atk. 150; Ross v. Nowell, 1 Wash. (Va.) 14; Watkins v. Stockett, 6 Harr. & J. 435; Strong v. Stewart, 4 Johns. Ch. 167; English v. Lane, 1 Port. (Ala.) 328.

In Boyd v. McLean, 1 Johns. Ch. 582, it was held, after an examination of the cases, "that a resulting trust might be established by parol proof, not only against the face of the deed itself, but in opposition to the answer of the nominal purchasers denying the trust, and even after the death of such purchaser." The Statute of Frauds in Rhode Island contains no exception in favor of resulting trusts, but Mr. Justice Story considered the exception immaterial, for it has been deemed merely affirmative of the general law. 1 Sumn. 187.

Where the trustee misapplies the fund, it may be followed, however it may have been invested, by parol, as between the parties, or a purchaser with notice. So, where an estate was purchased in the name of one person, and the consideration came from another, a resulting trust may be established by parol—and in all cases where there is a resulting trust.

In Hayworth v. Worthington, 5 Blackf. (Ind.) 361, it was held that parol evidence is admissible to prove that bill of sale of goods, absolute on its face, was intended by the parties to be only a mortgage. The court say these decisions are founded upon the assumption that the admission of such evidence is necessary for the prevention of fraud.

Cas. temp. Talb. 62; King v. Newman, 2 Munf. 40; Strong v. Stewart, 4 Johns. Ch. 167; Dunham v. Dey, 15 Johns. 555; Walton v. Cronly's Adm'r, 14 Wend. 63; Van Buren v. Olmstead, 5 Paige, 9.

In the case of Overton v. Bigelow, 3 Yerger, 513, it was held, "that an absolute bill of sale of negroes may be converted into a mortgage by a parol agreement to allow the conveyor to redeem; and this agreement may be inferred from the price given, and the mode of dealing between the parties."

The case of Walker v. Locke et al. 5 Cush. 90, is considered as having no application to the case before us. It is well known that until within a few years the courts of Massachusetts had no chancery jurisdiction. The jurisdiction, when first conferred by statute, was limited to 301*] cases of specific execution *of contracts and trusts, not including fraud as a ground of relief. Within some one or two years past, the jurisdiction has been extended to frauds, but this has been done since the decision in the case above cited.

If the decision had been made since the extension of the jurisdiction beyond the construction of the local statutes, we should consider it only as the decision of a highly respectable and learned court, and not as a rule of decision for this court.

It is admitted that the authorities on the question before us are conflicting in this country and in England; but as this court in several cases have decided the point, and it is now and has been for several years past a rule of decision, we are not prepared to balance the state authorities, with the view of ascertaining on which side the scale preponderates.

The third point regards the lapse of time and the Statute of Limitations.

In his answer, the defendant avers that the pleadings show a possession by him of more than twenty years before the institution of this suit, and that that possession has never been disturbed; and also that the proceeds of sale were received more than six years before the bill was filed, and these facts are relied on to bar the right of the complainant.

It is clear that the Statute cannot constitute a bar in the present case. Courts of equity apply the Statute by analogy to cases at law; but in this case, the trust being established, there was no adverse possession in favor of which the Statute could run. The possession was consistent with the intentions of the parties, until the fraud was discovered, in 1851. Nor can the Statute bar the right of the complainant to the proceeds of the land, as Babcock was bound to apply these to the payment of interest on the debt, and in discharge of the principal.

The decree of the Circuit Court is affirmed, with costs.

Mr. Justice **Catron**, dissenting:

The opinion just pronounced maintains that a deed in fee, without conditions, and made in that form, according to an agreement of the parties at the time, may be proved to have been a mortgage by parol evidence, establishing that a defeasance was part of the agreement when the absolute deed was executed; but that it was left out by design. And that this parol proof may be made, after the lapse of more than twenty years from the date of the deed before the grantee was sued; *he having [*302 been in possession of the land conveyed, holding it under the deed from its date up to the time when the suit was brought.

The defendant (among other things) relied on the Statute of Frauds as a defense to the suit. Lord Hardwicke lays down the rule in Montacute v. Maxwell, 1 P. Williams, 618, to be, that where there was no fraud or mistake in the original transaction, and the word or promise of the defendant was relied on, the Statute of Frauds declares such promise void, and equity will not interfere. And in this doctrine I understand the Supreme Judicial Court of Massachusetts to concur.

Walker v. Locke, 5 Cush. 90.

The effect of the defeasance here set up, by parol evidence, is, that it defeats the absolute deed, and makes it void on payment of a sum of money. On general principles the rule is, that where there is a written contract, all ante-

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cedent propositions, negotiations and parol interlocutions, on the same subject, are deemed to be merged in such contract. 1 Story's Com. p. 173, sec. 160; 2 Story, p. 286, sec. 1018.

There must be fraud or mistake in making the agreement, if it can be reformed. Id. sec. 157, p. 169.

I think the parol proof was inadmissible both by the Statute of Frauds of Massachusetts, and according to the general rule referred to; and that the decree should be reversed, and the bill dismissed.

Mr. Justice **Campbell**, dissenting:

The defendant, in the year 1828, entered upon the land conveyed to him by Nehemiah Wyman, and retained it until 1844. He then sold it as his own property, and appropriated the price to his own use. During this whole period, there was no act on the part of Wyman from which the relation of a mortgagor or debtor can be inferred, and no account was rendered by the defendant, nor was any act performed by him inconsistent with his deed.

The evidence relied on to engraft a trust on this deed, consists of conversations reported by Nehemiah Wyman, the debtor, and his brother William, as contemporaneous with the deed, and other conversations reported by William Wyman as occurring in 1844 and 1851; and also the statements of the answer.

No intercourse between Nehemiah Wyman and the defendant took place between 1828 and 1851, directly or mediately, relative to this subject.

The witness, Nehemiah Wyman, is not, in my opinion, a competent witness. This suit is 303*] brought by his son upon an *assignment made after the controversy had commenced, and with the acknowledged purpose of using his father as a witness.

It was found that sufficient evidence did not exist to support the claim, and machinery was resorted to, calculated to introduce the evils of champerty and maintenance.

The witness sold his claim, with a concession to the assignee to employ him as a witness to establish it.

Such a practice holds out to parties a strong temptation to commit perjury.

Bell v. Smith, 5 B. & C. 188, J. Bayley's Opinion; Maury v. Mason, 8 Port. (Ala.) 212; Clifton v. Sharpe, 15 Ala. 618; 1 Penn. 214; 12 Pet. 140.

The testimony of Edward Wyman is open to much observation; and I feel entirely indisposed to rest a decree upon his evidence. Nor do I see intrinsic difficulties in the inconsistencies of the answer. I cannot shut my eyes to the fact that nothing has been done between these parties for above twenty-three years inconsistent with the relations of vendor and vendee, or consistent with the relations of creditor and debtor, except the detention of the evidence of the original debt by the defendant, and the most important part of that evidence was canceled in 1830 by him.

I dissent from the opinion of the court in reference to the jurisdiction of the Circuit Court of the United States in Massachusetts. It is admitted that, in the courts of Massachusetts, this trust could not be incorporated into the deed. The Statute of Frauds prevents it.

Walker v. Locke, 5 Cush. 90.

This Statute constitutes a rule of property for the State. In the present case, the subject of the suit is a contract made in Massachusetts, by citizens of that State, and affecting the title to real property there. In my opinion, the statute law of Massachusetts furnishes a rule of decision to the courts of the United States.

Aff'g—2 Curt. 386.

EDWARD FIELD, Plff. in Er.,
v.
PARDON G. SEABURY et al.

(See S. C. 19 How. 323-333.)

Third party cannot raise in ejectment the question of fraud between grantor and grantee—patent cannot be collaterally avoided at law for fraud—California Act.

When a grant or patent for land, or legislative confirmation of titles to land, has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent, or by the law, to inquire into its fairness as between the grantor and grantee, or between third parties, a third party cannot raise in ejectment the question of fraud as between the grantor and the grantee, and thus look beyond the patent or grant.

It is a question exclusively between the sovereignty making the grant and the grantee.

A patent cannot be avoided collaterally at law for fraud. The California Act of March 26, 1851, makes a direct grant of all lands of the kind mentioned therein, which had been sold, registered, etc.

Argued May 12, 1856. Decided Feb. 19. 1857.

The case is stated by the court.

IN ERROR to the Circuit Court of the United States for the District of California.

Messrs. **R. A. Lockwood** and **Mr. Blair**, for the plaintiff in error:

The title sought to be impeached is a direct grant by statute, equal, and indeed superior in grade, to a patent emanating from a state.

10 Johns. 133; 12 Johns. 81; 6 Pick. 414; 2 How. 319.

Neither at law nor in equity can a deed, much less a patent or grant by statute, good on its face, be collaterally impeached by extrinsic evidence of fraud.

7 Wheat. 212; 5 How. 143; 11 How. 552; 22 Eng. L. & Eq. 328; 23 Eng. L. & Eq. 437; 26 Eng. L. & Eq. 509; 4 Bibb, 329; 7 B. Mon. 80; 5 Johns. 43; 10 Johns. 23; 12 Johns. 83; 1 Doug. 19; 21 Eng. L. & Eq. 420; 17 Eng. L. & Eq. 357.

The construction of the Act of March 26, 1851, as of other statutes, was matter of law for the court. The Circuit Court violated this fundamental rule by leaving to the jury the question whether the Leavenworth grant was within the Act, and making it depend on their opinion as to the fairness of that grant in its inception.

The Statute is a direct grant. The Leavenworth grant, its confirmation by the council, and registry in a book of record, are only important as describing the grantee of the State. The language being clear, it is not allowable to qualify or restrict its operation by interpretation.

Note.—Patents for lands may be set aside for fraud—see note to Miller v. Kerr, 5 L. ed. U. S. 381.

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10 English L. & Eq. 458, 601; 11 Ib. 465; 14 Ib. 308; 19 Ib. 484.

The Statute is a gratuitous donation.

17 Eng. L. & Eq. 357.

The court has no power to annex the condition of good faith in construing this Statute.

26 Eng. L. & Eq. 117; 1 Tyr. 15.

The various Acts of Congress confirming classes of French and Spanish grants, are conclusive in favor of plaintiff in error, as to this question of construction.

3 Stat. at L. 121, 329, 700; 5 Stat. at L. 126; 16 How. 64, 494.

Mr. S. W. Holladay, for defendants in error:

A deed void by reason of fraud cannot be made valid by an Act of the Legislature, so as to affect the rights of third parties.

Smith v. Morse, 2 Cal. 524.

The papers of the defendant in error do not contain the substance required by the Statute as the basis of title, and we seek by any legal tests to examine the nature of their papers, that the court may know whether their pretended grant is such a grant as the Statute means. If the grant were stolen and not delivered by the alcalde, it would not be "a grant" within the meaning of the Act. So, also, if it had been made by Leavenworth after he went out of office, and antedated, such proof of fraud was admissible in this case, as going to the very substance of the defendant's title.

Fermor's case, 3 Co. 77; Merrill v. Meacham, 5 Day, 346; Hoitt v. Holcomb, 3 Fost. N. H. 554; Greathouse v. Dunlap, 3 McL. 303.

The counsel then argued that the defendants were not within the Act of March 26, 1851.

Mr. Justice **Wayne** delivered the opinion of the court:

This case has been brought to this court by writ of error from the Circuit Court of the United States for the District of California.

The circumstances disclosed by the record, and the documentary evidence introduced by the parties in support of their respective rights to the land in controversy, make an extended statement necessary, in order that the points decided may be understood.

The defendant in error brought into the Circuit Court an action of ejectment against Wyman and others, tenants of the plaintiff in error, to recover the possession of lot No. 464, it being a subdivision of a lot of one hundred varas square, numbered 456, of the San Francisco beach and water lots. Field, the plaintiff in error, was admitted to defend, and a verdict having been given for the plaintiffs below, it was agreed by a stipulation in the record that this writ of error should be presented by Field alone, without joining the other defendants.

Both parties claimed title under an Act of the Legislature of California, passed the 26th March, 1851, entitled "An Act to provide for the disposition of certain property of the State of California," the provisions of which, so far as they relate to this cause, are as follows:

323*] *The 1st section of the Act describes the land to be disposed of; and the 2d section is, that "the use and occupation of all the land described in the 1st section of the Act is hereby granted to the City of San Francisco for the term of ninety-nine years from the date of this Act, except as hereinafter provided; all the lands mentioned in the 1st section of this Act, which have been sold by authority of the ayuntamiento, or town or city council, or by any alcalde of the said town or city, at public auction, in accordance with the terms of the grant known as Kearney's grant to the City of San Francisco, or which have been sold or granted by any alcalde of the said City of San Francisco, and confirmed by the ayuntamiento, or town or city council thereof; and also registered or recorded in some book of record now in the office or custody or control of the Recorder of the County of San Francisco, on or before the third day of April, A. D. one thousand eight hundred and fifty, shall be, and the same are hereby granted and confirmed to the purchaser or purchasers or grantees aforesaid, by the State relinquishing the use and occupation of the same and her interests therein to the said purchasers or grantees, and each of them, their heirs and assigns, or any person or persons holding under them, for the term of ninety-nine years from and after the passage of this Act."

Sec. 3. "That the original deed, or other written or printed instrument of conveyance, by which any of the lands mentioned in the first section of this Act were conveyed or granted by such common council, ayuntamiento, or alcalde, and in case of its loss, or not being within the control of the party, then a record copy thereof, or a record copy of the material portion thereof, properly authenticated, may be read in evidence in any court of justice in this State, upon the trial of any cause in which the contents may be important to be proved, and shall be prima facie evidence of title and possession, to enable the plaintiff to recover the possession of the land so granted."

Kearney's grant mentioned in the Act was read in evidence at the trial by the plaintiffs in the action; it is dated March 10th, 1847, and is as follows:

"I, Brigadier-General S. W. Kearney, Governor of California, by virtue of authority in me vested by the President of the United States of America, do hereby grant, convey, and release, unto the Town of San Francisco, the people or corporate authorities thereof, all the right, title, and interest thereof, of the Government of the United States, and of the Territory of California, in and to the beach and water lots on the east front of said Town of San Francisco, including between the points known as the Rincon and Fort Montgomery, excepting such lots as may be selected for the use of the general government *by the [*326 senior officers of the army and navy now there, provided the said ground hereby ceded shall be divided into lots, and sold by public auction to the highest bidders, after three months' notice previously given. The proceeds of said sale to be for the benefit of the Town of San Francisco." Record, pp. 25, 26.

It was agreed by the parties at the trial (see Record, p. 24) that the lot sued for, is included in the 1st section of the Act of March 26, 1851, already cited, and also within the locality of the Kearney grant; that it is no part of any government reservation; and that on the 9th of September, 1850, when California was admitted as a State into the Union, the lot was below high water mark.

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In order to show themselves entitled to the lot in question under the 2d section of the Act cited, the plaintiffs below produced the following documents:

1. A grant by John W. Geary, first alcalde of San Francisco, to Thomas Sprague, dated January 3d, 1850, reciting the Kearney grant, calling it a "decree," and that by virtue thereof, and by direction of the ayuntamiento, a certain portion of said ground, duly divided into lots as aforesaid, after notice, as required by the "decree" or grant, had been exposed to sale at public auction, in conformity with it, on the 3d day of January, 1850; and that one of the lots, numbered on the map 646, had been sold to Thomas Sprague for $1,700, for which he had paid in cash $425, and had obliged himself to pay the sum of $1,275 in three equal installments, on the 3d of April, 3d of July, and the 3d of October; that Sprague then received a grant for the lot to him, his heirs and assigns, forever, of all the estates that the Town of San Francisco had in the same, as fully as the same was held and possessed by it, subject to a proviso that the grant was to be void for failure to pay the installments. Record, p. 19.

The foregoing document or grant was not recorded or registered, nor was any evidence given that three months' notice of the sale had been given, other than the recitals in the grant.

2. The plaintiff introduced a deed from Sprague to Seabury, Gifford and one Horace Gushee, dated May 17, 1850, conveying to them in fee all his right and title to the lot sued for, and also another lot, No. 450, for the sum of $4,000, with a provision that they should pay $1,560 of the installments payable to the town.

The plaintiffs then introduced a deed from Horace Gushee to the plaintiff Parker, conveying to Parker in fee all his right and title to the water lot No. 464, for the consideration of $100, which was dated April 20th, 1855. Rec. 23.

Receipts by the city officers for three of the 327*] installments of *the purchase money, dated the 3d April, 3d July and 3d October, were indorsed upon the grant.

The plaintiffs then rested their case upon the foregoing evidence. Rec. p. 26.

Two grounds of defense were relied upon by the defendants—First, that the Geary grant was not within the Act of March 26, 1851, for want of the notice of sale required by the Kearney grant; and also that it had never been registered and recorded, as the Act required, in some book of record now in the office now in the custody or control of the Recorder of the County of San Francisco, on or before the third day of April, one thousand eight hundred and fifty. Second, that the defendants and those under whom they claimed had a good title to the premises under the provisions of the Act of March 26, 1851. They also relied upon a possession of the premises for five years prior to the institution of the suit. To prove their title the defendants gave in evidence the following documents:

1st. A grant of the lot one hundred varas square (of which the lot in question was a subdivision), dated September 25th, 1848, by Leavenworth, Alcalde of San Francisco, to Parker, upon the petition of the latter, both written on the same sheet, as follows:

"To T. N. Leavenworth, Alcalde and Chief Magistrate, District San Francisco:

Your petitioner, the undersigned, a citizen of California, respectfully prays the grant of a title to a certain lot of land in the vicinity of the Town of San Francisco, containing one hundred varas square, and bounded on the north by Washington Street, on the west by a street dividing said lot from the beach and water survey, on the south by Clay Street, and on the east by unsurveyed land, and numbered on the plan marked on page one (1) of district records as four hundred and fifty-six (456).

William C. Parker."

On the same day the grant was made as follows:

"Territory of California
District of San Francisco,
Sept. 25, A. D. 1848.

Know all men by these presents, that William C. Parker has presented the foregoing petition for a grant of land in the vicinity of the Town of San Francisco, as therein described; therefore, I, the undersigned, alcalde and magistrate of the district of San Francisco, in Upper California, do hereby give, and grant and convey unto the said William C. Parker, his *heirs and assigns, forever, the lot of [*328 ground as set forth in the petition, by a good and sufficient title, in consonance with the established customs and regulations, being one hundred varas square, lying and being situated in the eastern vicinity of San Francisco, and outside the limits of the water lot surey.

In testimony whereof, I have hereunto set my hand, as alcalde and chief magistrate of the district aforesaid.

Done at San Francisco, the day and year above written.

T. M. Leavenworth.

Recorded in the alcalde's office, in book F of land titles, on page number 18, at 10½ o'clock A. M., November 28, 1849.

Office First Alcalde.

A. Bowman, Reg. Cl'k."

Then the defendants called Parker as a witness to prove the execution of the grant in the manner and at the time as has been just stated, producing at the same time a deed from Parker to Leavenworth, dated the 26th September, 1848, and Parker certified it had been executed by him.

It was also proved that Leavenworth conveyed the premises to George W. Wright, by deed dated the 1st December, 1849. Wright conveyed one undivided half of the lot in fee to Charles T. Botts, and the other undivided half of the same to Edward Field, the now plaintiff in error, except two lots or subdivisions of the same, numbered 467 and 468. A deed from Botts, dated 1st October, 1852, to Joseph C. Palmer and Wright, conveying to them in fee the one undivided half of said lot, except the subdivisions 467 and 468, for the consideration of $40,000, reciting the premises conveyed to be ten water lots, and that Botts derived title through the deed from Wright to him; and Palmer then conveyed the last-mentioned premises as they held them to Field, the plaintiff in error, for $75,000, without any recital of the preceding conveyances, and the same was recorded on the 12th January, 1853,

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the day of the execution of the deed. It is as well to remark that all of the deeds just mentioned were in the County Recorder's office. It was also agreed by the parties, in writing, that the original defendants in the action were in possession of the premises under leases from Field, the plaintiff in error, the production of the leases being dispensed with. Record, p. 25, 4th clause of the stipulation.

The defendants also gave in evidence book B of the district records, page 1, kept in the alcalde's office, and as such turned over to the recorder of the County of San Francisco, upon the organization of that office in May, 1850, to prove from it that there had been a certificate of the Leavenworth conveyance of the land to Parker, contemporary with the execution of it. 329*] *The authenticity of the book B was proved by the testimony of witnesses who had been connected with the office of the alcalde, and afterwards with the office of the Recorder of the County. See Record, pp. 27, 28, 29. Other testimony was also introduced by the defendants, of another book, F, kept by Alcalde Geary, the predecessor of Leavenworth, in which grants issued by his predecessor were recorded at length, which was turned over to the county recorder at the same time with book B; in which there was a literal transcript of Parker's original petition and Leavenworth's grant, as they have been already recited.

The defendants also gave in evidence a resolution of the ayuntamiento or town council of San Francisco, on the 11th October, 1848, confirming the grants of Leavenworth to several parcels of land adjacent to the town, on the ground that Leavenworth had made them for the purpose of raising funds to defray the necessary expenses of the town and district. A deed from the Board of California Land Commissioners, acting under the Act of May 18, 1853, by which they were authorized to sell the interest of the State in the San Francisco beach and water lot property, was also put in evidence by the defendants, which conveyed in fee to Joseph Palmer and Edward C. Jones all the right, title and interest of the State of California in the aforesaid ten water lots, for the consideration of $1,425. It was also proved that Palmer, Cook & Co., of which Palmer, Wright, and Jones, were members, commenced improving the lot in May, 1850, more than five years before the commencement of the suit, which was on the 7th of June, 1855 (Rec. p. 44), and that they shortly afterwards leased it to one Gordon, who erected on it valuable improvements; and that they, and others claiming under them, had ever since occupied the premises. See testimony of Galloway, Rec. 40; and Stevenson, 40.

A resolution of the town council, passed on the 5th October, 1849, requesting the alcalde to advertise the sale at the earliest moment, was also put in proof by the defendants, to show that the Geary grant of Jan. 7, 1850 (Rec. 19), had been made without three months' notice of the sale having been given. Then, at this stage of the trial, the plaintiffs were permitted to discredit the fact that Leavenworth's grant to Parker had been recorded, as has been stated, by showing that there had been mistakes in recording grants in the book of records, and that there were several entries in the book purporting to be copies of grants by Leavenworth in 1849, after he was out of office, which the court permitted to be done—the defendants objecting—on the ground that, by reading from the book the grant to Parker, the defendants had made the entire book evidence; and that the plaintiffs might read other entires in it, without any proof that the grants had been issued, or in fact dated, in the year 1849. The *court also permitted Parker, the [*330 original grantee of Leavenworth, to be examined as a witness; and also Clark, a member of the town council, to prove that there had been fraud in the issue and confirmation of the Leavenworth grant. And upon the defendants objecting to the admissibility of such evidence, the court overruled their objection, saying "that the Act of March 26, 1851, under which the plaintiffs and defendants claimed to have a title to the premises in dispute, was intended to confirm only honest titles, and that the plaintiff might impeach the Leavenworth grant to Parker, and the confirmation of it by the town council, by showing fraud." And under this ruling of the court, the plaintiffs were permitted to read, as evidence from the books of records B and F, and from other books purporting to be minutes of grants made by Leavenworth to one Clark, to Jones and Buchelin, prior to October 11, 1848, intending to show by them that the members of the council who voted for the resolution of that date held divers grants which were confirmed by it, and had therefore acted fraudulently. And that was done without any proof of identity between the supposed grantees and other members of council, and without producing any originals of the supposed grants, or proving that any such grants were made. The witnesses, however, introduced to prove fraud in the issue of the Leavenworth grant, denied positively that it existed.

We do not think a more extended statement from the record necessary for the conclusion at which we have arrived in this case. That which has been given is sufficient for the construction of the Act of March 26, 1851, under which both parties claim the premises in dispute, and for the decision of the exception taken by the defendants to the ruling of the court in respect to the admissibility of witnesses to prove that Leavenworth had practiced a fraud in issuing a grant to Parker for the lot 456.

It is admitted, that neither the plaintiff nor defendant could claim a title to any part of that lot under these alcalde grants, unless they can be brought within the Act of March 26, 1851. Laws of California, 764. The court below said, in its charge to the jury, that neither of the alcaldes had any power to grant land, and that no estate passed by either of their grants. These documents are only to be considered as ear-marks to designate the legislative grantees, who were intended to take under the Act of March 26, 1851. Both parties in the suit bringing themselves within the classes designated, the defendants, being in possession, as has been ascertained by the evidence, would, on principles of law, be entitled to a verdict. In this the court was correct; and its first ob-

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ligation, when the case was submitted 331*] *to the jury, was to determine, by its construction of the Act, whether both parties or either of them had, by their documentary evidence, been brought within the classes of grantees designated by the Act. This, however, it did not do; but leaving that question undecided, after permitting the plaintiffs to introduce witnesses to prove that the Leavenworth grant had been fraudulently issued by him, it submitted the case to the jury, making it not only competent to find the fact of fraud, but constituting the jurors judges of the legal question, whether the plaintiff who had alleged the fraud was within the classes of grantees which the Legislature meant to confirm, and that the defendant's alcalde grant was not comprehended by the legislative Act—thus giving to a party who might not be able to claim a title under the Act, a chance, by the verdict of a jury, to dispossess another, also, without a title under it, who had just been said by the court in a controversy between them for the land, would be entitled to a verdict in virtue of his being in possession of it. If the plaintiff had no title under the Act, though the defendant also was without one, the former could have no complaint against him, nor any legal right to recover in ejectment land of which the defendant was in possession. The court, in this part of its ruling, made the charge of fraud the turning point in the case, and not the right of title to the premises, by the construction of the Act under which both parties claimed a title, and by which it had said either could only claim. The result was, the jury, having been so instructed, found a verdict for the plaintiff upon the question of fraud, without any instruction in any part of its charge that he claimed a title from an alcalde's grant, which was within the Act of March 26, 1851, or that the defendant was without one, unless it be the court's intimation to the jury that the defendant might be considered as having no title under the Act, if they should find that there had been fraud in the issue of his alcalde grant, or in the confirmation of it. The court's construction of the rights of the parties under the Act should have been independent of the question of fraud. The evidence which it allowed to be given of it was inadmissible, and the finding of the jury is of no weight in the case. Fraud, as it is sometimes said, "vitiates every act"—correctly, too, when properly applied to the subject matter in controversy, and to the parties in it, and in a proper forum. For instance, as when one of them charges the other with an actual fraud; or when one of them, by his omission to do an act in time, which he ought to have done, as in not having recorded a deed, the other, without any knowledge of its existence, becomes in good faith a purchaser of the same property—in such a case 332*] a claim, *under the unregistered deed, is said to be fraudulent and void against a subsequent bona fide purchaser without notice. But in that case the latter gains a legal preference by the court's construction of the Registry Act, under which the first deed ought to have been recorded, and as a matter of law, so instructs the jury. But these cases are not applicable to the case in hand. Those are cases where the actual or constructive fraud grows out of the conduct of parties directly to each other, or is consequential from such conduct.

This case involves directly the point whether, when a grant or patent for land, or legislative confirmation of titles to land, has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent or by the law to inquire into its fairness as between the grantor and grantee, or between third parties, a third party cannot raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant.

We are not aware that such a proceeding is permitted in any of the courts of law. In England, a bill in equity lies to set aside letters patent obtained from the King by fraud (Atty.-Gen. v. Vernon, 1 Vern. 277, 370; the same case, 2 Ch. Rep. 553), and it would in the United States; but it is a question exclusively between the sovereignty making the grant and the grantee. But in neither could a patent be collaterally avoided at law for fraud. This court has never declared it could be done. Stoddard v. Chambers, 2 How. 284, does not do so, as has been supposed. In that case, an Act of Congress confirming titles, excepted cases where the land had previously been located by any other person than the confirmee, under any law of the United States, or had been surveyed and sold by the United States; and this court held that a location made on land reserved from sale by an Act of Congress, or a patent obtained for land so reserved, was not within the exception, and the title of the confirmee was made perfect by the Act of confirmation, and without any patent, as against the prior patent, which was simply void; and this valid legal title inured at once to the benefit of an assignee of the confirmee. In this connection it must be remembered that we are speaking of patents for land, and not of transactions between individuals, in which it has been incidentally said, by this court, that deeds fraudulently obtained may be collaterally avoided at law. Gregg v. Sayre, 8 Pet. 244; Swayze v. Burke, 12 Pet. 11.

But we are also of the opinion that the Act of March 26, 1851, to provide for the disposition of certain property of the *State of [*333 California (Cal. Laws, 764), makes a direct grant of all lands of the kind, and within the limits mentioned in the Act, which had been sold or granted by any alcalde of the City of San Francisco, and confirmed by the ayuntamiento, or town or city council thereof, and also registered or recorded in some book of record which was at the date of the Act in the office or custody or control of the Recorder of the County of San Francisco, on or before the third day of April, one thousand eight hundred and fifty. The words of the Statute are, "that all the lands mentioned in the 1st section of it are hereby granted and confirmed to the purchaser or purchasers, or grantees aforesaid, by the State relinquishing the use and occupation of the same, and her interests therein, to the said purchasers or grantees, and each of them, their heirs and assigns, or any person or persons holding under them, for the term of ninety-

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nine years from and after the passage of the Act." This language cannot be misinterpreted. The intention of the Legislature is without doubt, and we cannot make it otherwise by supposing any other condition than those expressed in the Act; and we also think that the registry of an alcalde's grant, in the manner and within the time mentioned in the Act, is essential to its confirmation under the Act. In this particular, the Kearney grant, under which the plaintiff claimed, was deficient, and so the court should have instructed the jury upon the prayer of the defendant, without the qualification that the entry made of it in the district records was a registry within the meaning of the Act. We do not deem it necessary to say more in this case, than that, in our view, the defendants have brought themselves, by their documentary evidence, completely within the confirming Act of the 26th March, 1851, and that the court should have so instructed the jury, as it was asked to do by their counsel.

The judgment of the court below is reversed.

EDWARD FIELD, Plff. in Er.,
v.
PARDON G. SEABURY et al.

(See S. C. 19 How. 333, 334.)

Judgment reversed for the reasons given in the next preceding case.

Submitted May 12, 1856. Decided Feb. 19, 1857.

IN ERROR to the Circuit Court of the United States for the District of California.

Mr. R. A. Lockwood for the plaintiff in error:

Mr. S. W. Holladay for defendants in error.

Mr. Justice Wayne:

This case was like the preceding, and they were argued together.

For the reasons given in the first of them, the court directs the reversal of the judgment in the court below in this case.

PATRICK BURKE, Plff. in Er.,
v.
WILLIAM H. GAINES and Wife et al.

(See S. C. 19 How. 388-390.)

Jurisdiction—title to land under U. S.

This court has no jurisdiction of a case brought up by error from a state court, where no right was claimed by the plaintiff in error under any Act of Congress, or under any authority derived from the United States.

The decision of the State Court in favor of a title claimed by defendant in error under the United States, gives plaintiff no right to bring error.

Fulton v. McAffee, 16 Pet. 149, affirmed.

Argued Feb. 12, 1857. Decided Feb. 23, 1857.

IN ERROR to the Supreme Court of the State of Arkansas.

The case is stated by the court.

No counsel appeared for the plaintiff in error.

Messrs. Henry A. Wise and A. H. Lawrence for the defendants in error.

The argument being confined to the facts, is not here given.

Mr. Chief Justice Taney delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Arkansas. A brief summary of the case will be sufficient to show that this court have no jurisdiction.

The defendants in error, who were the plaintiffs in the court below, brought their action of ejectment in the State Court to recover certain premises described in the declaration.

By a statute of Arkansas, a party may maintain an ejectment upon an equitable title. And the defendants in error, in order to show such a title in themselves, offered in evidence certain documents tending to prove that a certain Ludovicus Belding had, by settlement in 1829, acquired a pre-emption right to the land in question, and that they are his heirs at law, and have paid to the proper officer the price fixed by the government.

The plaintiff in error offered no evidence of title in himself, although he was in possession of the land. And at the trial, the defendants in error asked the court to instruct the jury that the papers and documents read in evidence by them were sufficient to maintain the action, if the defendant in error was in possession of any part of the land at the commencement of the suit, and also that they were entitled to recover, by way of damages, reasonable rents and profits.

The plaintiff in error, on his part, asked the court to instruct the jury that the certificates and documents offered by the defendants in error were void, and conferred no title to the premises.

This is the substance of the instructions asked for by the respective parties, although drawn out at greater length, and shows the questions presented for the decision of the court. The court gave the instructions asked for by the defendants in error, and refused those requested by the plaintiff.

Under these instructions, the jury found a verdict in favor of the defendants in error, and a judgment was entered accordingly, which was afterwards affirmed in the Supreme Court of the State; and upon that judgment, this writ of error was brought.

*It appears, therefore, that no right was [*390 claimed by the plaintiff in error under any Act of Congress, or under any authority derived from the United States. He merely objected to the validity of the title claimed by the defendants in error. As the case appears on the record, he was a mere trespasser holding possession in opposition to a title claimed under the United States. The decision of the State Court in favor of the title thus claimed by the defendants in error can certainly give the plaintiff no right to bring this writ under the 25th section of the Act of 1789. He claimed no right under the United States, and consequently can have no foundation for his writ of error.

The case cannot be distinguished from that of Fulton et al. v. McAffee, 16 Pet. 149, and the writ must be dismissed for want of jurisdiction.

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OLIVER and DAN'L R. GARRISON, Appellants,
v.
THE MEMPHIS INSURANCE COMPANY.

(See S. C. 19 How. 312-318.)

Bills of lading—"perils by the river" do not include loss by fire—insurance company subrogated to claims—ground of equitable jurisdiction.

In bills of lading by which the owners of the vessel stipulated to deliver certain bales of cotton at New Orleans "the dangers of the river only excepted," held that fire, even accidental, and happening without fault of the shippers, was not within the exception, and such owners were liable for the cotton lost by accidental fire.

The language of the bills of lading had a definite legal meaning which slight proof of custom could not change.

An insurance company which has paid those losses by fire to the shippers of the cotton is subrogated to their claims for such losses against the owners of the vessel.

And where fifteen claims which have been adjusted by the insurance company are joined in the same bill, and much inconvenience been prevented, this, with the other facts, show sufficient ground for resort to equity.

Argued Feb. 6, 1857. Decided Feb. 27, 1857.

APPEAL from the Circuit Court for the District of Missouri.

This was a suit in chancery brought in the Circuit Court by the appellee against the appellants, to recover the value of a quantity of cotton insured by the appellee, against fire.

This cotton was shipped on board a steamship belonging to the appellants, who were carriers of freight on the Mississippi River. The appellants, by their agents, received this cotton on board, to be carried from Memphis to New Orleans. It was shipped by different merchants, who had each his bill of lading printed and filled up, ready to be signed, which was according to the usage of merchants and carriers on the river. These bills of lading had each a clause limiting the liability of the carrier, but this clause varied somewhat. In one of them it was "the dangers of the river only excepted;" in others "the dangers of the river and unavoidable accidents only excepted," and in others "the dangers of the river and fire only excepted."

The several shippers insured their shipments against fire, in the Company of the appellees. The boat and cargo were destroyed by fire, without fault or negligence of the owners, their agents or servants.

It was in evidence that the term "dangers of the river" was generally understood among shippers and boat owners on the Mississippi to include dangers by fire.

The final decree rendered by the Circuit Court, dismissed the bill as to the relief sought in respect to the cotton, for which the bills of lading given by the clerk of The Convoy specifically exempted the vessel from liability from loss by fire, and also as to the relief sought in respect to the bills of lading, in which the dangers of the river and unavoidable accidents are excepted; and as to the residue, it decreed against the defendants below.

Mr. T. Ewing, for the appellants:

1. The carrier is not liable to the insurer, who has paid the loss in all cases where he would be liable to the shipper. The carrier who insures without disclosing the fact that he is carrier of the goods which he insures, may recover on his policy where, without wrong or negligence, he is made liable to the shipper.

Crowley v. Cohen, 3 B. & Ad. 478; Van Natta v. Mutual Ins. Co. 2 Sandf. 491; DeForest v. Fulton Ins. Co. 1 Hall, 110.

This is inconsistent with the idea that the carrier is liable to the insurer under all conditions that would render him liable to the shipper.

2. In this case there was no fault or negligence; the fire, therefore, was the result of inevitable accident. It is quite immaterial in what shape it came.

Hunt v. Morris, 6 Mart. 676.

3. Dangers of the seas in a bill of lading, is equivalent to perils of the sea in a policy of insurance.

The Reeside, 2 Sumn. 567.

Fire is a peril of the sea.

Phil. Ins. 3d ed. 1099, pp. 627, 628; Plaisted v. Boston & Kennebec Steam Nav. Co. 27 Me. 135; Perrin v. Protection Ins. Co. 11 Ohio, 170; Citizen's Ins. Co. v. Glasgow, 9 Mo. 407.

4. When the contract was entered into, it was the common mercantile understanding on the Mississippi that fire was one of the "dangers of the river," and this is a proper subject of proof.

Abb. Shipp. pp. 384, 385.

Mr. H. S. Geyer, for the appellee:

The English common law on the general responsibility of carriers, prevails generally, in this country, as a part of the common law of the land.

1 Kent's Com. 608, 609; Story on Bail. sec. 496, 497.

According to that law, the appellants are responsible for a loss by fire proceeding from any other cause but of lightning, or the act of the public enemy.

Forward v. Pittard, 1 T. R. 27; Hyde v. Trent, etc. Co. 5 T. R. 389; Steamboat Co. v. Bason, Harp. (S. C.) 264; Harrington v. McShane, 2 Watts, 443; Patten v. Magrath, Dudley (S. C.), 159; Singleton v. Hilliard, 1 Strob. (S. C.) 203; 15 Conn. 239.

Loss by fire does not come within the exception, in the bills of lading, of "the dangers of the river."

Johnson v. Friar, 4 Yerg. 48; Gordon v. Buchanan, 5 Yerg. 72; Turney v. Wilson, 7 Yerg. 340; Whitesides v. Russell, 8 Watts & S. 44; Williams v. Branson, 1 Murphy, 417.

The payment of a total loss by the insurers, or their liability to pay such loss in consequence of an abandonment, gives them an equitable right to the property, or whatever remains of it, as far as it was covered by the policy, including the spes recuperandi and the rights identified with the insurable interest, or depending upon the possession of it.

2 Phil. Ins. 3d ed. pp. 397-399; Rogers v. Hosack, 18 Wend. 319; Walker v. U. S. Ins. Co. 11 S. & R. 61; Mellon v. Bucks, 5 Mart. (N. S.) La. 371; Atlantic Ins. Co. v. Storrow, 5 Paige, 285; Gracie v. N. Y. Ins. Co. 8 Johns. 245.

Mr. Justice Campbell delivered the opinion of the court:

*The appellee filed a bill in the Circuit [*314

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Court against the appellants, the owners of the steamboat Convoy, a vessel formerly employed in the navigation of the Mississippi River, and which, in 1849, was consumed by fire, with a cargo of cotton.

The appellee is an Insurance Corporation of Memphis, Tennessee, and insured eleven hundred and fifty-two bales of the cotton belonging to this cargo from loss by fire; this insurance was effected upon fifteen distinct parcels, and shipped mostly from Tennessee to a number of consignees in New Orleans. The Company adjusted the losses with the assured on their policies, and bring this suit for reimbursement, by enforcing the claims of the shippers against the owners. These answer the bill by a denial of their legal responsibility for the loss. They maintain that fire is one of the perils of the River Mississippi; that all the bills of lading that exempt the carrier from a loss by perils of the river, imply fire as one of those perils; that the variations in the bills of lading, some including "fire," and "unavoidable accidents" as well as fire, are referable to the fact that they are preferred by different shippers, who have different forms for expressing the same legal consequence. That they all understand that a carrier is exempt from a liability for fire on a bill of lading exonerating him from the risks of the river.

It was admitted on the hearing that the boat was consumed, without any negligence or fault of the owners, their agents or servants. The Circuit Court excused the owners from losses, where the bills of lading contained an exception of fire, or unavoidable accidents, but condemned them on the others, to satisfy the demand of the Company.

It cannot be denied that the appellants are responsible, according to the strictness of the common law rule determining the carrier's liability, unless an accidental fire is one of the exceptions included in the term "perils of the river." These words include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man, nor are to be prevented by human prudence; and have been extended to comprehend losses arising from some irresistible force or overwhelming power which no ordinary skill could anticipate or evade.

Jones v. Pitcher, 3 Stew. & Port. 136; 4 Yerg. 48; 5 Yerg. 82; Schooner Reeside, 2 Sumn. 568.

They exonerate a carrier from a liability for a loss arising from an attack of pirates, or from a collision of ships, when there is no negligence or fault on the part of the master and crew. Latterly, the courts have shown an indisposition to extend the comprehension of 315*] these words. The destruction of a *vessel by worms at sea is not accounted a loss by the perils of the sea; nor was a damage from bilging, arising in consequence of the insufficiency of tackle for getting her from the dock; nor was damage occasioned to a vessel by her props being carried away by the tide while she was undergoing repairs on the beach, excused, as falling within that exception. In Laveroni v. Drury, 8 Exch. R. 166, a question arose whether a damage to a cargo of cheese, occasioned by rats, was within the exception of the dangers or accidents of the sea and navigation; and the Continental and American authorities were cited to the Barons of the Exchequer, to show that it was, and that the carrier was excused, he having taken the usual and proper precautions against them.

That court decided otherwise, and say, "the exception includes only a danger or accident of the sea or navigation, properly so called (viz: one caused by the violence of the winds and waves, a vis major, acting upon a seaworthy and substantial ship), and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in ship at sea." And the court conclude "that the liability of the master and owner of a general ship is prima facie that of a common carrier; but that his responsibility may be either enlarged or qualified by the terms of the bill of lading if there be one; and that the question, whether the defendant is liable or not, is to be ascertained by this document when it exists." The principle of these cases establishes a liability against a carrier for a loss by fire arising from other than a natural cause, whether occurring on a steamboat accidentally, or communicated from another vessel, or from the shore; and the fact that fire produces the motive power of a boat does not affect the case. N. J. S. N. Co. v. Merchants' Bank, 6 How. 344, 381; Hale v. N. J. S. N. Co. 15 Conn. 539; Singleton v. Hilliard, 1 Strobh. (Law S. C.) 203; Gilmore v. Carman, 1 Sm. & Mar. 279.

In this suit, a witness was introduced, who claims to have been long familiar with the usages of the navigation and the river insurance risks of the Mississippi, and competent to testify in reference to the perils of that river. He says, "those are, sinking by coming in collision with rocks, snags, or other boats and vessels, and fire; but the most common form of bills of lading contains the exceptions, perils of the river and fire; but that in many instances the word "fire" is omitted, and he has not known an instance where the want of that word has created a difficulty in adjusting a loss, or was considered to give a claim against a boat on account of a loss by fire." The first inquiry *is, whether this evidence is ad- [*316 missible. In mercantile contracts, evidence is admissible to prove that the words in which the particular contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from that which they ordinarily import, and to annex incidents to written contracts, in respect to which they are silent, but which both parties probably contemplated because usual in such contracts.

But, although it is competent to explain what is ambiguous, and to introduce what is omitted, because sanctioned by usage, it is not competent to vary or contradict the terms of the contract. The exceptions in the bills of lading under consideration have been in use in policies of insurance and contracts of affreightment for a long period, and have acquired a distinct signification in the customs of merchants, and the opinions of professional men and courts. It would be surprising if any particular or artificial meaning was attached to them in the customs of the Mississippi River, contrary to, or

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distinguishable from, that which existed elsewhere in the community of shippers and merchants. In this case, the evidence fails to establish any peculiar sense of these words, as appropriate to the locality where the parties to this contract reside and made their contract. The evidence rather serves to show that the witness did not recognize the liability of a carrier, as it exists in the common law, and was ready to acquit him of responsibility for losses to which he did not contribute, by the negligence or fault either of himself or his agents. In Turney v. Wilson, 7 Yerg. 340—a case decided in the state from which the shipments described in the bill were chiefly made—evidence was offered to show there was an implied contract recognized in the usages of shippers and merchants which had prevailed from the first settlement of the country, to exempt the carrier from losses, except those proceeding from negligence or dishonesty to explain or construe a bill of lading of the common form. The court decided that the dangers of the river were such as could not have been prevented by human skill and foresight, and were incident to river navigation. That all evidence was irrelevant that did not show that the loss was occasioned by the act of God, the enemies of the country, or dangers of the river; that the custom could not affect or in anywise alter the written contract of the parties as contained in the bill of lading, as the language had a definite legal meaning which this custom could not change. A similiar question arose in the case of The Schooner Reeside, 2 Sumn. 568, where Justice Story condemns, in pointed language, the habit of admitting loose and incon-317*] clusive usages and customs "to *outweight the well-known and well-settled principles of law." And in Rogers v. Mechanics' Insurance Co. 1 Story, 603, he denies the authority of a usage of a particular port, in a particular trade, to limit, or control or qualify the language of mercantile contracts, such as a policy of insurance. A usage such as is pleaded in this suit, if existing, must be notorious and certain, and have been uniform in its application and long established in practice. It must have been exhibited in the transactions of the individuals and corporations concerned, in conducting the business of shipments, transportation and insurance, through the Mississippi Valley.

If the evidence had established that policies of insurance there did not designate fire among the risks assumed, that the words "perils of the river" were used to include that risk, and losses by fire had been uniformly settled under that clause in the policy; that contracts of affreightment had been made and losses adjusted on the same conditions; that these usages had received the sanction of professional and judicial opinion in the States bordering that river—the cause of the appellants would have presented different consideration. The record contains nothing to exempt them from the legal rule of liability, as established by the common law. Seven of the bills of lading produced contain the exception, "perils of the river and fire;" three others add to the perils of the river, "unavoidable accidents;" and in these cases the Circuit Court exonerated the appellants from responsibility.

The appellants further contend that the Insurance Company is not subrogated to the claims of the shippers of the cotton, whose losses have been adjusted on their policies of insurance; or, if this is so, still their suit should have been at law, in the name of the assured—the remedy being adequate and complete. In Randal v. Cochran, 1 Ves. Sr. 98, the Chancellor replied to a similar objection, "that the plaintiff had the plainest equity that could be." The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer. And in White v. Dobinson, 14 Sim. 273, an insurer enforced a lien on a judgment recovered by the assured for a loss, where the loss had been partially settled by him, on the policy. Monticello v. Mollison, 17 How. 152. These cases also show that an insurer may apply to equity whenever an impediment exists to the exercise of his legal remedy in the name of the assured.

The bill discloses fifteen different contracts of affreightment, of a similar character, which have been adjusted by the appellees, and which form the subject of this suit.

They have joined in the same bill, and much inconvenience *and vexation have been [*318 prevented. Without further inquiry, we think a sufficient ground for a resort to equity is disclosed.

Decree affirmed.

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*JOSIAH WALTON, Admr. of Priscilla [*355 Cotton, et al., Compts. and Plffs. in Er.,

v.

ALLEN COTTON, Noah Cotton, and William E. Jones.

(See S. C. 19 How. 355-359.)

"Children" in certain pension acts includes grand children.

The word "children" in the Pension Acts of June 4, 1832, and July 4, 1836, embraces the grandchildren of the deceased pensioner, whether their parents died before or after his decease.

They are entitled, per stirpes, to a distributive share of the deceased parent.

Argued Feb. 16, 1857. Decided Feb. 27, 1857.

IN ERROR to the Supreme Court of the State of Tennessee.

The case is stated by the court.

Messrs. S. S. Baxter and C. Ready, for the plaintiffs in error:

The right to an amount due the pensioner, vested, on the death of the pensioner, in the children then living, and if any of them die before the money is actually paid, the sum due such deceased child is to be paid to the executor or administrator, for the use and benefit of descendants of such children.

4 Stat. at L. 529, 530; 5 Stat. at L. 127, 311, 385.

The construction of the word "children" in the Act of Congress, is to be analogous to the word "children" in devises by will. The following authorities are referred to, to ascertain the effect of the word "children" in devises:

Crooke v. Brookeing, 2 Vern. 106; Reeves v. Brymer, 4 Ves. 698; Radcliffe v. Buckley, 10

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Ves. 195; Royle v. Hamilton, 4 Ves. 437; Williams on Executors, part 3, b. 3, ch. 2, sec. 2.

A remedial statute may be extended by equity to persons not named in it.

Dwarris, p. 721; United States v. Freeman, 3 How. 557.

Messrs. **Andrew Ewing** and **A. H. Lawrence** for the defendants in error.

Mr. Justice **McLean** delivered the opinion of the court:

This case comes before us by a writ of error to the Supreme Court of Tennessee.

It was commenced by filing a bill, in Sumner County, before Chancellor Ridley, in which the complainants state they are the children of Priscilla Cotton and Thomas Cotton, who was a captain in the Revolutionary War; that after his death, his widow, Priscilla, filed her declaration for a pension, on account of her husband. Josiah Walton made the application; but she died before the pension was granted. Walton administered on the estate, and he renewed the application, at great trouble and expense. The Pension Department allowed about one half the amount claimed. Out of the money drawn by the administrator, he retained what was agreed for his services and the services of counsel, and paid over the residue, in equal shares, to all the children of Priscilla Cotton, and the representatives of her children who were dead.

The bill further represents that William E. Jones, who acts as an agent for pension claims, and Allen Cotton, with the view of getting the business and money into their hands, applied to the County Court of Davidson County, and suppressed from said court the fact that an administration on said estate had been granted in the County of Sumner, and procured Allen Cotton to be appointed as administrator, which was done with the view of depriving the complainant and others of a legal portion of said pension fund.

The new administrator made application for the extension of the pension, so as to cover the 356*] whole time from the allowance *of the pension to the death of the pensioner, only one half of which had been granted. The application was successful; and Jones, under a power of attorney from the administrator, received the sum of $3,500 from the Government, which the defendants retain in their hands, and refuse to pay over; three fifths of the amount of which the complainants are entitled to, if the children who died before the decease of their mother be not entitled to any share, and three eights, should they be entitled.

The answer admits many of the allegations of the bill, but denies that the defendants acted improperly in procuring administration in Davidson County. They admit that they applied for and obtained the above sum, with a full knowledge by the Pension Office of the prior administration. The money was paid to them as the only living children of Priscilla Cotton at the time of her death; and they allege that this being the construction of the Government, it is conclusive.

The Chancellor, on the final hearing, decreed that the representatives of Arthur Cotton, John Cotton, and Polly Foxall, were entitled to three fifths of said $3,500, and interest, to be paid over to said children; and that said defendants, Noah Cotton, Allen Cotton, and William E. Jones, who have received said fund, are liable to pay over said three fifths of $3,500, amounting to $2,100, with interest as aforesaid, to be paid over to the children of Polly Foxall, one third; to the children of Arthur Cotton, one third; and to the children of John Cotton, one third; after paying the costs and expenses of their suit, the costs to be paid out of the fund in the hands of the defendants.

From this decree there was an appeal to the Supreme Court of Tennessee, which, on a hearing, reversed the decree of the Chancellor, holding that the fund should be distributed among the living children at the time of the pensioner's death, and that no part of it should go to the representatives of deceased children.

As the complainants claim a right under an Act of Congress, which by the decree of the Supreme Court has been rejected, the case is brought within the 25th section of the Judiciary Act, which gives us jurisdiction.

The 1st section of the Act entitled "An Act supplementary to the 'Act for the relief of certain surviving officers of the Revolution,'" dated June 4th, 1832, gave pensions to surviving officers, non-commissioned officers, musicians, soldiers, and Indian spies who had served in the Continental line, or state troops, volunteers, or militia, at one or more terms—a period of two years—during the war of the Revolution, etc., and *Cotton was entitled to receive his [*357 full pay, not exceeding the pay of a captain in the line, from the 4th of March, 1831, during his natural life. The 4th section of the same Act provided that the amount of pay which accrued under the Act before its date should be paid to the person entitled to the same as soon as may be; and in case of the death of any person embraced by the Act, or of the Act to which it is supplementary, during the period intervening between the semi-annual payments directed to be made and the death of such person, shall be paid to his widow, or if he leaves no widow, to his children.

The Act of July 4th, 1836, in the 1st section, gives five years' half-pay to widows, or children not sixteen years of age, under certain circumstances. If the soldier had died since the 4th March, 1831, and before the passage of that Act, the pension which had accrued during these periods is given by the 2d section to the widow, and if no widow, to the children. The Act of the 7th July, 1838, extends the benefits of the 3d section of the Act of 1836 to widows whose husbands have died since the passage of the Act. The Act 19th July, 1840, enacts, in the 1st section, that any male pensioner dying, leaving children and no widow, the pension due shall be paid to his children, and that it shall not be considered assets of said estate.

The 2d section provides, when a female pensioner shall die, leaving children, the amount due at the time of her death shall be paid to her representatives, for the benefit of her children. And the 3d section declares, "that on the death of any pensioner, male or female, leaving children, the amount due may be paid to any one or each of them, as they may prefer, without the intervention of an administrator."

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The question in the case turns upon the construction of these statutes. Does a right construction of them give the pension due to the grandchildren of the deceased pensioner; and if so, does the bounty extend to the representatives of his children who died before his decease; or do the acts restrict the bounty to his children living at the time of his death? This last construction has been adopted and acted upon by the government.

This view is mainly founded on the considerations, that on the death of the pensioner, the bounty is given to his widow, and that if he leave no widow, to his children; that it was a bounty of the Government, arising from personal considerations of gratitude for services rendered, is not liable to the claims of creditors, and should not be extended, by construction to persons not named in the Act.

358*] *The pension is undoubtedly a bounty of the government, and in the hands of an administrator of a deceased pensioner it would not be liable to the claims of creditors, had the Acts of Congress omitted such a provision. But the legislative intent is shown to be in accordance, in this respect, with the law. But should the word "children," as used in these statutes, be more restricted than when used in a will? In the construction of wills, unless there is something to control a different meaning, the word "children" is often held to mean grandchildren. There is no argument which can be drawn from human sympathy, to exclude grandchildren from the bounty, whether we look to the donors or to the chief recipient.

Congress, from high motives of policy, by granting pensions, alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered. But to withhold any arrearage of this bounty from his grandchildren, who had the misfortune to be left orphans, and give it to his living children, on his decease, would not seem to be a fit discrimination of national gratitude.

Under the construction given by the department, if a male pensioner die, leaving no widow or children, but grandchildren, the pension cannot be drawn from the Treasury. This would seem to stop short of carrying out the humane motive of Congress. They have not named grandchildren in the Acts; but they are included in the equity of the Statutes. And the argument that the pension is a gratuity, and was intended to be personal, will apply as well to grandchildren as to children.

There can be no doubt that Congress had a right to distribute this bounty at their pleasure, and to declare it should not be liable to the debts of the beneficiaries. But they will be presumed to have acted under the ordinary influences which lead to an equitable and not a capricious result. And where the language used may be so construed as to carry out a benign policy, within the reasonable intent of Congress, it should be done.

On a deliberate consideration of the above Statutes, we have come to the conclusion that the word "children," in the Acts, embrace the grandchildren of the deceased pensioner, whether their parents died before or after his decease. And we think they are entitled, per stirpes, to a distributive share of the deceased parent.

This construction does not correspond with the decree of the Chancellor, nor with that which was expressed by the Supreme Court in reversing his decree. The decree of the Supreme Court of Tennessee is therefore reversed, and the case *is directed to be [*359 transmitted to that court, that the views here given may be carried into effect, in the ordinary mode of proceeding by that court.

Mr. Justice Curtis, dissenting:

I cannot concur in so much of the opinion just delivered as construes the word "children," in this Act of Congress, to mean children and grandchildren. The legal signification of the word "children," accords with its popular meaning, and designates the immediate offspring. Adams v. Law, 17 How. 419, and cases there cited. It may be used in a more enlarged sense to include issue; but the intention so to employ it must be manifested by the context or by the subject matter. I see nothing in the context or the subject matter of this Act to carry the meaning of the word "children" beyond its ordinary signification. Nothing has been suggested, save the conviction, felt by some members of the court, that grandchildren are proper subjects of this bounty of Congress. This consideration is, in my opinion, too indeterminate to enable me to construe the Act to mean what it has not said.

Mr. Justice Daniel and Mr. Justice Campbell concurred in the above opinion of Mr. Justice Curtis.

SAMUEL F. PRATT, Pascal P. Pratt, and Edward P. Beals, Claimants of the Steamboat Sultana, Appts.,

v.

CHARLES M. REED, Libt.

(See S. C. 19 How. 359-362.)

To create lien for supplies on vessel, necessity for credit on vessel must be shown.

In order that there may be a maritime lien on a vessel for supplies, a necessity, at the time of procuring the supplies, for a credit on the vessel must be shown.

This proof is as essential as that of the article itself.

Argued Feb. 2, 1857. Decided Feb. 27, 1857.

THE libel in this case was filed in the District Court of the United States for the Northern District of New York, by the appellee against the steamboat Sultana, etc., to recover for supplies furnished said boat.

The decree of the District Court was in favor of the libelant for the sum of $2,629.81.

The Circuit Court having affirmed this decree; the claimants took an appeal to this court.

NOTE.—Maritime liens for supplies and repairs—see notes 4 L. ed. U. S. 609; 11 L. ed. U. S. 239; 70 L.R.A. 391.

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A further statement of the case appears in the opinion of the court.

Mr. Henry W. Rogers, for appellant:

The coal, or most of it, for the value of which this libel was filed, was furnished to the sole owner of The Sultana. In such case no lien is created.

The St. Jago de Cuba, 9 Wheat. 416; The Phebe, 1 Ware, 275; Conkling's Admiralty, 59.

There was no proof that the coal was necessary for the purposes of the voyage, or that there was any necessity for the credit.

Conkling, Adm. 817; Benedict's Adm. 484; The Nestor, 1 Sumn. 74; The Fortitude, 3 Sumn. 228; The Alexander, 6 Jur. 241.

Mr. John Ganson, for the appellee:

As the coal was furnished on the master's order, a lien is given, notwithstanding he was owner. It is not proved that the libelant knew that the master was sole owner; the proof is, that the libelant knew that he was principal or sole owner.

The Chusan, 2 Sto. 468.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Northern District of New York, in admiralty.

The libel was filed by Reed, the respondent, against the steamboat Sultana, to recover for supplies furnished said boat.

The claimants in the court below, set up, by way of defense, a mortgage executed to them, by the master and owner, upon the Sultana, dated the 31st October, 1853, to secure the sum of $5,354.98. The mortgage was duly recorded in the office of the customs at Buffalo, the place of the enrollment of the vessel, and was also filed in the office of the clerk of the County of Erie. The demand claimed in the libel was a running account for the supply of coal at Erie, in the State of Pennsylvania, extending from June, 1852, to May, 1854. The claimants admitted, in their answer the supply set up in the libel, and also that it was represented to be necessary at the time delivered, to enable the vessel to pursue her business upon Erie and other western lakes.

The answer denies that the supplies were furnished upon the credit of the boat; but, on the contrary, avers they were furnished on the credit of the master.

The agreed facts in the case admit that there was no representation of the necessity of the supplies, other than that they were directed by the master at the times when furnished, and that the libelant knew, at these several times, that Appleby, the master, was the sole owner of The Sultana; that he usually navigated the boat, as master, and was present when the supplies were furnished. When not present, they were furnished at the request of the person in command.

Although it does not distinctly appear in the case, yet it is fairly to be inferred, that this vessel was engaged in making regular trips upon the western lakes, in the business of carrying passengers and freight, and procured her supplies of coal at places of convenient distance, according to her necessities, by a previous understanding with the parties furnishing the article. The bill rendered by the libelant contains a running account, of debit and credit, through a period of nearly two years.

There is no great doubt in the case, but that the article was necessary for the navigation of the vessel at the time when furnished, though the proof is very loose and indefinite.

It seems to have been taken for granted, that a supply of *coal was essential to the [*361 propelling of a steamboat, and, in a general sense, this is doubtless true; but then, to make out a necessity within the admiralty rule, the supply must be really or apparently necessary at the time when it is furnished. But the more serious difficulty in the case on the part of the libelant, is the entire absence of any proof, to show that there was also a necessity, at the time of procuring the supplies, for a credit upon the vessel. This proof is as essential a sthat of the necessity of the article itself. The vessel is not subject to a lien for a common debt of the master or owner. It is only under very special circumstances, and in an unforeseen and unexpected emergency, that an implied maritime hypothecation can be created. It seems, also, to be supposed that circumstances of less pressing necessity, for supplies or repairs, and an implied hypothecation of the vessel to procure them, will satisfy the rule, than in a case of a necessity, sufficient to justify a loan of money on bottomry, for the like purpose. We think this a misapprehension.

The only difference is, that before a bottomry bond can be given, an additional fact must appear, namely: that the master could not procure the money, without giving the extraordinary interest incident to that species of security. This distinction was attempted in the case of The Alexander, 1 Wm. Rob. 346, but was rejected by Dr. Lushington. A principle, also excluding any such distinction, has been laid down at this term, in the case of Wm. Thomas et al. v. J. W. Osborn.

Now, the supplies having been furnished at a fixed place, according to the account current, and apparently under some general understanding and arrangement, the presumption is that there could be no necessity for the implied hypothecation of the vessel—there could be no unexpected or unforeseen exigency to require it. For aught that appears, the supplies could have been procured on the personal credit of the master, and in this case especially, as he was also the owner.

We do not say that the mere fact of the master being owner, of itself, excludes the possibility of a case of necessity that would justify an implied hypothecation; but it is undoubtedly a circumstance that should be attended to, in ascertaining whether any such necessity existed in the particular case.

1 Wm. Rob. 369, The Sophie.

These maritime liens, in the coasting business, and in the business upon the lakes and rivers, are greatly increasing; and as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of the law, in this respect, will *tend to perplex and embarrass business,[*362 rather than furnish facilities to carry it forward.

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After the fullest consideration, we think the decree below was erroneous, and should be reversed, and that the mortgages are entitled to the proceeds in the registry.

This is the case of a foreign ship, the vessel belonging at Buffalo as her home port, and the debt contracted at Erie, in the State of Pennsylvania. We do not intend to express any opinion as to the necessity required to create liens upon vessels, under the local law of the States.

Decree reversed, and proceeds ordered to be paid to the mortgagees.

DANIEL TOD, Daniel P. Rhodes, Robert C. Yates, and James Ford, Libelants and Appellants,

v.

SAMUEL E. PRATT and Edward P. Beales, Claimants of Steamboat Sultana, her Engine, Boiler, etc.

(See S. C. 19 How. 362.)

This case falls within the principle of the preceding case of Pratt v. Reed, and same decision.

Argued Jan. 30 and Feb. 2, 1857. Decided Feb. 27, 1857.

THIS is an appeal from a decree of the Circuit Court of the United States for the Northern District of New York, affirming the decree of the District Court for said district.

The case is sufficiently stated by the court.

See, also, the preceding case of Pratt v. Reed, with which the case was argued.

Mr. John Ganson for appellants.

Messrs. Bowen and Henry W. Rogers for appellees.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Northern District of New York, in admiralty.

The libel was filed by the appellants in the court below to recover for supplies furnished the steamboat Sultana, at Cleveland, in the State of Ohio. The supplies furnished were coal, which, according to the account current, began in April, 1853, and continued from time to time till April, 1854.

The defense set up was the mortgage, which has been referred to in the case of Pratt et al. v. Reed, just decided. There was also a second ground of defense which it is not material to notice. The District Court decreed in favor of the defendants, except as it respects some $500, which item has not been appealed from. The Circuit Court affirmed the decree.

The case falls within the principles stated in that above referred to, and which determined that the mortgages were entitled to the proceeds of the vessel in the registry.

This was the result of the decision of the court below, and the decree is, therefore, affirmed.

THE UNITED STATES, Plff. in Er.,

v.

THE CITY BANK OF COLUMBUS.

(See S. C. 19 How. 385-388.)

Validity of act of cashier must be determined upon all the evidence to be brought out and passed upon by the jury—it cannot be determined by a single act—it does not necessarily depend on express knowledge or direction from the directors.

To determine whether an act of the cashier of a bank is valid, all the evidence relative to the acts and authority of the cashier, either inherent and exercised strictly virtute officii or as an agent, general or special, of the bank, under the authority of its charter or by-laws, and proof, if any, of the ratification or rejection by the bank of this or of similar acts of the cashier, should be brought out to be passed upon by the jury, under instructions from the court.

His authority to do an act does not depend necessarily in the knowledge of the directors that he has done it, or any express direction to do it from them.

His authority cannot be determined here upon an isolated fact or act of the cashier.

Argued Feb. 9, 1857. Decided Feb. 27, 1857.

ON CERTIFICATE of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio.

The case is stated by the court.

Mr. C. Cushing, Atty.-Gen. for the plaintiff.

Mr. Henry Stanbury for the defendant.

The argument, being to the merits, is not here given.

*Mr. Justice Daniel delivered the [*386 opinion of the court:

This cause is brought before us upon a certificate of a division of opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio.

The United States instituted their action of assumpsit against the defendants for the recovery of a sum of money, laying their damages at $200,000.

The declaration consisted of two counts. The first was upon an alleged agreement between the United States and the City Bank of Columbus, whereby the latter, on the 1st day of November, 1850, contracted and undertook to transfer for the plaintiffs the sum of $100,000, the money of the plaintiffs, from the City of New York to the City of New Orleans, and to deposit the same at the latter place, in the Treasury of the United States, by the first day of January, 1351, free of charge.

In this count, the receipt of the money by the Bank, viz.: $100,000, for the purposes stated, the failure to make the transfer and deposit in conformity with the agreement, the conversion of the money so received by the Bank to its own use, are all expressly averred.

The second count was the common indebitatus assumpsit for money had and received to the plaintiffs' use. Upon the trial before the jury of the issues joined by the parties, at the October Term of the Circuit Court, in the year 1855, the plaintiffs, in order to establish the alleged agreement and undertaking on the part of the Bank, gave in evidence the following papers, viz.:

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First, a letter from Thomas Moodie, Cashier of the City Bank of Columbus, in these words:

"City Bank of Columbus,
Columbus, Ohio, Oct. 26, 1850.

Hon. Thomas Corwin,
Secretary of the Treasury, Washington City.

Sir: The bearer, Colonel William Miner, a director of this Bank, is authorized on behalf of this institution, to make proposals for the purchase of United States stocks to the amount of $100,000. Any arrangement he may make will be recognized and fully carried out by this Bank. He is also authorized, if consistent with the rules of the Treasury Department, to contract on behalf of this institution for the transfer of money from the east to the south or west, for the government.

I have the honor to be, sir, your obedient servant, Thomas Moodie, Cashier."

387*] *Second, the following contract:

"W. City, November 1, 1850.

This will certify that I have contracted with the United States Treasury, as the agent of the City Bank of Columbus, to transfer $100,000 from New York to New Orleans, to be deposited in the Treasury at the latter-named city by the 1st day of January, 1851, free of charge. I have, in pursuance of said contract, this day received a draft in my own name for $100,000 on the United States Treasury at New York City, which is to be accounted for on said contract.

William Miner."

"Upon the production of these papers, and proof of their execution, and further proof that said letter was the act of said Cashier alone, without the knowledge or sanction of the directory of said Bank, before, at the time of, or subsequent thereto, but was copied in the letter book of the Bank at the time of its execution a question arose as to the validity thereof, upon which question the judges of this court were divided in opinion. It is, therefore, by the request of both the parties, hereby ordered that the said question be certified to the Supreme Court of the United States—that is to say, 'Do said papers, so made, constitute a valid contract between the parties to this suit?' It was agreed that the defendant is an independent Bank, under the Act of the General Assembly of the State of Ohio of 1844-'5, to incorporate the State Bank of Ohio and other banking companies.

Wednesday, November 28, 1855.

(Signed) John McLean. [Seal.]
H. H. Leavitt. [Seal.]"

In considering this certificate of division, and the inquiry it propounds, an insuperable difficulty is perceived, arising from the partial and imperfect form in which the facts assumed as the foundation of the inquiry are presented, and from the obvious absence of facts and circumstances pertinent to the case, and by which, if disclosed, its complexion might be entirely controlled.

This court is asked to say whether the above-cited letter of the Cashier of the City Bank of Columbus, written without the knowledge of the directory, though copied at the time of its date in the letter book of the Bank, was a legal and valid act and authority.

Now, it must be obvious that the legality or validity of the letter of the cashier, and his authority to write that letter, do not depend solely and necessarily upon the fact of knowledge in *the directory at the time of writing [*388 that letter, nor on that of express direction or permission given at the time of its composition. The letter might have been legal and valid in the absence of either such knowledge or direction, or of both.

The powers of the cashier of a bank are such as are incident to, and implied in, his official character, as generally understood, as cash keeper, cash receiver, or payer, as negotiator and correspondent for the corporation, or as agent for various acts that are necessary and appropriate to the functions of such an officer, and inseparable from the operations of the bank; or those powers and duties may be created by a general or special authority declared in the charter or in the by-laws of the corporation. It would seem inconsistent with these considerations to determine upon an isolated fact or act of the Cashier, not absolutely irreconcilable with the customary functions of such an officer, as being decisive of his capacities and duties; and this, irrespective of reference or inquiry as to the powers with which he might have been clothed; but on the contrary, by cutting off all proofs as to the existence of any such powers, when by the introduction of those proofs the competency of such powers, or the recognition of them by the Bank, might perhaps have been shown.

The true character of this cause seems not to have been developed before the Circuit Court, nor is it made apparent upon the certificate now before this court.

We think that all the evidence relevant to the acts and authority of the Cashier, either inherent and exercised strictly virtute officii, or as an agent, general or special, of the Bank, under either the authority of its charter or its by-laws, and proof, if any, of the ratification or rejection by the Bank of this or of similar acts of the Cashier, should have been fully brought out, to be passed upon by the jury under instructions from the court, or in the mode of a certificate of division, in the event of a disagreement between the judges.

This court, therefore, refusing to respond upon the question, as propounded to them upon the certificate from the Circuit Court, remands this case to that court for trial.

GEORGE BULKLEY, Plff. in Er.,
v.
CHRISTIAN HONOLD.

(See S. C. 19 How. 390-393.)

Vendor of vessel in Louisiana warrants against hidden defects—measure of recovery for breach of such warranty—unsoundness is a hidden defect—contract governed by the laws of Louisiana.

Note.—Conflict of laws as to sales—see note, 64 L.R.A. 823.

Implied warranty of fitness of property bought for special purpose—see note, 22 L.R.A. 187.

Implied warranty against latent defects, and that manufactured article is fit for its purpose.

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The law of Louisiana imposes on the vendor the obligation of warranting the thing sold against its hidden defects.

Hidden defects are those which cannot be discovered by simple inspection.

If the vendee retain the thing sold, he may have an action to recover the difference in value between the thing as warranted and as it was in fact, together with the expenses incurred on the thing, after deducting its fruits.

Unsoundness of a vessel, by reason of the decay and rottenness of the hull, to asertain which it was necessary to strip and bore the vessel, is a hidden defect.

Such warranty extends to the soundness of a vessel. It is not necessary that the plaintiff should offer to restore the vessel.

This contract is governed by the laws of Louisiana; the vessel being purchased at New Orleans, and the contract performed there, although the vendors resided in New York.

The subject of sales, with the obligations which attend them, is regulated by the Civil Code of Louisiana, and sales of vessels are within these laws.

Argued Feb. 16, 1857. Decided Feb. 27, 1857.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

Messrs. **Miles Taylor, Durant & Horner, and Owen & Vose**, for plaintiffs in error:

After stating the facts in the case, the counsel said the plaintiff in error respectfully submits that the judgment of the court below ought to be reversed on the following grounds:

First. If the contract of sale in this case is to be governed by the law of Louisiana, then the decision of the lower court is erroneous.

1st. Because the defect in the ship was an apparent defect in the legal sense of that term, the existence of which imposed no responsibility on the vendor.

Williams v. Miller, 9 La. 131; Millaudon v. Price, 3 La. Ann. 6; Twibill v. Perkins, 8 La. Ann. 133.

2d. Because the obligation of warranty implied in sales of ships, does not extend to cases of decay, to which they are from their nature liable.

Decuir v. Packwood, 5 Mart. La. 306; Millaudon v. Price, 3 La. Ann. 6; Twibill v. Perkins, 8 La. Ann. 133; Thompson v. Mylne, 4 La. Ann. 206, 210; C. C. 1934; C. N. 1641–2; 1 Sirey Codes Annotes, notes, 1, 36; Smith on Mercantile Law, 464; Barclay v. Conrad, 7 La. 264.

3d. The defendant in error, by failing to offer to place the defendant in the court below in the position he was in before the sale, by tendering back the ship, &c., lost all right to maintain his action in redhibition, or in diminution of the price.

Poth. Cont. De Vente, part 2, ch. 1. sec. 4, art. 4, sec. 11, Nos. 219–222; art. 5, sec. 232; Troplang Cont. De Vente, sec. 567; Code of 1808, p. 348, art. 25; C. C. 2451, 2497, 2509, 2522; C. N. 1603, 1625, 1641, 1642; Conner v. Henderson, 15 Mass. 319; 23 Pick. 283.

Second. But the contract of sale in this case is not governed by the laws of Louisiana.

1st. The law of domicil of the vendor of a movable, determines the extent of the right transferred and the obligations incurred, by the vendor.

Story's Confl. of Laws, ed. 1834, secs. 376, 379, 382, 387, 388.

2d. The Commercial Law of the United States is in contradistinction to the Civil Law of Louisiana governing the sale.

Talcott v. McKibben, 2 Mart. La. 304; Old Code, p. 260, art. 7; C. C. 2823; Durnford v. Patterson, 7 Mart. La. 460; Barry v. La. Ins. Co. 12 Mart. La. 484; Wagner v. Kenner, 2 Rob. La. 122; Thompson v. Mylne, 4 La. Ann. 206.

In a case like the present, it is necessary to allege and prove that the defendant was, anterior to the institution of suit, put regularly in default; but it is nowhere alleged in the petition that the defendant was put in default. If we look at plaintiff's position after the sale, and after the ship returned to port, and the survey of the inspectors which demonstrated her defective condition, we shall find that he had the right under Louisiana law,

1st. To sue for damages for breach of contract;

2d. To sue for a specific performance of the contract, if the case would permit it;

3d. To sue for dissolution of contract.

C. C., 1920.

The plaintiff has pursued the first, and sued defendant for damages.

This is in truth nothing but an action for reduction of the price, for under C. C., compensation for injury sustained by a purchaser in consequence of defects in the thing sold, can only be recovered by a redhibitory action, or by the action quanti minoris.

Richardson v. Johnson, 1 La. Ann. 389;

On sales of personal goods there is an implied warranty, that the article sold corresponds with the commodity represented, unless circumstances show that there was the risk, not only of quality, but of kind. Borrekins v. Bevan, 3 Rawle. 23; Willing v. Consequa, 1 Pet. C. C. 317; Jackson v. Wetherill, 7 S. & R. 482; Kase v. John, 10 Watts, 109; but see Holden v. Dakin, 4 Johns. 421.

In case of partial adulteration, which does not destroy the distinctive character of the thing, the buyer is bound. Jenning v. Gratz, 3 Rawle. 168; but see De Freeze v. Trumper, 1 Johns. 274.

Implied warranty, as to quality only, applies where articles are susceptible of a standard quality, or sold by sample. Pollard v. Lyman, 1 Day Cas. 156.

Where the seller of a horse knew of a material defect and did not disclose it, if it be unknown to the buyer, or could not be presumed to be known to a buyer of common prudence, it will vitiate the contract. Dixon v. M'Clutchey, Addis. 322; 3 Yeates, 262; Addis. 146.

A warranty will be implied against all latent defects, when the seller knew that the buyer did not rely on his own judgment, but on that of the seller, who knew, or might have known, the existence of the defects. Schneider v. Heath, 3 Camp. 506; Baglehole v. Walters, 3 Camp. 154; Hough v. Richardson, 3 Story, 690; Doggett v. Emerson, 3 Story, 732; Story on Sales, sec 374.

When the defect is latent, and such that the vendee could not, by the closest and strictest attention, detect it, he is always understood to rely upon the openness of the seller, and if the seller, knowing such a defect, do not disclose it, it is a fraud which annuls the contract, unless there is a proviso that the sale is "with all faults." See cases last cited, and Mellish v. Motteaux, Peake, 115; Bywater v. Richardson, 1 A. & E. 508; S. C. 3 Nev. & Man. 752; 2 Kent. Com. 490. Where the sale is "with all faults," the vendor is not liable for latent defects, whether he knew them or not, if he has used no artifice to disguise them, or to prevent the buyer from discovering them, or has been guilty of no misrepresentation. Pickering v. Dowson, 4 Taunt. 779; Pearce v. Blackwell, 12 Ired. 49; Hanson v. Edgerly, 29 N. H. 343

There is an implied warranty against latent defects where the seller might have provided against the existence of any such defects, or, where a warranty is implied from the very nature of the transaction—as in the case of a manufacturer, or pro-

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Peterson v. Burn, 3 La. Ann. 655; Fisk v. Proctor, 4 La. Ann. 562.

Now, it is well settled that before the redhibitory action will lie, the purchaser must put the vendor in default.

Janin v. Franklin, 4 La. 198; Barrett v. Bullard, 19 La. 281; Fazende v. Hagan, 9 Rob. La. 306; Bach v. Barrett, 2 La. Ann. 950; Fisk v. Proctor, 4 La. Ann. 562.

The action for a reduction of the price is subject to the same rules and to the same limitations as the redhibitory action.

C. C. 2522.

Mr. J. P. Benjamin, for defendant in error:

1st. The contract being made and executed in Louisiana, the rights and obligations of the parties to it must be governed by the law of that State.

2d. By that law, the vendor is bound to warrant the thing sold against hidden defects.

C. C. 2450, 2451.

3d. The consequences of this warranty are, to give the purchaser the election of avoiding the sale or claiming damages.

C. C. 2496, 2519, 1920.

4th. The defects which the defendant is bound to warrant against are such as "render the thing absolutely useless, or its use so inconvenient and imperfect that it must be supposed the buyer would not have purchased it, had he known of the vice."

C. C. 2496, 2499.

5th. The only exceptions to the warranty are "against apparent defects discoverable by simple inspection (C. C. 2497), and later defects which the seller has declared to the buyer, or at the time of the sale."

C. C. 2498.

The case made out by the statement of facts is covered completely by the foregoing provisions of the statute law of Louisiana, which seem to leave no room for argument.

Mr. Justice Curtis delivered the opinion of the court:

The defendant in error brought his action in the Circuit Court of the United States for the Eastern District of Louisiana, founded on the allegations that he purchased at New Orleans, of the plaintiff in error and others, a vessel called The Ashland, for the sum of $27,500; that the vessel was then partly laden as a general ship for an outward foreign voyage, and it was agreed the purchaser should take on himself the expenses and advantages of that condition of the vessel; that, accordingly, the cargo was completed and the vessel went to sea, but was found to be unseaworthy, returned to New Orleans, the cargo was removed, and the hull examined and ascertained to be so decayed and rotten as to be of no value without very extensive and costly repairs. The court found these facts proved, and allowed to the plaintiff below damages equal to the difference between the price paid and the actual value of the vessel, adding the expenses of the vessel and cargo, incurred by the plaintiff below by reason of the sale.

The petition averred a fraudulent concealment by the vendors of the defects of the vessel, but the court found this not proved.

The law of Louisiana imposes on the seller the obligation of warranting the thing sold against its hidden defects. Civ. Code, arts. 2450, 2451. Hidden defects are those which could not be discovered by simple inspection. Civ. Code, art. 2497. In case the vendee desires to rescind the contract by reason of the breach of such a warranty, he may do so by an action of redhibition. But he may also retain the thing sold, and have an action for reduction of the price by reason of the difference in value between the thing as warranted and as it was in fact. Civ. Code. arts. 2519, 2520. And in this action only such a part of the price as will indemnify the vendee for the difference between the value of the thing as warranted and the thing actually sold, together with the expenses incurred on the thing, after deducting its fruits, can be recovered. Civ. Code, arts. 2522, 2509.

*The Circuit Court appears to have [*392 strictly pursued these rules in framing its judgment.

But it is insisted the defects were apparent, and not hidden defects. We do not think so. Certainly they were discoverable, but not on what the Code terms "simple inspection." It was necessary to strip or bore the vessel, to ascertain the state of its frame; and this, we think, the vendee was not bound to do under the law of Louisiana.

It is further argued that implied warranty does not extend to the soundness of a vessel,

ducer, who undertakes to furnish articles of his manufacture, or produce, in answer to an order. Jones v. Bright, 5 Bing. 533; S. C. 3 Moore & Payne, 155; Brown v. Edgington, 2 Man. & Gr. 290; Story on sales, secs. 371, 372, 375.

If an article sold for a particular purpose, turns out to be defective, an action is maintainable against the seller, though there was no warranty at the time of sale. Gray v. Cox, 6 D. & R. 200; 4 B. & C. 108; 1 C. & P. 184; 8 D. & R. 220; 5 B. & C. 458; as copper sheeting for a ship, supplied by the manufacturer for that purpose. Jones v. Bright, 3 M. & P. 155; 5 Bing. 533; or a barge, for a purpose known to the builder, who sold it. Shepherd v. Pybus, 4 Scott, N. R. 434; 3 M. & G. 68.

The warranty that it is fit for the specific purpose, is implied, and there is no exception as to undiscoverable latent defects. Randall v. Newson, 2 L. R. Q. B. Div. 102; 46 L. J. Q. B. Div. 259; 36 L. T. N. S. 164; 25 W. R. 313; C. A. Rev'g S. C. 44 L. F.; Q. B. Div. 634; 34 L. T. N. S. 527.

As a general rule, upon the sale of an article by the manufacturer, there is an implied warranty that it will answer the purpose for which it was made. Brown v. Murphee, 31 Miss. 91; Field v. Kinnear, 4 Kan. 476; Street v. Chapman, 29 Ind. 142; Kingsbury v. Taylor, 29 Me. 508; Pacific Iron Works v. Newhall, 34 Conn. 67; Bigge v. Parkinson, 7 Hurl. & N. 955.

Also, that the article is free from any latent defect growing out of the process of manufacture, Hoe v. Sanborn, 21 N. Y. 552. For a latent defect in the materials employed, the manufacturer is liable as on implied warranty, only where it is proved, or is to be presumed that he knew of the defect. See last case cited, and Bragg v. Morrill, 49 Vt. 45.

A warranty may exist in the case of an executory contract when the defect in the property is incapable of discovery at the time of delivery. In such case the purchaser may retain the property and sue upon the warranty. Parks v. Morris A. & T. Co. 54 N. Y. 586; Brown v. Burhans, 4 Hun, 227. If the defect is open, visible and notorious, at the time of delivery, the purchaser is bound to reject the articles, and refuse to receive them as compliance with the contract, or he will waive his right to damages. See cases last cited, and McClung v. Kelly, 21 Iowa, 508; Phelps v. Quinn, 1 Bush, 375.

An express warranty excludes any implied warranty. McGraw v. Fletcher, 35 Mich. 104; Mullain v. Thomas, 43 Conn. 252.

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because it is known to all, that, from the nature of the thing, it must decay, and the purchaser may be considered as knowing this, and making allowance therefor in the price. It is true that vessels must, after some time, decay; and it is also true that most subjects of sale must at some time become of less or of no value. But it is not true that vessels exposed to sale are generally unsound and unseaworthy. The buyer has no notice, from the nature of the article, that any particular vessel offered to be sold is unseaworthy by reason of the decayed state of that part of its frame which is concealed from sight. We do not perceive, therefore, why any different rule should be applicable to vessels, from that applied to most other subjects of sale. See De Armas v. Gray et al. 10 La. 575.

Another objection is, that the plaintiff below did not offer to restore the vessel. But this proceeds on a misapprehension of the nature of remedy. In an action of redhibition, such an offer would be necessary. Here, the contract is to stand unrescinded, and the buyer retains the thing, the price only being lessened as much as is necessary to do justice.

It was also argued that this contract was not to be governed by the laws of Louisiana, but by the laws of New York, where the vendors resided. But the contract was made and performed in Louisiana, and must be governed by its laws.

Boyle v. Zacharie, 6 Pet. 635; Cox v. United States, 6 Pet. 172; Bell v. Bruen, 1 How. 169.

The counsel for the plaintiff in error also urged, that if the law of Louisiana ought to govern the contract, that law was to be found, not in the Civil Code of that State, but in the general commercial law of the country. Without pausing upon the difficulties which otherwise might attend this proposition, we think it sufficient to say, that we find the subject of sales, with the obligations which attend them, regulated by the Civil Code of Louisiana, and we see no sound reason why sales of vessels are not within those laws.

The judgment of the Circuit Court is affirmed.

393*] *LATHROP L. STURGIS, Plff. in Er.,
v.
CHRISTIAN HONOLD.

(See S. C. 19 How. 393.)

This case depends on the same facts as preceding case, and the decision is the same.

Argued Feb. 16, 1857. Decided Feb. 27, 1857.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

Messrs. Miles Taylor, Drant & Horner, and Owen & Vose, for plaintiff in error.

Mr. J. P. Benjamin, for defendant in error.

The brief of Mr. Taylor is given in the report of the preceding case of Bulkley v. Honold.

Mr. Justice Curtis delivered the opinion of the court:

This case depends on the same facts and principles as the preceding case, and the judgment of the Circuit Court therein is affirmed.

*THE UNITED STATES, Appts., [*363
v.
THOMAS W. SUTHERLAND, Guardian of Victoria, Isabel, Miguel, and Helina, Minor Children of Miguel De Pedroreno, Deceased.

(See S. C. 19 How. 363-366.)

Description in Mexican patent not void for uncertainty.

A description of the land in a Mexican patent of espediente as follows: "A tract of land known by the name of 'El Cajon,' near the mission of San Diego," is not void for uncertainty.

Those who allege it is void for uncertainty must prove either that there are two estates called "El Cajon" near the mission of San Diego, to which the description would equally apply, in which case it would be void for ambiguity; or they must prove that there is no estate or property known by that name about San Diego.

But the land in the patent is further described as "that which the diseño attached to the espediente expresses."

There is no evidence whatever that, with the assistance of this map, a surveyor would find any difficulty in locating it.

Argued Feb. 17, 1857. Decided March 5, 1857.

APPEAL from the District Court of the United States for the Southern District of California.

The case is stated by the court.

Mr. C. Cushing, Atty-Gen., for the appellants:

1. The grant is void for uncertainty.

2. No sufficient juridical possession has been given, so as to define the grant and segregate it from public domain. The alleged survey does not conform to the grant in any respect.

The alleged investiture of juridical possession was after the functions of Mexican officials had ceased in California.

This case is distinguished from Frémont's, because that grant specified a quantity to which the grantee was entitled. Here there was no quantity specified, and nothing made certain by survey and position.

3. The grant itself contains a condition precedent, which is not shown to have been performed.

Mr. Robert Rose, for the appellees:

The want of judicial possession, is no objection to the validity of the claim.

Frémont v. The U. S. 17 How. 562; U. S. v. Larkin, 18 How. 557; U. S. v. Reading, 18 How. 6.

The condition to pay the debt to Pedrorena, is a matter in which the United States have no concern. It is a condition subsequent.

The land conceded is identified by the map annexed to the grant. Upon the final confirmation by this court, it will be the duty of the Surveyor-General of the United States for California to make an accurate survey, and to furnish plates of the same.

9 Stat. at L. 633.

Mr. Justice Grier delivered the opinion of the court:

The defendants in error filed their petition before the Board of Commissioners for ascertaining and settling private land Claims in California, claiming "a tract of land called 'El Cajon,' containing eleven sitios de ganado

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mayor, situated in the County of San Diego, by virtue of a grant in fee made to their mother, Doña Maria Antonio Estudillo de Pedrorena, by Pio Pico, Governor of California, bearing date 23d of Sept. 1845, and approved by the Territorial Deputation on the 3d of October, 1845."

The only question arising in this case, which has not been disposed of in former decisions of this court, is the objection "that the grant is void for uncertainty," because it defines neither boundaries nor quantity. The authenticity of the grant and confirmation are proved, and do not appear to have been disputed before the commissioners. It is in evidence, also, that Doña Maria and her husband went into possession of the place called "El Cajon" in the year 1845, and have made it "the best cultivated rancho in the country about San Diego." It had formerly belonged to the mission of San Diego. The mission was in debt to the husband of Doña Maria, and agreed to transfer their right of occupancy on this rancho to her, in satisfaction of her husband's debt.

Judicial possession was not delivered till September, 1846, after the establishment of the American authority, which was in July of that year. And whether void or valid, the espediente of possession made by the officer, San-364*] tiago E. Arguello (who *could not get the assistance of a surveyor), seems to throw little light on the subject of precise boundary.

But, under the circumstances, the want of such juridical delivery of possession will not affect the title of the petitioners, unless the grant be absolutely void for uncertainty. The description of the land granted is to be found in the following language in the patent or espediente: "A tract of land known by the name of 'El Cajon,' near the mission of San Diego." And again: "The land of which grant is made is that which the map (diseño) attached to the respective espediente expresses," etc. "The judge who may give the possession shall inform the government of the number of sitios de ganado mayor it contains.

In construing grants of land in California, made under the Spanish or Mexican authorities, we must take into view the state of the country and the policy of the government. The population of California before its transfer to the United States was very sparse, consisting chiefly of a few military posts and some inconsiderable villages. The millions of acres of land around them, with the exception of a mission or a rancho on some favored spot, were uninhabited and uncultivated. It was the interest and the policy of the King of Spain, and afterwards of the Mexican Government, to make liberal grants of these lands to those who would engage to colonize or settle upon them. Where land is plenty and labor scarce, pasturage and raising of cattle promised the greatest reward with the least labor. Hence, persons who established ranchos required and readily received grants of large tracts of country as a range for pasturage for their numerous herds. Under such circumstances, land was not estimated by acres or arpents. A square league, or sitio de ganado mayor, appears to have been the only unit in estimating the superficies of land. Eleven of these leagues was the usual extent for a rancho grant. If more or less was intended in the grant, it was carefully stated. Surveying instruments or surveyors were seldom to be obtained in distant locations. The applicant for land usually accompanied his petition with a diseño, or map, showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills, and mountain ranges. The distances between these monuments were often estimated at about so many leagues, and fractions of this unit little regarded. To those who deal out land by the acre, such monuments as hills, mountains, etc., though fixed, would appear rather as vague and uncertain boundary lines. But where land had no value, and the unit of measurement was a league, such monuments were considered to be sufficiently certain. *Since this country has become a part [*365 of the United States, these extensive rancho grants, which then had little value, have now become very large and very valuable estates. They have been denounced as "enormous monopolies, princedoms," etc., and this court have been urged to deny to the grantees what it is assumed the former governments have too liberally and lavishly granted. This rhetoric might have a just influence, when urged to those who have a right to give or refuse. But the United States have bound themselves by a Treaty to acknowledge and protect all bona fide titles granted by the previous government; and this court have no discretion to enlarge or curtail such grants, to suit our own sense of property, or defeat just claims, however extentive, by stringent technical rules of construction, to which they were not originally subjected.

The patent to the claimant's mother confers a title in fee to an estate "known by the name of 'El Cajon,'" or the "The Chest." It describes it as lying "near the mission of San Diego." It therefore assumes that there is an estate or rancho having such a name, and having some known boundaries.

It is prima facie evidence of such a fact. Those who allege that it is void for uncertainty, must prove either that there are two estates called "El Cajon," near the mission of San Diego, to which the description in the patent would equally apply; in such case it would be void for ambiguity; or they must prove that there is no estate or property known by that name about San Diego. But there is not a particle of such evidence to be found on the record, nor was such a defense set up before the commissioners. For anything that appears, the "El Cajon" was as well known as San Diego itself. But the description of the patent does not end here; it is further described as "that which the diseño attached to the espediente expresses." This map or survey is thus made a part of the patent for the purpose of description. It exhibits a circular valley surrounded by hills or mountains, except at a narrow outlet on the eastern boundary, where a stream of water passes out. The course of the stream through the valley is traced, as also are the roads. The position of corrals, ranchos, cottages, etc., are carefully noted; on the east, a hill or mountain bounds the valley called "El Cajon;" on the west, "Cerro del Porsuele" "Cerro de la and Mesa;" the northern boundary,

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as a continuous circular hill or mountain, without a name; the southern are broken hills, called "Lomas Altas." The cardinal points of the compass are given, and a scale of measurement, a single glance at which would show that the valley traced according to that scale would contain about ten leagues, or possibly eleven, the usual allowance for such estates. There is 366*] no evidence whatever, *tending to show that, with the assistance of this map, a surveyor would find any difficulty in locating it according to its calls.

In the cases of Frémont and of Larkin, the grants were much more vague than the present, and the same remark which was made in the latter case will equally apply to this: "No question appears to have been made as to the practicability of locating the grant in the tribunals below, nor do we see any ground upon which such a question could have been properly raised in the case."

The judgment is, therefore, affirmed.

Dissenting, Mr. Justice Daniel.

ROSWELL BEEBE et al., Appts.,
v.
WILLIAM RUSSELL.

(See S. C. 19 How. 283-287.)

Final decree—reference to take account and report, not.

A decree referring it to a master to take an account, upon the evidence and examination of parties, and to decide allowances, and report to the court, is not final, and this court has no jurisdiction of an appeal therefrom.

The whole controversy has not been determined, nor does it appear that the sum ascertained would exceed $2,000.

Whiting v. Bank of U. S. 13 Pet. 6; Michaud v. Girod, 4 How. 503; Forgay v. Conrad, 6 How. 202; considered.

Submitted Feb. 18, 1857. Decided Mar. 5, 1857.

THE bill in this case was filed in the Circuit Court of the United States for the District of Arkansas, by the appellee against the appellants, to recover certain premises, and for an accounting of rents and profits thereof.

The court below decreed in favor of the complainant, and referred the case to a master, to take an account of the rents and profits, and report the sum ascertained at the next term of the court. The defendants thereupon brought the case here on appeal.

A further statement appears in the opinion of the court.

Mr. A. H. Lawrence for the appellants.

Mr. Albert Pike for the appellee.

Mr. Justice Wayne delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Arkansas.

We find, from our examination of the record, that the decree from which this appeal has been taken is not final, within the meaning of the Acts of Congress of 1789 and 1803. It will therefore be dismissed for a want of jurisdiction. The right of appeal is conferred, defined, and regulated, by the 2d section of the Act of March 2, 1803, which, however, adopts and applies the regulations prescribed by the 22d, 23d and 24th sections of the Judiciary Act of the 24th September, 1789, ch. 20, respecting writs of error. The language of both is, that final judgment and decrees, rendered in any circuit, etc., etc., may be reviewed in the Supreme Court, where the matter in dispute, exclusive of costs, shall exceed the sum or value of $2,000. It has been the object of this court at all times, though an accidental deviation may be found, to restrict the cases which have been brought to this court, either by appeal or by writ of error, to those in which the rights of the parties have been fully and finally determined or judgments or decrees in the court below, whether they were cases in admiralty, in equity, or common law. In the case of The Palmyra, 10 Wheat. 502, where, in a libel for a tortious seizure, restitution with costs and damages had been decreed, but the damages had not been assessed, this court held that the decree was not final, and dismissed the appeal. It said, "the decree of the Circuit Court was not final in the sense of the Act of Congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages. The whole cause is not, therefore, finally determined in the Circuit Court, and we are of the opinion that the cause cannot be divided so as to bring up distinct parts of it." This court also ruled, in Brown v. Swann, 9 Pet. 1, that a decree enjoining a judgment at law taxing a sum which remained to be ascertained with precision, was not final, to permit an appeal from it. We might multiply citations from the reports of this court, to show its caution upon this subject. We feel very confident no case has been decided by it, when the question of the finality of a decree or judgment has been brought to its notice, in which the distinction between final and interlocutory decrees has not been regarded as it was meant to be by the legislation of Congress, and as it was understood by the courts in England and in this country before Congress acted upon the *subject. A decree is under- [*285 stood to be interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision. 1 New 322. And we find it stated in the second volume of Perkins' Daniel's Chancery Practice, 1193, "that the most usual ground for not making a perfect decree in the first instance, is the necessity which frequently exists, for a reference to a master of the court, to make inquiries, or take accounts, or sell estates, and adjust other matters which are necessary to be disposed of, before a complete decision can be come to upon the subject matter of the suit." When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree. It is true a decree may be final although it directs a reference to a master, if all the consequential directions depending upon the result of the master's report are contained in the decree, so that no further

Note.—What is a "final decree," or judgment, of state, or other court—see note to Gibbons v. Ogden, 5 L. ed. U. S. 302.

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decree of the court will be necessary, upon the confirmation of the report, to give the parties the entire and full benefit of the previous decision of the court. Mills v. Hoag, 7 Paige, 18.

Testing, then, this decree by the citations just given from Daniel's Chancery Practice, from the case of Mills v. Hoag, our inquiry is, whether further action of the court in the nature of a decree would not be necessary to give to the defendant in error the benefit of the "rents and profits received by the defendants in the court below, or which could or ought to have been received by them, or any of them, for any part of the premises," which it had directed the defendants to surrender to the complainant; and whether the court's direction to the master, how he should take the accounts of rents and profits, and that no allowances were to be made by the master for improvements which the defendants had made, and that no account of rent was to be taken upon permanent and valuable improvements erected by them, do not involve rights in the respective parties, and a pecuniary uncertainty in respect to the sum to be paid by the defendant, which are only made certain and operative by a decree of the court upon the master's report. The court's direction was, "that it be referred to the master, to take an account of the rents and profits received, or which could and ought to have been received, by the defendants, or any of them, for any part of the said premises; that he take such an account distributively as to the said Ashley and Beebe, in the lifetime of Ashley, and as to his heirs since his death, and as to said G. C. Walker since his purchases; that he make no allowances for im-286*] provements made *by them, or either of them, and take no account of rent upon permanent and valuable improvements erected by them; and that he report to the court here, at the next term thereof. And it is further ordered, etc., that the defendants do pay the costs of this suit." Thus leaving a sum to be ascertained with precision by the master from different elements, from which he is directed to make up the account, and those not merely consequential from the previous directions of the decree. Further, a decree from which an appeal may be taken must not only be final, but it must be one in which the matter in dispute, exclusive of costs, shall exceed the sum or value of $2,000. The value of the subject matter in controversy may be shown from the record, or by evidence aliunde, when it is disputed; and in this case the record discloses that to be such as would give the court jurisdiction; but the decree also shows that a sum is still unascertained between the parties, which may or may not exceed $2,000, and if it does, which may be the subject of another appeal. The object of the law, and the interpretation of it by this court, is to prevent a case from coming to it from the courts below, in which the whole controversy has not been determined finally, and that the same may be done in this court. We say, "in which the whole controversy has not been determined." Wherever it has been, and ministerial duties are only to be performed, though that be to ascertain an amount due, the decree is final.

But the reference of a case to a master, to take an account upon evidence, and from the examination of the parties, and to make or not to make allowances affecting the rights of the parties, and to report his results to the court, is not a final decree; because his report is subject to exceptions from either side, which must be brought to the notice of the court before it can be available. It can only be made so by the courts overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment. We have just said, the decree is final when ministerial duties are only to be done to ascertain a sum due. The case of Ray v. Law, in 3 Cranch, 179, is an instance. It was then ruled by this court, that a decree for a sale under a mortgage is such a final decree as may be appealed from. Afterwards, when that case was cited in the case of The Palmyra, 10 Wheat. 202, Marshall, Chief Justice, said for the court: "In that case, which was an appeal in an equity cause, there was a decree of foreclosure and sale of the mortgaged property. The sale could only be ordered after an account taken, or the sum due on the mortgage ascertained in some other way. And the usual decree is, that unless the defendant shall pay that sum in *a given time, the estate shall be sold. [*287 The decree of sale, therefore, is in such a case final upon the rights of parties in controversy, and leaves ministerial duties only to be performed." In such a case the direction is but a consequence of the decree, and no further decree is necessary. So a decree upon the coming in of the master's report on a bill for specific performance, ascertaining the quantity of land to be conveyed, and the balance of money to be paid, and that the conveyance should be executed on such balance being tendered, is a final decree. Travis v. Waters, 1 Johns. Ch. 85. But in the last case cited, it would not have been final if the decree had not directed the conveyance of the land upon the sum found by the master being tendered.

It has been supposed that this court did not apply its present interpretation of the laws regulating appeal in the cases of Whiting v. Bank of the United States, 13 Pet. 6; of Michaud v. Girod, 4 How. 503, and in Forgay et al. v. Conrad, in 6 How. 201. It is, however, not so. Whiting's case, in that part of it relating to appeals, was only what this court had said in Ray v. Law, in the case of The Palmyra, before cited, that a decree of foreclosure and sale is final upon the merits of the controversy, and an appeal lies therefrom. In Michaud v. Girod, no such point was made in the argument of it, nor touched upon in the opinion of the court. In Forgay's case, it was made upon the decree given by the court below, and it was adjudged by this court to be final, to give this court jurisdiction of it. But it was so, upon the ground that the whole merits of the controversy between the parties had been determined, that execution had been awarded, and that the case had been referred to the master merely for the purpose of adjusting the accounts. The fact is, the order of the court in that case for referring it to a master was peculiar, making it doubtful, if it could in any way control or qualify the antecedent decree of the court upon the whole merits of the controversy, or modify it in any way, except upon a

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petition for a rehearing. We refer to the case, however, with confidence, to show that the reasoning of the opinion is cautionary upon the subject of bringing appeals, and confirmatory of what we have said in this case.

We dismiss the case, the court not having jurisdiction of the appeal.

288*] *TERRENCE FARRELLY, Edward O. Morton et al., Heirs and Representatives of Frederic Notribe, Appts.,

v.

WILLIAM W. WOODFOLK.

(See S. C. 19 How. 288-289.)

A decree referring the cause to a master to state an account, on testimony and examination of parties is an interlocutory and not a final decree, and this court has no jurisdiction of an appeal therefrom. See Beebe v. Russell, ante 668.

Submitted Feb. 18, 1857. Decided Mar. 5, 1857.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The point upon which the case is decided, appears in the opinion of the court.

Mr. **Albert Pike** for the appellants.

Mr. **R. J. Meigs** for the appellee.

Mr. Justice **Wayne** delivered the opinion of the court:

The case having been submitted to the court upon printed arguments, we find from an examination of the record that the appeal has been prematurely taken from an interlocutory and not a final decree.

After reciting such facts in the case as the court deemed to be necessary for understanding the subject matter of controversy, and the court's directions in respect to the rights of the complainant, the court then orders that the cause shall be referred to the clerk of the court as a special master in chancery, to take and state an account of the sum for which the lands are bound under the mortgage exhibited in the pleadings in the cause; and also to take and state an account, showing what money and property Morton and his wife, and Mary T. Notribe, widow of Frederic Notribe, have severally received, and are entitled to receive, which were of the estate of Frederic Notribe at the time of his death; and a further account, showing what portion of the said estate, if any, remains to be administered, setting forth all particulars thereof as far as practicable, and if necessary to the due execution of this order. And the master is directed to call for and examine on oath any of the parties to this suit, and also to take testimony of witnesses touching any of the matters aforesaid, and to make report to 289*] *this court. This is so obviously an interlocutory decree, that we do not think it necessary to examine it in detail, to show that a further and final decree is necessary, to give to the complainant any of the advantages to which the court in its previous directions has declared him to be entitled.

For the reasons given in the opinion in the case of Roswell Beebe et al., appellants, v. William Russell, 19 How. 283; we, therefore, direct this cause to be dismissed for want of jurisdiction.

WILLIAM BYERS, Appellant

v.

FRANCIS SURGET.

(See S. C. 19 How. 303-312.)

Sale and purchase of lands, held fraudulent.

Where one obtained a judgment for costs, $39.10, against a firm in a suit by one of them in the name of the firm, long after its dissolution, upon which lands of a member of the firm, who was ignorant of the suit, of 14,000 acres, worth from forty to seventy thousand dollars, were sold by direction of the attorney in the judgment, who became the purchaser for the sum of $9.13½, and who refused to accept in redemption of the lands a sum tendered more than equal to the costs and expenses: Held, that such sale and purchase of the lands was fraudulent and void, and will be set aside.

Argued Feb. 18, 1856. Decided Mar. 5, 1856.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

This was a bill in equity, brought in the Circuit Court of the United States, by the appellee, to set aside and annul as illegal, fraudulent and void, a judicial sale of the lands of the appellee.

The Circuit Court rendered judgment in favor of the complainant.

The case further appears in the opinion of the court.

Mr. **Fowler**, counsel for the appellee, made no argument in this court.

Messrs. **S. H. Hempstead** and **Lawrence**, for the appellee:

The lands in question are described in the pleadings according to the public surveys, and amount, in quantity, to over 14,000 acres, and only produced on sale $9.13½, when worth intrinsically at the time about $70,000.

The court set aside the sale and annulled the title of Byers, from which decree he appealed. The case is reported in Hempst. C. C. 715.

The inadequacy of the consideration is so enormous as to shock the conscience.

1 Sto. Eq. 245; Livingstone v. Byrne, 11 Johns. 566; Williamson v. Dale, 3 Johns. Ch. 292; Osgood v. Franklin, 2 Johns. Ch. 23-29; Hardy v. Heard, 15 Ark. 184, 189; Sherry v. Lockwood, 1 Carter (Ind.) 575; McMichael v. McDermott, 17 Pa. St. 353; Cowgill v. Cahoon, 3 Harr. Del. 23; 3 Harr. 494; Addison v. Crow, 5 Dana, 271; Groff v. Jones, 6 Wend. 522; Tiernan v. Wilson, 6 Johns. Ch. 411; Swope v. Ardery, 5 Ind. 213; Franklin v. Osgood, 14 Johns. 527.

Mr. Justice **Daniel** delivered the opinion of the court:

The appellee, **Francis Surget**, a citizen of the State of Mississippi, instituted his suit in equity in the Circuit Court of the United States for the Eastern District of Arkansas, against the appellant, the object of which suit was to annul as fraudulent and void, a sale of lands belonging to the appellee, made by the sheriff

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of Jackson, in Arkansas, on the 18th of May, 1846. These lands situated in the county and State above mentioned, are described in the pleadings according to the public surveys, amounting to more than 14.000 acres, and estimated in value at from forty to seventy thousand dollars, and were sold by the sheriff in satisfaction of a claim for $39, and conveyed to the appellant for the sum of $9.13½.

The Circuit Court having pronounced the sale and conveyance fraudulent and void, and decreed a surrender and reconveyance of the lands by the appellant to the appellee, the former party has appealed from that decree to this court.

The facts of this cause, as collated from the pleadings, and as established by the proofs, are substantially as follows: the appellee, during the year 1835, separately, and in his individual right, entered and purchased of the government of the United States, at their Land Office at Batesville, in the State of Arkansas, a number of tracts or parcels of land, situated in the County of Jackson, in the State aforesaid, all of which are known and designated on the plats of the public surveys, and are enumerated and set forth in the bill. In the same year (1835) about the 10th of November, the appellee, together with John Ker, Stephen Duncan, and William B. Duncan, formed a partnership under the name and style of William B. Duncan & Co., and in the name and behalf of that firm, entered and purchased of the United States, at their Land Office at Batesville, various other tracts, lots and parcels of land, lying in the same county and State, known and designated on the plats of the public surveys, and described and set out in the bill. Sometime in the year 1836, the partnership of William 305*] *B. Duncan & Co. was, by mutual consent, dissolved; and the property, real and personal, belonging to the firm, including the purchases and entries of land made by them, was, by like consent divided, and the portion of each partner allotted to him, and by him held in severalty. The portions assigned and allotted, under this distribution to Stephen Duncan and William B. Duncan, as members of the partnership of William B. Duncan & Co., are particularly set out and described in the bill. Subsequently to the dissolution of the partnership of William B. Duncan & Co., and to the transfer to each partner of his respective rights and interest therein, Stephen Duncan and William B. Duncan, by deeds bearing date, the one on the 29th of December, 1836, and the other on the 23d of March, 1837, sold and conveyed to the appellee in fee simple, together with sundry other tracts and parcels of land, the lands, lots and parcels, before mentioned as having been transferred and assigned to said Stephen and William B., as members of the firm of William B. Duncan & Co., all of which lots and parcels of land, so conveyed to the appellee by Stephen and William B. Duncan, as well as the portion thereof belonging to the appellee, as a member of the firm of William B. Duncan & Co., and the several lots and parcels of land originally and separately entered and purchased by the appellee in his own right, were included in the levy and sale impeached by the bill.

In the year 1840, four years after the dissolution of the firm of William B. Duncan & Co., an action was instituted in the name of that firm, by William B. Duncan, in the Circuit Court of Jackson County, in the State of Arkansas, against one Noadiah Marsh, for a breach of covenant; and in that suit, under the plea of a subsequent discharge in bankruptcy, the court gave judgment in favor of the defendant for costs of suit.

The bill charges that this suit instituted against Marsh was posterior in time to the dissolution of the partnership, and was commenced and prosecuted without the authority or knowledge of the other members of the recent partnership, who all resided beyond the limits of the State of Arkansas; and further avers, that the first knowledge of the existence of the suit on the part of the appellee was imparted to him by a communication informing him of the sale of his land. This allegation in the bill with respect to the period at which the suit against Marsh was instituted, and with respect also to the person by whom instituted, and the ignorance on the part of the appellee of the institution of that suit, is fully sustained by the deposition of William B. Duncan, and by the facts that the deeds from the other partners to the appellee, executed *after the dis- [*306 solution, bear date in the years 1836 and 1837; the action at law against Marsh not having been commenced until 1840, Sept. 5th.

But should it be conceded that the partnership was in full existence at the time of the institution of the suit against Marsh, and that the suit had been ordered or sanctioned by the firm, yet a judgment for costs against them, upon a ground which controverted neither the justice nor the legality of their claim, presents an anomaly in judicial proceedings, as irreconcilable with reason as it is believed to be without precedent.

Upon this extraordinary judgment, the appellant, as the attorney for the defendant in the inferior court, assumed to himself the power to tax the costs adjudged to the defendant; to tax them not in the capacity of clerk, the agent created by law for the performance of that service, nor in that of the legal deputy or subordinate of that officer, but, as it has been asserted, as a sort of amicus clerici, and with equal benevolence, or in order to remedy the ignorance and imbecility which, by way of justification of the appellant's acts, it is attempted to be shown, characterized the ministers of the law in that unfortunate locality, assumed to himself the power and the right not only of selecting the final process, but of prescribing also the description and the quantity of the property which he chose to have seized in satisfaction of that process; of furnishing a list of the parcels and amount which he chose to have thus seized; of ordering the sheriff to levy upon the whole of what he had so described; of preparing himself and furnishing to the officer such advertisements for the sale of the property levied upon as he approved; of requiring of the sheriff, under peril of responsibility for refusal, towards the satisfaction of an execution for $39.10, peremptorily to make sale of more than fourteen thousand acres of land, estimated by the witnesses from forty to seventy thousand dollars; and finally, under a proceeding irregular in its origin, commenced by himself, and by him controlled and managed

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to it is consummation, of becoming the purchaser of the property estimated as above, for the sum of $9.13½.

Such is the history of a transaction which the appellant asks of this court to sanction; and it seems pertinent here to inquire, under what system of civil polity, under what code of law or ethics, a transaction like that disclosed by the record in this case can be excused, or even palliated? To the appellant must necessarily be imputed full knowledge of this transaction; he was the attorney for the defendant in the State court, he is shown to have been not only 307*] the adviser, but *virtually the executor of every step taken for the enforcement of the judgment of that court; and, as a lawyer, it is reasonable to presume that he must have comprehended the nature and effects of the measures adopted by him and at his instance. The bill impeaches these measures as being contrived by the appellant for purposes of fraud and oppression, as is betrayed—

1st. By the anomalous character of the judgment procured by the appellant, without notice or knowledge on the part of the appellee.

2d. By the fact, that the process sued out upon the judgment at law was not made out by the only officer legally authorized for that purpose, but was calculated, and drawn up, and determined, and written out, by the appellant himself, and by his authority and direction delivered to the sheriff, who was ordered by this same party on what particular property and to what amount to levy the execution.

3d. By the facts that whatever notices or advertisements may have been given or prepared previously to the sale of the lands levied upon, were prepared not by the sheriff, but by the appellant; and that such as were prepared by him were not published by the sheriff in the mode prescribed by the law, previously to the sale of lands under execution.

4th. By the wanton excessiveness of the levy insisted on by the appellant; this being an abuse of the process of the court, and evidence of a fraudulent design, with a view to incite suspicion, and to deter purchasers by reason of that suspicion, and by offering larger portions of property than many persons would be willing or able to purchase.

5th. By the peremptory demand upon the sheriff, and in opposition to the remonstrances of this officer, and under threats, in the event, of his refusal, to force a sale of this large amount of property, under circumstances calculated to insure its ruinous sacrifice.

6th. The gross inadequacy of consideration given by the appellant for this large property; an effect produced by his own fraudulent contrivances.

The ground upon which the defendant below, the appellant here, has rested his case, may in substance be reduced to the two following positions:

1. The strength of his legal title acquired under execution and sale, and under the conveyance from the sheriff, which execution, sale, and conveyance, he alleges were fair, and not fraudulent; and,

2. That sacrifices of land in the section of the State in which this sale occurred, similar to that complained of, were usual in sales under execution.

*With respect to the effect of the [*308 judgment at law, and of the proceedings taken for its enforcement, it is insisted, in the answer of the appellant, that this judgment having been rendered by a court of competent authority, and still remaining unreversed, neither the validity of that judgment nor the proceedings in virtue thereof can now be questioned.

It is true, that with respect to the regularity of that judgment, or of any legal errors in obtaining it, this court or the Circuit Court could not take cognizance, nor exercise any appellate power for its reversal; and in any collateral attempt at law to impeach that judgment, it must be regarded as binding and operative. But with any fraudulent conduct of parties in obtaining a judgment, or in attempting to avail themselves thereof, this court can regularly, as could the Circuit Court, take cognizance. Such a proceeding is within the legitimate province of courts of equity, and constitutes an extensive ground of their jurisdiction. The true and intrinsic character of proceedings, as well in courts of law as in pais, is alike subject to the scrutiny of a court of equity, which will probe, and either sustain or annul them, according to their real character, and as the ends of justice may require.

With reference to the conduct of the appellant, in procuring and enforcing the judgment at law, that conduct has been, by the answer of the appellant and by the argument of his counsel, sought to be sustained, upon the ground that, as attorney for Marsh, the appellant had the power and the right to control the judgment, and to carry it into effect. The power and right thus claimed for the appellant, like every other right and power, are bounded by rules of law and justice, and by consistency with the rights of others. So far as it was necessary to maintain and enforce the legitimate interests of Marsh, it was unquestionably within the competency of his attorney to interpose; but he could not, in pursuance of whatever he may have fancied legitimate, or of whatever he may have deemed judicious or promotive of advantage to his client or himself, usurp the authority and functions of officers on whom the law had devolved its just administration, and by that the preservation of the rights of the citizen.

The offices of clerk and sheriff were never designed to be mere names, nor to be engines and pretexts, to be used at the will of any one. By what authority, then, could the appellant assume the functions of both clerk and sheriff; tax such costs as he deemed proper; order the seizure of property to an amount entirely arbitrary, as his cupidity or indiscretion might incline him, and command peremptorily the sale of the whole subject thus illegally and rapaciously seized upon, without the *slight- [*309 est reference to the value of the subject, in comparison with the demand to be satisfied, and then to become himself the possessor of the subject thus sacrificed by his own irregular and oppressive conduct, for a pretended consideration so trivial that it may be considered as nominal merely?

In justification or in excuse for this assumption, it has been alleged and relied on by the appellant (though the position is entirely unsustained by proof), that it rendered neces-

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sary by the ignorance of those officers to whom the duties of clerk and sheriff had been assigned by law; and had become a common practice in the particular part of the country where this proceeding occurred. If the position thus taken be true in fact, it rather aggravates than extenuates the wrong complained of, as it shows that, by the ignorance or the corruption of those officers of the law, the rights of the complainant had been surrendered to the mercy of one having a direct interest to invade those rights. It evinces, moreover, if true, a practice, in a profession heretofore deemed enlightened and honorable, highly calculated to bring that profession into merited disrepute.

Upon the question of the illegality in the sale for want of notice by advertisement, it has been insisted by the appellant that the bill contains no charge with respect to such illegality, and that, therefore, no proofs as to that point can be admitted.

It is undoubtedly the rule in equity, as well as at law, that the proofs must correspond with the allegations, and that evidence irrelevant or inapplicable to the latter will be regarded as immaterial. The bill in this case is less searchingly and minutely framed than it might have been on this particular point; yet it is considered as being sufficiently comprehensive, and as sufficiently specific at the same time, to embrace this point, and to justify proofs in relation thereto.

It alleges as illegal and unwarrantable the taxing of the costs, the writing of the execution, the writing of the list and description of the lands required to be levied on, and the notices of sale by the appellant; the manner of publishing or putting those notices and the proceedings under them at the sale—all as being unwarranted by law, and as having been concocted and carried out in fraud; all these allegations it was competent to the appellee to prove. The answer of the appellant—after a general denial of fraud and unfairness, and after admitting the taxing of the costs, the writing of the execution, the description of the land to be levied upon, the directions of the sheriff, and the preparation of the advertisements, all by himself—next insists upon the regularity and propriety of all these acts. He then proceeds to aver the performance of every 310*] *prerequisite of the law with respect to such sales. After enumerating these prerequisites in detail, he endeavors to establish them by evidence. He says that the sheriff advertised the lands for twenty days in three of the most public places in each township of the county, in conformity with the Statute; and he introduces the evidence of the sheriff and of other witnesses to maintain these averments.

But in contravention of these statements are, first, the admission of the appellant that he himself, and not the sheriff, prepared the notices of sale; and second, the evidence of the sheriff introduced and relied on by the appellant, so far from showing a compliance with the requisites of the law, establishes the fact that these were violated and disregarded; for the sheriff declares that he took the list and the description of the property, and the notices prepared by the appellant; and this officer admits that he did not put up advertisements, either in number or locality, as required by law, nor could he swear to such a proceeding by him. He says it was his practice to set up advertisements in places in which it was convenient for him to do so, and to hand over other notices to persons in whom he had confidence.

Here, then, is proof, supplied by the appellant, that the law had not been complied with. The acts of an official deputy are evidence of the acts of his principal, and are binding on all who fall within the legal scope of those acts. But it is not perceived how the rights of suitors can be at all dependent upon the unofficial and individual confidence of one officer, even when that confidence may not have been misplaced. In this case, there is no proof that it has been fulfilled; for no person shows that the notices had been in fact put up and published according to the Statute. The mere belief, either of the sheriff or any other person, can have no operation where the law calls for full legal proof.

The objections here stated cannot be deemed narrow or technical with reference to a case like the present—a case presenting no claim to favor either in law or in equity; a case in which the respondent was and is bound to pursue the hair line of legal and formal strictness, and from which, if he deviate in never so small a degree he is doomed to fall. The conduct of the defendant, in all that he has done himself, and in all that he has exacted of others, is essentially important in this case as evidence of the quo animo with which this transaction was begun, prosecuted, and consummated. Another pregnant proof of the design of the appellant to grasp and to retain what no principle of liberality or equity could warrant, is the fact, clearly established, of his refusal after the sale to accept from *the appellee, for the re- [*311 demption of his lands so glaringly sacrificed, a sum of money considerably exceeding in amount the judgment for costs, with all the expenses incidental to the carrying that judgment into effect. The appellant, by his irregular and unconscientious contrivances, achieved what he conceived to be an immense speculation; and he determined to avail himself of it, regardless of its injustice and ruinous consequences to the appellee.

To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, namely: unless such inadequacy be so gross as to shock the conscience; for this qualification implies necessarily the affirmation, that if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud. Again; in answer to the same objection, it is insisted, that whatever presumption arising from inadequacy of consideration may be permitted with respect to transactions strictly limited to vendor and vendee, no unfavorable inference from that cause is permissible with respect to sales made under judicial process. Certainly the facts that sales are made by the officers or ministers of the law, and under its authority, may properly weaken the usual presumption arising from gross inadequacy; but to declare that such inadequacy connected with

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other facts and circumstances evincing fraud or unfairness, could never be regarded as affecting sales under process, would be as rational as the assertion that process of law could never be abused, and that the ministers of the law must necessarily be intelligent and upright, and incapable of being ever willingly or unwittingly made the instruments of fraud or oppression. But the transaction now under review can with no show of propriety be tested by the single fact of inadequacy of consideration, however gross and extraordinary that inadequacy has been. We perceive in this transaction other ingredients that have been mingled therewith by the appellant, that give to the objection of inadequacy an effect that, standing isolated and alone, could not be ascribed to or deduced from it.

Thus, when we advert to the irregular and extraordinary character of the judgment procured through the agency of the appellant—to his eagerness, that could not await the action of the officer of the court—his assumption of the functions of the clerk, in taxing the costs, and in writing out the execution—his preparation and delivery to the sheriff of a description and list of the lands of the appellee, amounting to 312*] more than fourteen *thousand acres—his requisition of a seizure of the whole of those lands in satisfaction of the sum of $39—his inflexible demand upon the sheriff, under threats of prosecution, to expose to sale the entire levy—his purchase of all these lands for the sum of $9.13½—and his refusal after the sale and purchase to accept, in redemption of these lands so sacrificed, a sum of money tendered to him much more than equal to the costs, with all the expenses incident to the judgment: when all these acts on the part of the appellant are adverted to, they impel irresistibly to the conclusion, that the gross inadequacy of consideration in the sale and purchase of these lands was the premeditated result which the proceedings by the appellant were put in practice to insure. They betray that malus dolus in which the design of the appellant was conceived, which appears to have presided over and regulated the progress of the design from its birth to its consummation; to which design the appellant has tenaciously clung, in the seeming expectation that it was beyond the corrective powers of law or justice.

Upon the whole case, we are constrained to view the entire transaction impeached by the appellee as one that cannot be sustained without the subversion of the principles and rules either of legal or moral justice.

We accordingly approve the decision of the Circuit Court is so regarding it, and order that decree to be affirmed.

WILLIAM F. BRYAN and Rudolphus Rouse, Plffs. in Er.,
v.
ROBERT FORSYTH.

(See S. C. 19 How. 334–342.)

Act of Congress—effect of—patent, when sufficient to found adverse possession on—American State Papers, evidence.

The Act of Congress of March 3, 1823, conferred on the grantee an incipient title, and reserved to the Department administering the public lands, the authority to settle the boundaries by actual survey among the claimants.

When the surveys were made, approved, and recorded at the Surveyor-General's office and recognized as valid at the General Land Office, it bound the parties to it, the confirmee, and the United States.

On such title an action of ejectment could be maintained, even if no patent had issued. It is good prima facie title.

A patent to the grantee, his heirs and assigns, forever, "subject to the rights of any and all persons under the Act of Congress of March 3, 1823," the lots under which Act had not been surveyed, is sufficient claim or color of title to found an adverse possession on, in ejectment.

A printed report in the American State Papers is competent evidence.

Argued Feb. 13, 1857. Decided Mar. 5, 1857.

THIS was an action of ejectment brought in the Circuit Court of the United States for the Northern District of Illinois, by the defendant in error, to recover a certain lot in the Village of Peoria, Ill.

The final trial in the court below resulted in a verdict and judgment for the plaintiffs. The defendant thereupon sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. C. Ballance and R. Johnson, for plaintiffs in error.

Mr. Archibald Williams, for defendant in error.

Mr. Justice Catron delivered the opinion of the court:

Forsyth sued Bryan and Rouse in ejectment for part of lot No. 7, in the Town of Peoria, State of Illinois. The action was founded on a patent to Forsyth, from the United States, dated the 16th day of December, 1845, which patent was given in evidence on the trial in the Circuit Court. It was admitted that the defendants were in possession when they were sued, and that they held possession within the bounds of the patent. To overcome this prima facie title, the defendants gave in evidence a patent from the United States to John L. Bogardus, containing 23 acres, dated January 5th, 1838, which included lot No. 7. To overreach this elder patent, the plaintiff relied on an Act of Congress, passed May 15, 1820, *for the relief of the inhabitants of the [*335 Village of Peoria, providing that every person who claims a lot in said village shall, on or before the first day of October next, deliver to the Register of the Land Office for the District of Edwardsville a notice in writing of his or her claim; and it was made the duty of the Register to make a report to the Secretary of the Treasury of all claims filed, with the substance of the evidence in support thereof, and also his opinion, and such remarks respecting the claims as he might think proper to make; which report, together with a list of the claims which, in the opinion of the Register, ought to be confirmed, shall be laid by the Secretary before Congress, for their determination.

The report was made, and laid before Congress, in January, 1821. As respected lot No. 7 (a part of which is in dispute), the Register reported that Thomas Forsyth claimed it; that it was three hundred feet square, French measure, situate in the Village of Peoria, and bounded eastwardly by a street, separating it from the Illinois River; northwardly by a cross street,

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westwardly by a back street, and southwardly by a lot claimed by Jacques Mette. The remark of the Register is: "A part of this lot must have been embraced by the lot claimed by Augustine Rogue." Rogue's claim (No. 2) was for a lot of about an arpent, and bounded, says the Register, northwardly by a lot occupied by Maillette, eastwardly by a road separating it from the Illinois River, and southwardly and westwardly by the prairie.

The Register reported on seventy lots in all. A survey to designate boundaries among the claimants was indispensable, as they were in considerable confusion. Congress again legislated on the subject, by Act of March 3, 1823, and provided that each of the settlers, whose names were contained in the report, who had settled a village lot prior to the first of January, 1813, should be entitled thereto; the lot so settled on and improved, not to exceed two acres; and where it exceeded two acres, such claimant should be confirmed in a quantity not exceeding ten acres. It was made the duty of the surveyor of public lands for the district, to cause a survey to be made of the several lots, and to designate on a plat thereof the lot confirmed and set apart to each claimant, and forward the same to the Secretary of the Treasury, who shall (says the Act) cause patents to be issued in favor of each claimant, as in other cases.

The survey was made in 1840 by order of the Surveyor-General of Illinois and Missouri, which was duly returned, approved and recorded. We are of opinion that the Act of 1823 conferred on the grantee an incipient title, 336*] and reserved to the *Executive Department, administering the public lands, the authority to settle the boundaries by actual survey among the claimants; and until this was done, the courts of justice could not interfere and establish boundaries. It was competent for Congress to provide, that before a title should be given to a confirmee, the exact limits of his confirmation should be ascertained by a survey executed by authority of the United States. West v. Cochran, 17 How. 415.

When the surveys were made, and the plats returned and approved, and recorded by the Surveyor-General of Illinois and Missouri, and recognized as valid at the General Land Office (as the patent to Forsyth shows it was), it bound the parties to it, the confirmee and the United States; nor can either side be heard to deny that the land granted by the Act of 1823 is the precise lot Forsyth was entitled to; such being the settled doctrine of this court. Menard's Heirs v. Massey, 8 How. 313. Neither can Bogardus or his assignee deny that he was concluded by the survey. His patent grants the land to him in fee, "subject, however, to all the rights of any and all persons claiming under the Act of Congress of 3d March, 1823, entitled 'An Act to confirm certain claims to lots in the Village of Peoria, in the State of Illinois.'" This patent is the only title set up by the defendants below; by its terms all power to perfect the title of Forsyth, according to the Act of 1823, was reserved to and retained by the Department of Public Lands, as effectually after the Bogardus patent was issued as before.

The survey having bound the United States, and concluded Bogardus, Forsyth had a title by virtue of the Acts of 1820 and 1823, and the survey, which was of a legal character; and he could maintain an action of ejectment on it, even had no patent issued. This is true beyond controversy, if the action had been prosecuted in a state court, where the state laws authorized suits in ejectment on imperfect titles. Ross v. Barland, 1 Pet. 655; Chouteau v. Eckhart, 2 How. 372.

But it is insisted that in the courts of the United States a different rule applies, and that, as a patent carries the fee, it is the better title. The case of Robinson v. Campbell, 3 Wheat. 212, is supposed to be to this effect. There, the conflicting patents were made by the Commonwealth of Virginia, and the defendant attempted to prove that a settlement had been made on the land in dispute by one Fitzgerald, and which preference right had been assigned to Martin, who obtained a certificate from the commissioners for adjusting titles to unpatented lands; which certificate was of anterior date to the junior patent, and was the source of title. It was nothing more than evidence that Martin had a preference to purchase the land, if *he saw proper to do so; [*337 and was not competent evidence in an action of ejectment, according to the laws of Virginia, or even of Tennessee. It was not an entry founded on consideration, but a right of abating an equity at the discretion of the settler. Neither in Virginia nor Kentucky (where the Virginia land laws prevail) is the defendant allowed to go behind the patent in a court of law, in order to give the patent a date from that of the entry on which the patent was founded.

The question here is, on the effects of Acts of Congress confirming claims to lands as valid, by which legislation the government is concluded; and as respects these, it is settled, that after a survey is duly made, approved, and recorded at the Surveyor-General's office, an action of ejectment may be maintained on such titles in the courts of the United States. It is a good prima facie title. Stoddard v. Chambers, 2 How. 313; Le Bois v. Bramell, 4 How. 456; Bissell v. Penrose, 8 How. 317. In Stoddard v. Chambers, this court held "that a confirmation by Act of Congress vests in the confirmee the right of the United States, and a patent, if issued, could only be evidence of this." Other cases followed this decision. By the 3d section of the Act of July 4, 1836, it is provided that a patent shall issue to the confirmee in cases confirmed by that Act. In this respect, the provisions of the Acts of 1823 and 1836 are alike.

Of course the patent in this instance can relate to a title which is valid against another title unaided by the younger patent.

This disposes of the exception taken by the defendants below to the ruling of the court, that Forsyth's title was superior to that of Bogardus.

They next ask the court to instruct the jury, that by the laws of Illinois they had such title as would bar an action of ejectment after seven years, accompanied by actual residence on the land sued for; and if the jury believe from the evidence that the defendants have so long had said possession, the plaintiff cannot

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succeed in this suit. There were two other instructions asked, requiring the court to instruct the jury that the plaintiff's action was barred by the Act of Limitations of twenty years.

The court refused to instruct as requested; "but, on the contrary, instructed the jury that the patent to Bogardus did not grant or convey the ground in controversy; and it being conceded that it was the only title the defendant had, there is no such title as under the Statute of Limitations protects the possession of the defendants." This instruction was founded on an exception in the patent to Bogardus. It 338*] grants to him, *and to his heirs and assigns, forever, "subject, however, to all the rights, of any and all persons under the Act of Congress of March 3d, 1823, entitled 'An Act to confirm certain claims to lots in the Village of Peoria, in the State of Illinois.'"

When this patent was made, in 1838, the village lots had not been surveyed, and those that interfered with the land granted to Bogardus might never be claimed. Subject to this contingency he took his patent, and had a title in fee till 1840, when the village title of Forsyth was ripened into the better right. After that, those claiming under Bogardus held the position of one who claims protection by the Act of Limitations under a younger patent against an elder one. He has only the appearance of title. The patent to Bogardus was a fee simple title on its face, and is such title as will afford protection to those claiming under it, either directly, or, having a title connected with it; with possession of seven years, as required by the Statute of Illinois. The court below erred in cutting off this defense.

In the progress of the trial in the Circuit Court, the plaintiff offered in evidence the printed report of Edward Coles, the Register of the Land Office at Elwardsville, as found in the American State Papers, Vol. III., from pages 421 to 431, inclusive, to which the defendant objected, because it was not, without proof of its authenticity, legal evidence. But the court overruled the objection, and the report was given in evidence to the jury, to which ruling the defendants excepted.

These State Papers were published by order of Congress, and selected and edited by the Secretary of the Senate and Clerk of the House. They contain copies of legislative and executive documents, and are as valid evidence as the originals are from which they were copied; and it cannot be denied that a record of the report of Edward Coles, as found in the printed journals of Congress, could be read on mere inspection as evidence that it was the report sent in by the Secretary of the Treasury. The competency of these documents, as evidence in the investigation of claims to lands in the courts of justice, has not been controverted for twenty years, and is not open to controversy.

It is ordered that the judgment be reversed, and the cause remanded for another trial.

Mr. Justice McLean, dissenting:

Sometime during the late war with England, a company of militia in the service of the United States, at Peoria, in Illinois, taking offense at the inhabitants of the village, burnt it.

Congress, with the view of ascertaining the extent of the injury and the names of the sufferers, on the 15th May, 1820, *passed [*339 an Act, "that every person, or the legal representatives of every person, who claims a lot or lots in the Village of Peoria, in the State of Illinois, shall, on or before the first day of October next, deliver to the Register of the Land Office for the District of Edwardsville a notice in writing of his or her claim; and it shall be the duty of the said Register to make to the Secretary of the Treasury a report of all claims filed with the said Register, with the substance of the evidence thereof; and also his opinion, and such remarks respecting the claims as he may think proper to make; which report, together with a list of the claims which in the opinion of the said Register ought to be confirmed, shall be laid by the Secretary of the Treasury before Congress, for their determination."

The report was made, as required in the above Act, by E. Coles, Esq., Register, on the 10th of November, 1820. By that report, No. 7, Thomas Forsyth claims "a lot of three hundred feet in front by three hundred feet in depth, French measure, in the Village of Peoria, and bounded eastwardly by a street separating it from the Illinois River, northwardly by a cross street, westwardly by a back street, and southwardly by a lot claimed by Jacques Mette."

On the 3d of March, 1823, Congress passed an Act, which declares, "that there is hereby granted to each of the French and Canadian inhabitants, and other settlers, in the Village of Peoria, in the State of Illinois, whose claims are contained in a report made by the Register of the Land Office at Edwardsville, in pursuance of the Act of Congress approved May the 15th, 1820, and who had settled a lot in the village aforesaid prior to the 1st day of January, 1813, and who had not heretofore received a confirmation of claims or donation of any tract of land or village lot from the United States, the lot so settled on and improved, where the same shall not exceed two acres."

The 2d section made it the duty of the surveyor of the public lands of the United States for that district, to cause a survey to be made of the several lots, and to designate on a plat thereof the lot confirmed and set apart to each claimant, and forward the same to the Secretary of the Treasury, who shall cause patents to be issued in favor of such claimants as in other cases.

In the action of ejectment brought by Forsyth, as above stated, to recover possession of lot No. 7, described, it was agreed that upon the trial it shall be admitted that the plaintiff has the title of Thomas Forsyth in and to the land sued for, by descent, and purchase and conveyance; and also that the defendants have had the actual possession of the land for which they are respectively sued, by residence thereon, for ten *years next preceding the [*340 commencement of the suit; and that John L. Bogardus under whom they claim, had possession of the southeast fractional quarter of section nine, in township eight north, of range eight east; upon which the land sued for is situated, claiming the same under pre-emption right more than twenty years before the commencement of these suits, but he never had the actual possession of that part of said fractional

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quarter section sued for; and that said "defendants respectively had vested in them, before the commencement of this suit, all the right of Bogardus."

A patent was issued to Bogardus for the southern fractional quarter of section nine, in township eight, north of range east, containing twenty-three acres and ninety-three hundredths of an acre, etc.; "subject, however, to all the rights of any and all persons claiming under the Act of Congress of 3d March, 1823, entitled 'An Act to confirm certain claims to lots in the Village of Peoria, in the State of Illinois.'"

The defendants rely on the Statute of Limitations of 1827, which requires that the possession should be by actual residence on the land, under a connected title in law or equity, deducible of record from the United States.

The court instructed the jury that the title claimed under Bogardus did not protect them under the Statute.

This is held by this court to be an error, for which the judgment is reversed.

The error of the court consists in giving a construction not only to a written instrument, but to a patent. That it is the province of the court to construe such a paper, will not be controverted. The patent conveyed to Bogardus the land described, "subject, however, to all the rights of any and all persons claiming under the Act of Congress of the 3d March, 1823, entitled 'An Act to confirm certain claims to lots in the Village of Peoria, in the State of Illinois.'"

The lot in controversy was claimed under the Act of 1823, which declared, "that there is hereby granted to each of the French and Canadian inhabitants, and other settlers, in the Village of Peoria, in the State of Illinois, whose claims are contained in a report made by the Register of the Land Office at Edwardsville, in pursuance of the Act of Congress approved May 15th, 1820, and who had settled a lot in the village aforesaid prior to the 1st of January, 1813, and who have not heretofore received a confirmation of claims or donation of any tract of land or village lot of the United States, the lot so settled upon and improved, where the same shall not exceed two acres," etc.

The right made subject to the patent was a 341*] legal right; it *was a grant by Congress, which this court has recognized as the highest grade of title. A patent is issued by a ministerial officer, who is subject to error, but the legislative action is not to be doubted.

The survey of the lot was not made until 1st September, 1840, and the patent was issued to Forsyth, December 16, 1845.

In the case of Ballance v. Forsyth, 13 How. (54 U. S.) 24, this court say: "If the patent to Bogardus be of prior date, the reservation in the patent, and also in his entry, was sufficient notice that the title to those lots did not pass; and this exception is sufficiently shown by the acts of the government." And again: "The Statute did not protect the possession of the defendant below. His patent excepted those lots; of course, he had no title under it for the lots excepted."

Until the case before us was reversed for error, by the district judges who conformed to the above decision, I did not suppose that anyone could doubt the correctness of the decision.

Bogardus, in 1838, took a grant from the United States, subject to Forsyth's right, thereby recognizing it, and consequently from that time he held it in subordination to Forsyth's title. If it be admitted that the fee did not pass to Forsyth until the patent issued in 1845, the patent had relation back to the Act of 1823, and operated from that time. The report of the Register defined the boundaries of the lot as specifically as the survey, by reason of which the lot was well known, it is presumed, to the public, before the survey as afterwards. This may not have been the case with all the lots.

Let anyone read the patent to Bogardus, and ask himself the question, whether the United States intended to convey the lots to which the patent was made subject, and the answer must be that they did not. By the Act of 1823, they granted those lots to the French settlers, who, by the report of the Register, were entitled to them under the Act of 1820. It would have been an act of bad faith in the government, after the Act of 1823, to convey any one of those lots; and on reading the patent, it is clear they did not intend to convey any one of them. It is said, suppose the French settlers had not claimed the lots, would not Bogardus have had a right to them? Such a supposition cannot be raised against the facts proved. The title of Forsyth was of prior date, and of a higher nature than that of Bogardus. His title was subordinate as expressed upon its face.

In the case of Hawkins v. Barney's Lessee, 5 Pet. 457, the same question was before this court. Barney conveyed fifty thousand acres of land, in Kentucky, to Oliver; sometime afterwards, Oliver reconveyed the same tract to Barney, in *which deed were recited [*342 several conveyances of parcels of the tract to several individuals, and particularly one of 11,000 acres, to one Berriman. Barney brought an ejectment against Hawkins, and proved that he had entered on the fifty thousand acre tract. This court held his action could not be sustained, unless he proved the defendant was not only in possession of the large tract, but he must show that the possession was not upon any one of the tracts sold and conveyed.

To apply the principle to the case before us. Had Bogardus brought an action of ejectment to sustain it, he must have proved the trespasser was within his patent, and outside of any one of the reserved lots. The words, "subject to all the rights of any persons under the Act of 1823," showed that those rights were not granted by the patent; and if Bogardus himself could not have recovered, it is strange how the defendants could recover, who claim to be in possession under his patent.

The agreed case admits that the "defendants respectively had vested in them, before the commencement of this suit, all the right of Bogardus." But whether this possession under the right of Bogardus was for a day or a year, is nowhere shown by the evidence; and unless I am mistaken, the Statute requires a seven years' possession under title to protect the trespasser, and in effect give him the land.

Bogardus was in possession, claiming a preemption, but I do not understand, from the opinion of the court, that such a possession will run, even against the French claimants. Bo-

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gardus himself was a trespasser on the lands of the United States, and until he received his patent in 1838, I suppose he could not set up a claim to the land under title.

I hold, and can maintain, that the instruction of the District Judge was right, in saying that the patent of Bogardus did not grant or convey the ground in controversy. And if it did, there was no such possession under it, which, by the Statute of Limitations, protected the right of the defendants.

CHARLES BALLANCE, Plff. in Er.,
v.
ADOLPH PAPIN, Henry Papin, and Mary Atchison.

(See S. C. 19 How. 342, 343.)

Evidence of U. S. survey, under Act of March 3, 1823.

The Act of March 3. 1823, required that a survey should be made of each lot confirmed to claimant, and a plat thereof forwarded to the Secretary.

The evidence of a United States survey is not a mere plat without any written description of the land by metes and bounds.

Neither the plat, nor less proof than a written description, will make a record on which a patent can issue.

Argued Feb. 16, 1857. Decided Mar. 5, 1857.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case appears in the opinion of the court, and in the preceding case of Bryan v. Forsyth.

Mr. C. Ballance, in person.

Messrs. Archibald Williams and H. R. Gamble, for defendants in error.

Mr. Justice Catron delivered the opinion of the court:

In the case of Charles Ballance against Papin and Atchison, the same title was relied on by the defendant below (Ballance) that was set up in defense in the preceding case of Forsyth v. Bryan and Rouse. The plaintiff sued to recover a village lot in Peoria, No. 42, confirmed to Fontaine, in right of his wife, Josette Cassarau dit Fontaine. A plat of lot No. 42 was given in evidence, and is found in the record, but no certificate of the surveyor accompanies this plat, and without such certificate there is no evidence that lot No. 42 was lawfully surveyed. The Act of 1823, sec. 2, required that a survey should be made of each lot confirmed to the claimant, and a plat thereof forwarded to the Secretary. The evidence of a legal United States survey is not a mere plat, without any written description of the land by metes and bounds; neither the plat, nor less proof than a written description, will make a record on which a patent can issue. That most accurate evidence of separate surveys of the village lots of Peoria exists, we know; but as none is found in this record of lot No. 42, it follows, from the reasons given in the previous case, that no title was adduced in the Circuit Court that authorized it to reject the instructions demanded by the defendant; that, comparing the titles of the parties by their face, the defendant's was the better one. But as the same question of the appliction of the Act of Limitations arises in this case as it did in the former one, it must of course have been reversed, had the certificate of survey been found in the record.

We, therefore, order that the judgment be reversed, and the cause remanded for another trial to be had therein.

Dissenting, Mr. Justice McLean.

THE UNITED STATES, Appts.,
v.
DOMINGO and VICENTE PERALTA.

(See S. C. 19 How. 343-349.)

Presumption of authority of public officers, and of validity of grants—power of Mexican governors.

Public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.

The presumption arising from a grant makes it prima facie evidence of the power of the officer making it, and throws the burden of proof on the party denying it.

The archives of the Mexican Government show that the power to make grants has been exercised by the governors under Spain, and continued to be so exercised under Mexico.

Such grants made by the Spanish officers have been confirmed and held valid by the Mexican authorities.

Argued Feb. 11, 1857. Decided Mar. 5, 1857.

APPEAL from the District Court of the United States for the Southern District of California.

This case arose on a petition to the Board of Land Commissioners, by the appellees, for the confirmation of their claim to a certain tract of land in the State of California.

The decree of the Commissioners held the claim valid, but restricted the boundaries claimed by the petitioners. This decree, on appeal by both parties, the District Court reversed, in so far as it restricted the claim of the petitioners and declared the claim good and valid, and in substance "that there be confirmed to the said Domingo and Vicénte Peralta, the northern portion of said land of San Antonio, bounded on the north by a line commencing on the Bay of San Francisco, at a point where there are, close to the said bay, the two cerritos as described in the first possession given to Martinez to Luis Peralta, August 16, 1820, running from said bay eastwardly along by the southern base of the cerritos of San Antonio, up a ravine at the head of which there is a large rock or monument looking to the north, described in evidence as the sugar loaf rock. thence by the southern base of said rock to the comb or crest range of the mountains or the Sierra, on the west by the Bay of San Francisco, and on the south by a ravine, a short distance south of the buildings in the Town of Oakland, on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from said bay to the most eastern boundary of the rancho of San Antonio.

From the decree of the District Court the United States have appealed.

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A further statement of the case appears in the opinion of the court.

Messrs. C. Cushing, Atty.-Gen., and R. H. Gillet, for appellants.

Messrs. Robert Rose and Geo. M. Bibb, for appellees:

The case of Arguello v. The U. S. 18 How. 539, acknowledges the authority of a governor of California, after the separation from the Crown of Spain, to validate, confirm and complete title commenced under the regal government. It declares that neither the Act of the Mexican Congress of 1824, nor the Regulations of 1828, prescribe any particular form of grants or patents of the public lands. Great latitude seems to have been exercised by the different political chiefs.

It decides, also, that while these countries were under the dominion of Spain, the governors had authority to make grants of the public land.

Arguello v. U. S. 18 How. 547; U. S. v. King, 7 How. 833; U. S. v. Philadelphia, 11 How. 609.

The cases of Larkin, at the suit of The U. S. v. Larkin, 18 How. 561; of Arguello v. The U. S. 18 How. 539; and the examples of the Governors Figueroa, Micheltorena, and of him who issued the new title to the heirs of Arguello (18 How. 542), with the approval of the Departmental Assembly in the case of Arguello, are sufficient to overcome the doubts of Commissioner Phelps, as to authority of a governor of California, after the revolution and independence of that province of the Crown of Spain, to validate, complete or conform a claim to land originating under the regal government; and also to correct his notions as to the necessity of technical words, to make a grant or concession of land, to be respected and protected as property under the Treaty of Guadaloupe Hidalgo.

An exemplification of a public record, certified by the officer to whom it is committed by law for safe keeping, is evidence of itself importing absolute verity; the exemplification is of itself sufficient proof.

Phil. Ev. 292, ch. 5; Gilb. Ev. pp. 96, 97; Kinnersley v. Orpe, 1 Doug. 56; U. S. v. Percheman, 7 Pet. 85; U. S. v. Wiggins, 14 Pet. 346, 347; see, also, U. S. v. Delespine's Heirs, 12 Pet. 655; Owings v. Hull, 9 Pet. 627.

Mr. Justice Grier delivered the opinion of the court:

This case originated before the Commissioners for ascertaining and settling private land claims in California.

Domingo and Vicente Peralta claimed as grantees and devisees of their father, Luis Peralta.

The documentary evidence filed in support of the claim consists of a true copy from the archives in the office of the Surveyor-General of California, containing, so far as they are material in the present inquiry, the following averments:

First. The petition of Luis Peralta to the Governor for a grant of land, extending from the creek of San Leandro to a small mountain adjoining the sea beach, at the distance of four or five leagues, for the purpose of establishing a rancho, dated June 20, 1820.

Second. The decree of Governor Sola therein directing Captain Luis Antonio Arguello to appoint an officer to place the petitioner in possession of the lands petitioned for, dated August 3, 1820.

Third. Order of Captain Arguello, dated August 10, 1820, detailing Lieut. Don Ignacio Martinez for that purpose.

Fourth. The relinquishment of Father Narciso Duran, on behalf of the mission of San José, of any claim to the land, and reserving the privilege of cutting wood on the same, which, he says, should remain in common, dated August 16, 1820.

Fifth. Under the same date, the return of Lieut. Martinez, upon the order to give the possession, describing the boundaries, etc.

Sixth. The decree of the Governor, directing a portion of the lands assigned to Luis Peralta, by the foregoing act of possession, to be withdrawn, upon the reclamation of the mission of San Francisco, who claimed that the said portion of the lands was then in the occupancy of the mission as a sheep ranch.

Seventh. The consent of Father Juan Cabot and Paloz Ordez, ministers of the mission, that the boundaries of the land solicited by Luis Peralta should be established at the rivulet, at the distance of three and a half to four leagues from the rancho house of the mission.

Eighth. The return of Maximo Martinez upon Governor Sola's second decree for the delivery of possession, filing the boundaries in accordance with the claim of the mission, at a rivulet which runs down from the mountains to the beach, where there is a grove of willows, and about a league and a half from the cerito (little mountain) of San Antonio, in the direction of San Leandro.

*Ninth. A document dated October, [*346 1822, and signed Sola, setting out, that on that day was issued in favor of Sergeant Luis Peralta, by the Governor of the Province, the certifying document for the land which has been granted him, as appears by the writ of possession which was given him by the Lieutenant of his company, Don Ignacio Martinez, in conformity with the orders of the government.

Tenth. A letter from Luis Peralta, protesting against the claim of the mission, dated October 14th. 1820.

Eleventh. A representation from Captain Don Luis Arguello to the Governor, dated June 23, 1821, advocating the rights of Sergeant Peralta, in opposition to those of the mission, to the land in controversy; and lastly, the description of the land returned by Luis Peralta, in obedience to the government, of the 7th of October, 1827.

The claimants gave in evidence, also, the original grant from Governor Sola to Luis Peralta, dated 18th of August, 1822; the petition of Luis Peralta to Governor Arguello, praying the restitution of the lands which had been taken from him on the demand of the mission; and the decree of Arguello, making such restitution, and directing him to be again put in possession by the same officer who had executed the former act of possession. To this order Maximo Martinez made a return, duly executed, certifying that the grantee had been newly put in possession of the place called "Cerito de St. Antonio, and the rivulet which

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crosses the place, to the coast, where is a rock looking to the north."

It was further shown, from the public records, that on the 9th of April, 1822, the civil and military authorities of California formally recognized and gave in their adhesion to the new government of Mexico, according to the plan of Iguala and Treaty of Cordova. Also, that in 1844, Ignacio Peralta, one of the heirs of Luis Peralta, petitioned the government for a new title to the land claimed, in consequence of the original title papers having been lost or mislaid. The archives show, also, that on the 13th of February, 1844, an order was made by Micheltorena, that a title be issued. Of the same date, there is the usual formal document "declaring Don Luis Peralta owner in fee of said land, which is bounded as follows:

On the southeast by the creek of San Leandro; on the northwest by the creek of Los Ceritos de San Antonio, the small hills of San Antonio; on the southwest by the sea, and on the northeast by the tops of hills range, without prohibiting the inhabitants of Contra Costa from cutting wood for their own use, they not to sell the same." This document contains an order that "this espediente be transmitted to 347*] the Departmental *Assembly for their approval," but nothing further appears to have been done, nor is the signature of Micheltorena attached to the record.

The authenticity of these documents is admitted. The objections urged against their sufficiency to establish the claim are: first, that the officers had no power to make grants of land; and second, that the northern boundary of the land described does not extend beyond a certain creek or stream, known by the name of San Antonio. This would exclude about one half of the claim.

We are of the opinion that neither of these objections is supported by the evidence in the case.

We have frequently decided that "the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified." To adopt a contrary rule would lead to infinite confusion and uncertainty of titles. The presumption arising from the grant itself makes it prima facie evidence of the power of the officers making it, and throws the burden of proof on the party denying it. The general powers of the governors and other Spanish officers to grant lands within the colonies in full property, and without restriction as to quantity, and in reward for important services, were fully considered by this court in the case of U. S. v. Clarke, 8 Pet. 436.

The appellants, on whom the burden of proof is cast, to show want of authority, have produced no evidence, either documentary or historical, that the Spanish officers who usually acted as governors of the distant provinces of California were restricted in their powers, and could not make grants of land. The necessity for the exercise of such a power by the governors, if the Crown desired these distant provinces to be settled, is the greater, because of their distance from the source of power. By the royal order of August 22, 1776, the northern and northwestern provinces of Mexico were formed into a new and distinct organization, called the Internal Provinces of New Spain. This organization included California. It conferred ample powers, civil, military and political, on the Commandant-General. The archives of the former government also show that as early as 1786 the governors of California had authority from the Commandant-General to make grants, limiting the number of sitios which should be granted. In 1792 California was annexed to the vice-royalty of Mexico, and so continued till the Spanish authority ceased. An attempt to trace the obscure history of the various decrees, orders and regulations of *the Spanish Government on [*348 this subject would be tedious and unprofitable. It is sufficient for the case, that the archives of the Mexican Government show that such power has been exercised by the governors under Spain and continued to be so exercised under Mexico; and that such grants, made by the Spanish officers, have been confirmed and held valid by the Mexican authorities. Sola styles himself Political and Military Governor of California. He continued to exercise the same powers after his adhesion to the Mexican Government, under the provisions of the plan of Iguala, and the 12th section of the Treaty of Cordova. The grant in fee, given by Sola, was after the Revolution.

The Government of Mexico, since that time, has always respected and confirmed such concessions, when any equitable or inchoate right, followed by possession and cultivation, had been conferred by the governors under Spain. The case of Arguello, 18 How. 540, was that of a permit by Governor Sola, afterwards confirmed by the Mexican Government and by this court. The plaintiff in error has not been able to produce anything from historical documents or the archives of California tending to show a want of power in the respective officers in this case. On the contrary, the presumption of law is confirmed by both. The order of Micheltorena, in 1844, for the granting the new title to Peralta, is itself evidence of the usage and custom, and that the acts of Sola and Arguello were considered valid, and that the title, whether equitable or legal, conferred to them, should be respected and confirmed by the government.

As the validity of the petitioner's title has been assailed on the ground of want of authority alone, it is unnecessary to notice more particularly the various documents exhibited in support of it. The grant by Sola of a portion of the tract of which Peralta had been originally put in possession, is a complete grant in fee for that portion. The restoration by Arguello of the original boundaries, by decree and act of the public officer, may not have the character of a complete grant; but it is of little importance to the decision of the case, whether it conferred only an inchoate or equitable title, connected with an undisputed possession of thirty years, and confirmed again in 1844, by the order of the Governor of California; its claim for protection under the Treaty of Mexico cannot be doubted, notwithstanding its want of confirmation by the Departmental Assembly.

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The only remaining question is the position of the northern boundary line.

Peralta's original petition, in June, 1820, de-
349*] scribed the land *desired, as beginning at a creek called San Leandro, "and from this to a white hill adjoining the sea beach, in the same direction, and along the coast four or five leagues."

The return of Ignacio Martinez, the officer who executed the order for delivery of possession on the 16th of August, 1820, describes "the boundaries which separate the land of Peralta to be marked out as follows: The deep creek called San Leandro, and at a distance from this (say five leagues), there are two small mountains (cerritos); the first is close to the beach; next to it follows the San Antonio, serving as boundaries; the rivulet which issues from the mountain range, and runs along the foot of said cerrito of San Antonio, and at the entrance of a little gulch there is a rock elevating itself in the form of a monument, and looking towards the north." This is the description of the northern boundary. It refers to stable monuments—two hills, a rivulet passing at their foot, and a monumental rock. In other documents, Peralta speaks of this line "as the dividing boundary with my neighbor, Francisco Castro." Again; in the return of Ignacio Martinez to the order of the Governor, Arguello, in 1823, to redeliver the possession to Peralta, up to his original boundary, he describes this within boundary by the same monument, "the cerrito San Antonio, the arroyito or rivulet which crosses the place to the coast where is a rock looking to the north."

Lastly, the title of confirmation by Micheltorena in 1844, as quoted above, though not in the very words of the above documents, clearly describes the same monuments. These hills, rivulet and rock, are well known monuments, and their position is satisfactorily proved.

The testimony of the opinions of witnesses who have but lately arrived in the country, who are ignorant of the language and traditions of the neighborhood, and who are all interested in defeating the claim of the petitioners, can have little weight against the knowledge of others who were present when the lines were established some thirty years ago, and have known these boundaries till the present time.

The decree of the Circuit Court is, therefore, affirmed.

Dissenting, Mr. Justice Daniel.

JOHN McCULLOUGH and Cyrus D. Culbertson
v.
GURNSEY Y. ROOTS and Erastus P. Coe.

(See S. C. How. 349-354.)

Warehouse receipts, and advances upon—effect of—sales of property described in—who entitled to price—when agent may sue in his own name.

A warehouse receipt, given in pursuance of an agreement that the plaintiffs were to advance on the property, dispose of it, and receive their pay therefrom, confers on the plaintiffs who had made the advances full power to dispose of the property for advances under such contract.

A license to the person giving such receipt to prepare the property for market and select the markets and purchasers, was an indulgence to him, and did not diminish the rights of the plaintiffs in the property, or their powers under the contract.

Whatever sales were made by him, were made as agent of plaintiffs, and they were entitled to the price.

He was not in a condition to dispute plaintiffs' title, and his authority to the purchaser to appropriate the price as a credit, upon another demand, was a fraud upon plaintiffs' rights.

That the advances were made, and business done by plaintiffs as agents of others, makes no difference with their right to recover where their principals reside out of the State, and plaintiffs are interested to the extent of their commissions.

Argued Feb. 24, 1857. Decided Mar. 5, 1857.

IN ERROR to the Supreme Court of the United States for the District of Maryland.

The case is stated by the court.

Mr. William Schley, for the plaintiffs in error:

The plaintiffs cannot recover on account for goods sold and delivered, if there was no privity or contract between them and the defendants, unless at the time the hams were sold to the defendants, the plaintiffs had an indisputable title to the property, and an immediate right of possession, exclusive of any right or lien of any other person.

Lee v. Shore, 1 Barn. & C. 94; Addison v. Round, 4 Ad. & E. 803; Miles v Gorton, 2 Crompt. & M. 504; Milgate v. Kebble, 3 Man. & G. 100; Lucas v. Latour, 6 Harr. & J. 100; Oliver v. Palmer, 11 Gill & J. 445.

The plaintiffs cannot sue for the price of the hams, or maintain replevin or trover, without showing that before the commencement of the suit, they had in fact returned the former warehouse receipts of Samuel Lewis, or tendered them for cancellation, or at least that they were ready and willing to deliver them up to be canceled.

Oliver v. Palmer, 11 Gill & J. 445; Morton v. Lamb, 7 T. R. 125; Rawson v. Johnson, 1 East, 203.

By the rejection of the various prayers submitted by the defendants, the law of these prayers was denied, except in so far as the law of any prayer was virtually conceded in the instruction actually given by the court.

Counsel are not permitted to claim a verdict upon any principle at variance with the position advanced by the court.

Sowerwein v. Jones, 7 Gill & J. 341.

It is also settled that a party has the right to raise any question of law arising out of the facts of the case, and demand the opinion of the court distinctly upon it.

Whiteford v. Burckmyer, 1 Gill. 143.

The counsel then contended: first, that the instruction given by the court did not cover the whole case; and second, that they were erroneous, even if they were to be considered as covering the whole case, and if there be any evidence, however slight, tending to prove a particular fact, it is within the province of the jury.

Bosley v. Chesapeake Ins. Co. 3 Gill & J. 359; McElderry v. Flannagan, 1 Harr. & G. 308; Ferguson v. Tucker, 2 Harr. & G. 183.

Messrs. George W. Dobbin, W. A. Talbot and R. Johnson, for the defendants in error:

The property in the hams in question was

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in Roots & Coe, prior to the warehouse receipt of Samuel Lewis, by reason of their advances made on the same at Indianapolis.

Reeves v. Capper, 5 Bing. (N. C.) 136; Downs v. Cobb, 12 Barb. 310.

The receipts by Roots & Coe, of Samuel Lewis' warehouse receipts, given with H. Lewis' knowledge and consent, was an executed delivery to them of the property therein mentioned. The agreement to deliver to him his former warehouse receipts, did not affect Roots & Coe's title to the property.

Hurry v. Mangles, 1 Camp. 452; Whitehouse, etc. v. Frost, etc. 12 East, 614; Harman v. Anderson, 2 Camp. 243; Hawes v. Watson, etc. 2 Barn. & C. 540.

The plaintiffs below, though agents of Adams & Buckingham, can maintain this suit in their own names, because the contract of sale with defendants below was made in the name of the plaintiffs; because they had not, as such agents, merely a bare custody, but had a lien for their commissions, and because they were not factors for a domestic, but for a foreign principal.

Sims v. Bond, 5 B. & Ad. 389; Harper v. Hampton, 1 Harr. & J. 671; 2 Foster (N. H.) 217; 8 Mass. 103; Story on Agency, sec. 393, 4, 6, 7, 8; Story on Agency, 400, 401.

Counsel then insisted that the instructions of the court below were correct.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiffs below (Roots & Coe) sued the defendants (McCullough et al.) in general indebitatus assumpsit, in the Circuit Court. for the price of a quantity of hams in tierces which they claim to have sold and delivered to them. The plaintiffs are merchants in Cincinnati, Ohio, who, on their own account and as agents for Adams & Buckingham, of New York, in November, 1853, contracted with Henry Lewis, of the same city, to make advances upon his consignments of bacon, pork and similar articles of provisions, which these consignees were to dispose of, and after reimbursing the advances and expenses, were to appropriate the net profits in part to the payment of a preexisting debt due to those firms. The course of business was, to suffer Henry Lewis to prepare the articles for the market, and to superintend the sales, under a condition of accounting for their proceeds to the consignees. The advances were usually made upon the warehouse receipts of a firm of which Lewis was a partner, generally before the property specified 351*] *in them was in the warehouse. The receipts expressed articles which the warehouseman expected either to prepare or to procure otherwise, and the money advanced was generally intended to aid that object. To secure themselves from the contingency of any failure in these anticipations, the plaintiffs (Roots & Coe) sometimes exacted the guaranty of Samuel Lewis, a brother of Henry Lewis. This generally took the form of a warehouse receipt made by him, corresponding to the others. The articles designated in the receipts of Samuel Lewis, it was understood, would be supplied by Henry—Samuel being unconnected with any business of this description on his own account.

In April, 1854, Roots & Coe were the holders of a number of receipts of Samuel Lewis for provisions, which Henry Lewis was unable to supply. The plaintiffs (Roots & Coe) agreed, that if Samuel Lewis would secure the consignment of a quantity of hams, by executing a new receipt therefor, they would extend their advances to Henry Lewis until he could make the best disposition of them. This was assented to, and the contract hereafter mentioned was made.

Samuel Lewis had not interfered with the business of Henry; nor did he control the property which his receipts from time to time specified. The property was left in the charge of Henry Lewis, to be appropriated according to his contract with the plaintiffs (Roots & Coe), of which the receipt was treated as a guaranty. The receipts executed at this settlement bear date the 4th of April, 1854, and are as follows:

"Received in store of Henry Lewis, and subject to the order of Roots & Coe, but not accountable for damages by fire, four hundred and fifteen hogsheads sugar-cured hams in pickle; containing nine hundred pounds net weight; said hams to be smoked and canvassed within thirty days, and delivered to said Roots & Coe, or their order, said Roots & Coe being responsible for the smoking and canvassing the same; and it is further agreed between the parties, that when the above hams are delivered to said Roots & Coe, then and in that case my former warehouse receipts for two thousand five hundred barrels of mess pork, four hundred barrels of lard, and one hundred thousand pounds of shoulders from the block, shall be given up and cancelled; but I am not responsible for smoking or canvassing the same, that being a matter between said Henry Lewis and Roots & Coe.

(Signed) Samuel Lewis."

At the same time, Henry Lewis gave the following receipt:

"Whereas Roots & Coe hold Samuel Lewis' warehouse *receipt of this date for four [*352 hundred and fifteen hogsheads sugar-cured hams in pickle, each hogshead containing nine hundred pounds net weight, to be delivered within thirty days: Now, I do hereby agree to smoke, canvas, yellow wash, and pack the same, free of charge to Roots & Coe; and also agree not to require Roots & Coe to refund to me the freight on the same from Indianapolis to this place, being one hundred and fifty cents per hogshead, which I have paid, in consideration of having received an advance on the abovementioned hams from Adams & Buckingham, through said Roots & Coe. But in case I should purchase and pay for the same within thirty days from this date, then Roots & Coe agree to refund the freight from Indianapolis to this point, being one dollar and fifty cents per hogshead. Henry Lewis."

At the time this contract was made, the property specified in it was not in store at Cincinnati, but a portion was delivered to the plaintiffs (Roots & Coe) the day after its date. The remainder came consigned to their order during that and the following month, and was deposited in the warehouse of Henry Lewis, under their directions; and Henry Lewis was employed to canvas, yellow wash, brand and pack in tierces the hams, ready for the market; for

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this Roots and Coe were to pay Lewis his bill of charges as a further advance. While the property was in this condition, a disagreement arose between Henry Lewis and Roots & Coe, relative to a deficiency in the weight of the hogsheads, and whether the warehouse receipt of Samuel Lewis amounted to a warranty of the weights.

In May and June, 1854, the defendants below purchased two hundred and twelve tierces of these hams, at a specific price. Roots & Coe, and Henry Lewis respectively claim to have made this sale, and both were present when it was made.

The money arising from the sale was designed for the former, and the sale was entered on their books, and there is strong evidence to the facts that the defendants promised to pay their bill for the hams in June, 1854. But before the payment, Henry Lewis insisted upon a surrender of the warehouse receipts of Samuel Lewis; and that being refused, he directed the defendants to appropriate the price as a credit on the joint debt of Samuel Lewis and himself to them; and this was done by them accordingly.

Upon the trial in the Circuit Court, the plaintiffs in error moved for fourteen distinct instructions to the jury, which the court declined to give, but gave in their stead the following charge:

"1. If the jury shall find, from the evidence [*353] in this case, *that the said two hundred and twelve tierces were part of the hams contained in the four hundred and fifteen hogsheads mentioned in the receipt of April 4, 1854; that they were sold by the said plaintiffs, in their own name, to the said defendants; that at the time of the said sale the said hams belonged to the said plaintiffs, or that they had an interest in the same for advances or commissions, and authority as the agents of Adams & Buckingham to dipose of the same; and that said hams were delivered to, and received by, said defendants, in pursuance of said sale, then the plaintiffs are entitled to recover the full amount or price of the said hams.

2. That although the jury may find from the evidence that said hams were sold to defendants by Henry Lewis, yet if they also find that at the date of said sale the said hams belonged to plaintiffs, or to Adams & Buckingham, for whom the plaintiffs acted as agents; and if the latter, that the plaintiffs had an interest in and control over the said hams, to cover advances and commissions; that defendants subsequently promised to pay plaintiffs the same, and that this suit was instituted before the price of said hams had been paid by defendants to Henry Lewis, then and in that event the plaintiffs are entitled to recover."

To this charge McCullough and Culbertson excepted, as well as to the refusal of the instructions moved for, and assign these decisions as errors in this court. The written contract, of November, 1853, which arranged the terms and course of business between the plaintiffs below (Roots & Coe) and Adams & Buckingham, their principal, with Henry Lewis, for the year 1854, confers on the former a plenary power to dispose of the consignments to be made, for advances under that contract. The contract of April did not alter or modify this term in this engagement. Henry Lewis was then in arrears to them. He had involved his brother Samuel in engagements, as his surety, which he could not fulfill. This contract of April was a relief and an accommodation to the brothers. The license to Henry Lewis to prepare the provisions for market, and to select the markets and purchasers, was an indulgence to him, and did not diminish the rights of Roots & Coe in the property, or their powers under the contract. Whatever sales were made by him, were made as the agent of Roots & Coe and they were entitled to control the price. He was not in a condition to dispute their title, and his authority to the plaintiffs in error to appropriate the price as a credit upon another demand was a fraud upon the rights of Roots & Coe, and Adams & Buckingham. Zulueta v. Vinent, 12 L. & Eq. 145; Bott v. McCoy, 20 Ala. 578; Walcott v. Keith, 2 Fost. N. H. 196. *We think the cause was fairly submit- [*354] ted to the jury in the charge of the court. The instructions prayed for by the plaintiffs in error present several questions which will now be considered.

They affirm, that if Samuel Lewis did not assent to the sale, nor waive his right to detain the property until his warehouse receipts were surrendered, and that Roots & Coe from time to time refused to surrender those receipts, and still control them, they cannot maintain an action for this money.

But the existence of the facts does not authorize the defendants (McCullough et al.) to resist the payment of the price of property they had purchased, and their possession of which had not been disturbed. Samuel Lewis had no title to the property, nor any power to sell it, nor any claim on the price. At most, he had only a lien, which he might never claim to exert, and from which the purchasers have experienced no injury. Holly v. Huggeford, 8 Pick. 73; Vibbard v. Johnson, 19 Johns. 77; Wanzer v. Truly, 17 How. 584.

Nor can the purchasers aver that Henry Lewis had no intention to act as the agent of Roots & Coe in making the sale, and in doing so he did not waive any right of Samuel Lewis, nor enlarge or impair the claim of Roots & Coe upon the property; but that he, and those claiming from him, are simply tort-feasors, and that Roots & Coe cannot claim the entire purchase money, because their title does not embrace the entire property and right to posessession. The relations of Roots & Coe to Henry Lewis were such that he cannot be deemed a tort-feasor, except by their election. They are authorized to adopt his acts, and to claim the benefit of his contracts. He was their bailee, and is estopped to deny their title in any form. It is further insisted that the suit should have been instituted in the names of Adams & Buckingham, and not in those of Roots & Coe. But the contracts for the consignment of the hams, as well as for their preparation for the market and their sale, were made in the names of those persons. They are interested in their result to the extent of their commissions, and their principals reside in another state from themselves. The authorities cited sustain their title to maintain this suit.

Judgment affirmed.

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JOSEPH FELLOWS, Survivor of Robert Kendle, Plff. in Er.,
v.
SUSAN BLACKSMITH, and Eli S. Parker, Admrs. of John Blacksmith, Deceased.

(See S. C. 19 How. 366–373.)

Seneca Indians—their removal must be made by the United States—not by individuals—Treaty is supreme law of the land.

The removal of tribes and nations of Indians from their ancient possessions to their new homes in the West, under Treaties made with them by the United States, has been by the authority and under the care and superintendence of the government.

They cannot be expelled from their homes by the irregular force and violence of individuals who had acquired title to them, or through the intervention of courts of justice.

The grantees derived no power under the Treaty of 1838 or 1842, to dispossess by force the Seneca Indians, or right of entry so as to sustain an ejectment in a court of law.

A treaty is the supreme law of the land. Courts cannot go behind it for the purpose of annulling its effect and operation.

Argued Jan. 19, 1857. Decided March 5, 1857.

IN ERROR to the Supreme Court of the State of New York.

The case is stated by the court.

Messrs. **R. H. Gillet** and **J. L. Brown**, for the plaintiff in error:

The Treaties are valid, and are of themselves conclusive as to the authority of the person representing the Seneca Nations, and as to their identity.

U. S. v. Palmer, 3 Wheat. 634; 4 Wheat. 65; Foster v. Neilson, 2 Pet. 306; U. S. v. Arredondo, 6 Pet. 710; Ware v. Hylton, 3 Dall. 199; U. S. v. The Peggy, 1 Cranch, 103; Worcester v. Georgia, 6 Pet. 559; Cherokees v. Georgia, 5 Pet. 1; Johnson v. McIntosh, 8 Wheat. 593.

The Treaties of 1838 and 1842, were effectual to extinguish the Indian title and vest in Ogden and Fellows, and the survivor of them, the title to the Buffalo Creek and Tonawanda Reservations; consequently the title to the locus in quo.

Mitchel v. U. S. 9 Pet. 711; 10 How. (51 U. S.) 442; Murray v. Wooden, 17 Wend. 536; Jackson v. Hill, 5 Wend. 532; Jackson v. Brown. 15 Johns. 264.

The title being thus acquired, Ogden and Fellows, and the survivor, had the right to enter into the possession of the premises.

The occupants of reservations ceded, became tenants at sufferance, and cannot maintain trespass for being violently turned out of possession.

Hyatt v. Wood, 4 Johns. 150, 313; Rowan v. Lytle, 11 Wend. 616; Allen v. Jaquish, 21 Wend. 636; Wilde v. Cantillon, 1 Johns. Cas. 123; Gault v. Jenkins, 12 Wend. 488; Douglas v. Valentine, 7 Johns. 273.

Mr. **J. H. Martindale**, for defendants in error:

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of New York. The case was decided by the Court of Appeals of that State; but the record had been remitted, after the decision, *to the Supreme Court, from [*367 which the appeal had been taken.

The suit in the Supreme Court was an action of trespass, quare clausum fregit, brought by the intestate, John Blacksmith, against the defendants, Joseph Fellows and Robert Kendle, for entering, with force and arms, into the close of the plaintiff, commonly known as an Indian saw-mill and yard, at the Town of Pembroke, County of Genesee, and then and there having expelled and dispossessed the said plaintiff.

The defendants plead, 1st, not guilty; and 2d, that the said close, etc., was the soil and freehold of the defendant, Fellows, and that the defendant, Fellows, in his own right, and the defendant, Kendle, as his servant, and by his command, broke and entered the said close, etc., as they lawfully might, for the cause aforesaid. To this plea, there was a replication, averring that the close, soil and freehold, was not the close of the defendant, Fellows.

On the trial it was proved by the plaintiff that the close mentioned in the declaration is situate in the Town of Pembroke, County of Genesee, upon a tract of land of twelve thousand eight hundred acres, commonly known as the Tonawanda Reservation, and was, at the time of the entry complained of, an Indian improvement upon the same; that said improvement was made about twenty years before the Treaty, by the plaintiff and seven other Tonawanda Indians; that the plaintiff is a native Indian, belonging to the Tonawanda band of the Seneca Indians, who reside on that reservation, and are a part of the Seneca Nation, and has so been known for at least thirty-six years; that he has resided on this reservation from his birth, and was in the actual possession of the said improvement at the time of the entry complained of; that on the 13th of July, 1846, the defendants entered into and took possession of the said close, and turned the plaintiff out, and in doing so committed the trespass. It was admitted that a Treaty had been made between the United States and the Six Nations of Indians on the 11th November, 1794, by which certain lands in western New York, including this Tonawanda Reservation, are declared "to be the property of the Seneca Nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or their Indian friends residing thereon, and united with them in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

The plaintiff then rested.

The defendants gave in evidence certain documents and Acts *of the Legisla- [*368 tures of the States of New York and Massachusetts, showing that a dispute had arisen, at an early day, between the two States, in respect to the title to a large tract of land within the limits of New York, of which the locus in quo is a part. That in 1786, the dispute was amicably settled by a cession from Massachusetts to New York of the sovereignty and jurisdiction over the tract, and by a cession from New York to Massachusetts of the right of pre-emption to the soil from the Indians.

The lands were then in the independent oc-

Note.—Indians and Indian tribes. Status of; amenable to what laws; rights of; what courts have jurisdiction over; power of Congress over. See note to Worcester v. Georgia, 8 L. ed. U. S. 484.

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cupancy of the Seneca Nation, and owned by them, and that Massachusetts acquired by the cession the exclusive right of purchasing their title whenever they became disposed to sell; that this right had become duly vested in Thomas L. Ogden and Joseph Fellows, by proper conveyances from Massachusetts, which survived to the latter on the death of Ogden.

A Treaty was then given in evidence, between the United States and the New York Indians, bearing date 15th January, 1838, and another between the United States and the Seneca Nation, bearing date the 20th May, 1842, under which the defendant claims that he had acquired the Indian title to the close in question, and by virtue of which it is admitted the defense to the action in this case rests.

The Treaty of 1838 (7 U. S. Stat. 551), set apart a tract of country, situated west of the State of Missouri, as a permanent home for all the New York Indians, containing 1,000,824 acres of land, being, as is expressed in the Treaty, "three hundred and twenty acres for each soul of said Indians, as their numbers are at present computed." The tract is particularly described and located. It was intended for the future home of nine tribes of Indians, containing, according to the official estimate, a population of 5,485. The Seneca tribe, including among them their friends, the Onondagas and Cayugas, numbers a population of 2,633.

By the 10th section of this Treaty, special provision was made concerning this tribe and their friends already mentioned. They were to have assigned to them the easterly part of the tract set apart to the New York Indians, and to extend so far as to include one half section of land for each soul. The tribe agrees to remove from New York to their new home within five years, and continue to reside there. The section then recites the purchase of the title of the Seneca Nation to certain lands described in a deed of conveyance by Ogden and Fellows, assignees of the State of Massachu- [*369] setts, for the consideration *of $202,000, and also that the Nation has agreed that said money shall be paid to the United States, and that out of this sum $102,000 shall be paid to the owners of the improvements on the land so conveyed, the residue to be invested in stocks by the government, the income of which is to be paid annually to the Nation at their new homes. The improvements were to be appraised, and a distribution of the $102.000 made among the owners, and "to be paid by the United States to the individuals who were entitled to the same, etc., on their relinquishing their respective possessions to Ogden and Fellows."

By the 15th section of the Treaty, the United States agree that they will appropriate the sum of $400,000, to be applied from time to time, under the direction of the President of the United States, in such proportions as may be most for the interest of the Indians who were parties to the Treaty, "to aid them in the removal to their homes, and in supporting them the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands; in the erection of mills, houses," etc.

A large tract of land in Wisconsin that had been set apart to certain Indians was relinquished to the government.

The deed of conveyance from the Seneca Nation to Ogden and Fellows, and referred to in the Treaty, is annexed thereto. It conveys four reservations in western New York: the Buffalo Creek Reservation, containing 49,920 acres; the Cattaraugus, 21,680 acres; the Allegany, 30,469 acres; and the Tonawanda, 12,-800 acres.

Some difficulty occurred in carrying this Treaty into execution, which it is not important to refer to. These difficulties raised by the Indians resulted in a modification of it by a second Treaty entered into on 20th May, 1842, which, after referring to the first, and to the deed of conveyance to Ogden and Fellows, and to the differences that had arisen between the parties, provides in the 1st article that Ogden and Fellows, in consideration of the release and agreements afterwards mentioned, stiplate that the Seneca Nation might continue in the occupation and enjoyment of two of the reservations, the Cattaraugus and the Allegany, the same as before the deed of conveyance. And in the 2d article, the Seneca Nation, in consideration of the foregoing and other stipulations, agree to release and confirm to Ogden and Fellows the two remaining reservations, the Buffalo Creek and the Tonawanda.

The 3d article provides for reducing the amount of the purchase money to be paid by Ogden and Fellows, so as to correspond with the relative value of the two reservations released to the value of four, as fixed in the Treaty of 1838.

*The 4th article provides for the ap- [*370] praisal of the land and improvements in these two reservations, by appraisers—one to be appointed by the Secretary of War, and the other by Ogden and Fellows—and to report their proceedings to the Secretary, and also to Ogden and Fellows.

The 5th article provides that the possession of the two tracts confirmed to Ogden and Fellows should be surrendered up as follows: the unimproved lands on the tracts within one month after the reports of the appraisers, and the improvements within two years, provided that the amount to be ascertained and awarded as the proportionate value of said improvements shall, on the surrender thereof, be paid to the President of the United States, to be distributed among the owners according to the determination of the appraisers; and provided, also, the consideration for the release and conveyance of the lands shall, at the time of the surrender thereof, be paid or secured to the satisfaction of the Secretary of War, the income of which to be paid to the Seneca Indians annually.

The 7th article provides that the modification in this Treaty of 1842 shall be a substitute for that of 1838, wherein it differs from it, and to this extent shall be deemed to repeal it.

It will be seen that the principal change under the second Treaty consists in the release, by Ogden and Fellows, to the Indians, of two of the four reservations conveyed to them under the Treaty of 1838, and the corresponding reduction of the price to be paid. Most of the other provisions of the Treaty are untouched, and remained in force. The assign-

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ment by the government of the large tract of country for the New York Indians west of the Missouri—the special tract therein assigned to this Seneca Nation—their agreement to remove to their new homes, and the large appropriation to aid in their removal and in their support and encouragement after they had arrived —all these provisions remained unaffected by the second Treaty.

Neither Treaty made any provision as to the mode or manner in which the removal of the Indians or surrender of the reservations was to take place. The grantees have assumed that they were authorized to take forcible possession of the two reservations, or of the four, as the case would have been under the first Treaty. The plaintiff in this case was expelled by force; and unless this mode of removal can be sustained, the recovery against the defendants for the trespass was right, and must be affirmed.

The removal of tribes and nations of Indians from their ancient possessions to their new 371*] homes in the west, under *Treaties made with them by the United States, have been, according to the usage and practice of the government, by its authority and under its care and superintendence. And, indeed, it is difficult to see how any other mode of a forcible removal can be consistent with the peace of the country, or with the duty of the government to these dependent people, who have been influenced by its counsel and authority to change their habitations.

The negotiations with them as a quasi nation, possessing some of the attributes of an independent people, and to be dealt with accordingly, would seem to lead to the conclusion, unless otherwise expressly stipulated, that the Treaty was to be carried into execution by the authority or power of the government, which was a party to it; and more especially, when made with a tribe of Indians who are in a state of pupilage and hold the relation to the government as a ward to his guardian. It is difficult to believe that it could have been intended by the government that these people were to be left, after they had parted with their title to their homes, to be expelled by the irregular force and violence of the individuals who had acquired it, or through the intervention of the courts of justice. As we have seen, the Seneca Nation upon the four reservations consisted of a population of some two thousand six hundred and thirty-three souls; and if we include the Tuscaroras, whose lands were also purchased under the same Treaty, nearly three thousand. It is obvious that any such litigation would be appalling.

If we look into the provisions of the two Treaties, we think the conclusion is clear, from a consideration of them, that no such means or manner of removal were contemplated, as that derived from a consideration of their unfitness and impropriety under the circumstances stated.

The Treaty of 1838 contemplated a removal to the tract west of the State of Missouri, and putting the Indians in possession of it. A large fund was appropriated, and in the hands of the government, to be disbursed in aid of such removal, and of their support and encouragement after their arrival. It did not, therefore, separate these Indians from the care and protection of the government on its ratification, but contemplated further duties towards them, and for which means were supplied. Besides, the purchase money for the reservations was to be paid to the government; and by the express terms of the Treaty of 1842. the appraised value of the improvements was, on the surrender of the possessions, to be paid to the President of the United States, to be distributed among the owners of the improvements according to the award of the appraisers. This provision shows *that the gov- [*372 ernment was to be present at the surrender and payment for the improvements.

The clause in the Treaty of 1838 is still more specific, which was, that the improvements were "to be paid by the United States to the individuals who were entitled to the same," etc., "on their relinquishing their respective possessions to the said Ogden and Fellows." It is also worthy of remark, that the St. Regis Indians, one of the nine tribes of the New York Indians, in giving their assent to the Treaty of 1838, deemed it necessary to guard against a forcible removal to the west, by a clause providing that they "shall not be compelled to remove under the Treaty;" a removal to the west being in contemplation.

We think, therefore, that the grantees derived no power, under the Treaty, to dispossess by force these Indians, or right of entry, so as to sustain an ejectment in a court of law; that no private remedy of this nature was contemplated by the Treaty, and that a forcible removal must be made, if made at all, under the direction of the United States; that this interpretation is in accordance with the usages and practice of the government in providing for the removal of Indian tribes from their ancient possessions, with the fitness and propriety of the thing itself, and with the fair import of the language of the several articles bearing upon the subject.

An objection was taken, on the argument, to the validity of the Treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and head men of the band in the negotiations and execution of it. But the answer to this is, that the Treaty, after executed and ratified by the proper authorities of the government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an Act of Congress. 1 Cranch, 103; 6 Pet. 735; 10 How. 442; 2 Pet. 307, 309, 314; 3 Story, Const. Law. p. 695.

The view we have taken of the case makes it unnecessary to examine the ground upon which the learned court below placed their decision; that court held the appraisal of the improvements, and payment therefor, were conditions precedent to the surrender of them by the Indians; and that the refusal of the Tonawanda band to permit the appraisal did not excuse the performance of these conditions. The ground upon which we have placed our judgment is not to conflict with this view. We hold that the performance was not a duty that belonged to the grantees, but for the government under the Treaty.

*We think the judgment of the court [*373 below right, and should be affirmed.

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ENOCH C. ROBERTS, Plff. in Er.,
v.
JAMES M. COOPER.

(See S. C. 19 How. 373-375.)

Additional security on appeal.

Where a judgment has been had in ejectment for only nominal damages, and a writ of error has been sued out by defendant and security given, this court cannot interfere to require additional security to cover damages which the plaintiff may recover in an action for mesne profits, or for other losses which he will sustain by being kept out of possession.

Argued Feb. 27, 1857. Decided Mar. 5, 1857.

IN ERROR to the Circuit Court of the United States for the District of Michigan.

Roberts, plaintiff in error, on the allowance of the writ of error, gave security in the sum of $1,000, for damages and costs. Cooper, defendant in error, now moves the court for an order requiring Roberts to give additional security in the sum of $25,000, or such other sum as the court may deem sufficient to cover damages, upon his affidavit that $1,000 is not sufficient to cover all damages and costs.

For the history of this case, with statements of the facts involved, and the opinion of this court on the merits, see 18 How. 173, and 20 How. 467.

Mr. Vinton for defendant in error.

Messrs. Romeyn and Truman Smith, for plaintiff in error.

Mr. Justice Wayne delivered the opinion of the court:

In this case, Roberts, who is the plaintiff in error, on the allowance of the writ of error, gave security in the sum of $1,000, conditioned that he would prosecute his writ to effect, and answer all damages and costs if he failed to make his plea good. Cooper now declares that the bond for 1,000 is not sufficient to answer all the damages and costs, if Roberts should fail to prosecute his writ to effect, and refers to an affidavit filed by him as the basis of this motion to show that fact.

Mr. Vinton, counsel of Cooper, now moves the court for an order requiring Roberts to give 374*] additional security in the sum *of $25,000, or such other sum as the court may deem to be sufficient to cover all damages which Cooper may suffer, if the writ of error should not be prosecuted with effect.

The case between the parties is for the recovery of land in ejectment. Cooper represents that he holds the legal title to the land in controversy in trust for the National Mining Company, incorporated by the Legislature of the State of Michigan, to carry on the business of mining for copper, and that he is the Secretary and Treasurer of the Company; that he instituted this suit to recover the possession of this land for them, that they might have the use and occupation of it for their chartered purposes. It is also stated by the affiant that a decision had been given by the Supreme Court of the United States at its last term, on a writ of error to the Circuit Court for the District of Michigan, between the same parties in controversy, for the same land, establishing, on the merits of the case, the title of the affiant to the land, and that the mining Company, in consequence of it, had prepared to prosecute its mining business to the extent of their ability upon the land, which is known to contain a very valuable deposit of copper ore, which could be worked with great profit; and that the Company was prevented from working the deposit, in consequence of a pending writ of error, which Roberts sued out on a judgment which had been rendered in this case against him and in favor of the legal title of the affiant, in the Circuit Court of the United States for the District of Michigan, at its last term. And the affiant also states that the damages which the Company will sustain by the delay caused by the writ of error will amount to at least the sum of $25,000, and to a larger amount, if Roberts shall not prosecute his writ of error to effect.

We have not been able to find a precedent for this motion. The counsel making it did not cite one, but relied on that part of the 22d, 23d and 24th sections of the Judiciary Act of 1789, the first of which declares that every justice or judge signing a citation on any writ of error shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, which, considered in connection with the 23d and 24th sections, he thought, empowered the court to grant this motion. In our interpretation, and the proper application of those sections, regard must be had to the nature of the action upon which a writ of error has been brought, and to the damages to which a plaintiff who has had a verdict and judgment *may be entitled. If it be for a money [*375 demand, on which a sum certain has been given by a judgment, it is the duty of the judge who signs the citation on a writ of error, to take care that good and sufficient security is given. Should it be neglected, and it shall be brought to the notice of this court, when such a case is before it upon a writ of error, upon a motion to enlarge the security, this court would take care that the party claiming its intervention should have the full benefit of the security intended by the law, on a case when the writ of error was a supersedeas.

But when a verdict and judgment upon it has been had in ejectment, on which nominal damages only, are awarded (except in cases between landlord and tenants, and that in England, in virtue of the Statute of 1 George IV., ch. 87, sec. 2), and a writ of error has been sued out by the defendant, and security given, as has been done in this case, this court cannot interfere to enlarge the security, to cover damages which a plaintiff may recover in an action for mesne profits, or for any other losses which he may allege he will sustain by being kept out of the possession of his land by any delay there may be in prosecuting the writ of error. Besides, this court cannot award damages in any case brought to it by writ of error, or require an enlargement of a bond given upon a writ of error, except as it is authorized to do in the 23d and 24th sections of the Judiciary Act of 1789, neither of which comprehend cases of apprehended losses, except when they are a part of the original suit, and then only, "when its reversal is in favor of the plaintiff, or petitioner in the original suit, and the damages to

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be assessed or the matter to be decreed are uncertain: in which case, the cause is remanded for a final decision.

We must deny this motion. It is not provided for by any legislation of Congress. And the utmost extent for which the enlargement of security upon nominal damages in ejectment has been found necessary in England, is given by the Statute 16 Charles II., sec. 8; and that is, where a defendant there brings error, he may be bound to the plaintiff in such reasonable sum as the court shall think proper, which sum has been settled at double the amount of one year's rent. 4 Burrows, 2502. The courts in England will also oblige a defendant in ejectment, who brings error, to enter into a rule or undertaking not to commit waste or destruction pending the writ. 3 Burrows, 1823; Palmer's Practice in the House of Lords, 159.

The motion to enlarge the security in this case is overruled.

376*] *MARGARET McREA and Bracy McRea, Admrs. of John D. Bracy, Appts.,

v.

THE BRANCH BANK OF THE STATE OF ALABAMA, at Mobile.

(See S. C. 19 How. 376-378.)

Parties.

On a bill by a creditor to reach and apply a trust fund, devoted as security for the debt, and which has come into possession of a third party, the trustee and cestui que trust are indispensable parties.

The facts of this case show a sale fraudulent as to creditors.

Argued Feb. 19, 1857. Decided Mar. 5, 1857.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The appellee filed a bill in the court below, to reach certain slaves therein mentioned as belonging to the estate of John D. Bracy, but alleged to have been fraudulently conveyed to the plaintiff in error.

The bill had a double aspect: setting up a lien on said slaves by virtue of a deed of trust from said John D. Bracy, dated June 7, 1844, to secure the payment of certain notes to the Bank; and second, as a creditor in company with others, to set aside the bill of sale to the said plaintiff in error, as made to hinder and delay creditors.

The bill alleged that John D. Bracy had run away from Alabama with the slaves in question, in order to prevent them from being seized and sold, and that the said plaintiff in error had no means, and gave no adequate consideration for said slaves, and knew that they were incumbered with liens. The answer alleges that the plaintiff in error had been informed that the slaves had been released from the deed of trust. It also denies fraud, and alleges a consideration.

The Circuit Court rendered a judgment for the Bank.

This case further appears in the opinion of the court.

Mr. Fowler, counsel of record for appellants, made no argument in this court.

Mr. A. H. Lawrence, for appellee.

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Arkansas.

It appears from the allegations of the bill, which are supported by the proofs, that in December, 1843, John D. Bracy, then a resident of Alabama, borrowed of the Branch of the Bank of the State of Alabama at Mobile (the appellees in this *case) the sum of $9,- [*377 065, and that Maria Matheson, who was his mother, and another person, joined in the promissory note which was given to the Bank for the loan. To indemnify Mrs. Matheson, Bracy conveyed certain negro slaves to one Gale, in trust, to save her harmless. The debt not being paid at maturity, the Bank recovered a judgment on it in November, 1845. The trustee afterwards sold some of the slaves, and their price was applied to reduce the debt; but sometime in the year 1846, Bracy privately left the State of Alabama, and carried away with him the residue of the slaves and some other property, not leaving, so far as appears, any other property in that State, out of which the judgment in favor of the Bank could be satisfied. He appears to have been for a time in the State of Mississippi. Sometime in 1847 he went to Louisiana; and in the year 1848 he removed with these slaves to White County, in the State of Arkansas, where he employed them in making some improvements on a tract of government land, where he and they resided. In September, 1849, Bracy went to Louisiana, where Margaret McRae, his sister, one of the appellants, then resided, and there made a bill of sale of all the slaves to her. She sent one of her sons to take possession of them; and Bracy also returned to their place of residence, in White County, where he continued to reside until the spring of 1850, when Mrs. McRea moved thither; and from that time they resided together, she having entered the land on which the plantation was, and taken a title in her own name. Bracy continued to reside there, having the principal ostensible management of the business of the plantation, until about a year before his decease, in April, 1852, when he removed to the county town, about six miles distant, to practice his profession as an attorney. He died deeply insolvent, the debts proved against his estate being upwards of $14,000; the sales of all his inventoried effects amounting only to the sum of $345.90. The bill asserts a lien on these slaves by virtue of the trust deed, of which it avers Mrs. McRea had notice when she purchased. But our opinion is, that Gale, the trustee, and Mrs. Matheson, cestui que trust, are indispensable parties to a bill for the subjection of this property to the claim of the Bank, by virtue of the trust deed. Upon that footing the bill cannot be maintained.

But we are all of opinion that the sale to Mrs. McRea was in fraud of creditors, and especially of the Bank. Without detailing the evidence, we think it enough to say, that the removal of the property from Alabama by

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Bracy; leaving the judgment of the Bank unsatisfied; his insolvency; the relation between the parties; their subsequent residence together; 378*] the *manner in which the property was held and managed, are causes of very grave suspicion. The bill charges, that if this property was conveyed to her, "it was so conveyed with intent and for the purpose of hindering, delaying, and defrauding the creditors of the said John D. Bracy." The answer of Mrs. McRea does not deny this allegation.

In the course of responding to the claim of the bill founded on the trust deed, her answer says: "She therefore charges, that there was no incumbrance whatever on the said slaves, or any of them, at the time she purchased them; and avers that she purchased them in good faith, and without any notice or knowledge whatever of a subsisting lien upon them by virtue of said deed of trust." We understand this averment of good faith on her part to relate simply to her ignorance of a lien by the trust deed, and that it does not meet the explicit allegation in the bill, that the purpose of the sale was to conceal the property from creditors; and though the failure of the answer to meet this charge in the bill does not operate as a technical confession of its truth, it does lay a foundation for the belief that if the defendant could have truly denied it, she would not have foregone the decided advantage of such a denial in an answer which puts the complainant on proof of the contested fact by more than one witness.

The answer alleges, that the agreed price of the sale was $3,500, payable in installments of $875 each, in five, six, seven and eight years; and that four promissory notes were executed accordingly. It does not say what was done with the notes, after they were executed. No such notes were found among the effects of Bracy, to be inventoried. Neither of these notes, if in existence, had become payable when this bill was filed, and we think the attempt to show that something had been paid on account of them by the delivery of some cotton is not successful.

In our opinion, the charge in the bill, that the sale was fraudulent as to creditors, is made out in proof, and this is sufficient to sustain the decree of the Circuit Court.

The decree of the Circuit Court is affirmed, with costs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Plaintiff in Error,

v.

THE MICHIGAN SOUTHERN RAILROAD COMPANY, John B. Jarvis, Elisha C. Litchfield, Thomas E. Davis, Guy Foote, Amos Root, and Moses A. McNaughton.

(See S. C. 19 How. 378-381.)

Jurisdiction, under 25th section of Judiciary Act must appear by the record.

There being no complaint, by bill or answer, that the Legislature of Michigan had passed any Act affecting the rights of either party which "impairs the obligation of a contract;" and there being no intimation in the decree that any such question arose in the case; and there being no necessary intendment that such a question did arise; and the record showing affirmatively that no such question did or could arise: held, that this court has no jurisdiction.

To give this court jurisdiction under the 25th section of the Judiciary Act, the record of the case must show, by direct averment or necessary intendment, that one of the questions enumerated in that section did arise, and was decided by the state court.

(Mr. Justice Curtis did not sit in this cause.)

Argued Feb. 20, 1857. Decided Mar. 5, 1857.

IN ERROR to the Supreme Court of the State of Michigan.

On motion to dismiss the writ of error for want of jurisdiction.

The case is stated by the court.

The arguments of counsel, being chiefly devoted to the pleadings and evidence in the case, are not here given.

Mr. James F. Joy for plaintiff in error.

Mr. C. I. Walker for defendants in error.

Mr. Justice Grier delivered the opinion of the court:

This case is before us on a motion to dismiss for want of jurisdiction.

It is a bill in chancery originating in the Circuit Court of Wayne County in the State of Michigan, and afterwards taken by appeal to the Supreme Court of the State.

In order to give this court jurisdiction under the 25th section of the Judiciary Act, the record of the case must show, by direct averment or necessary intendment, that one of the questions enumerated in that section did arise, and was decided by the State Court, as required.

If the subject of complaint be, that a state statute is repugnant to the Constitution of the United States, and therefore void, and that the State Court has declared it to be valid, this fact should appear by some direct averment, either on the bill or answer, or in the decree of the court.

After scrutinizing with great care the rather prolix pleadings of this case, we are unable to find any complaint, by the bill or answer, that the Legislature of Michigan have passed any Act affecting the rights of either party which "impairs the obligation of a contract;" nor is there an intimation in the decree that any such question arose in the case; nor is there any necessary intendment that such a question did arise, and was necessarily decided, from anything that does appear in the pleadings, evidence, or decree; on the contrary, it shows affirmatively that no such question did or could arise.

This will clearly appear from an examination of the bill and answer.

The bill alleges that the complainants were incorporated by an Act entitled "An Act to authorize the sale of the Central Railroad and to incorporate the Michigan Central Railroad Company," approved March 28, 1846; that they

NOTE.—The record for the purpose of showing jurisdiction in the Supreme Court of the United States of a writ of error to a state court,—see note, 63 L.R.A. 329.

What the record must show respecting the presentation and decision of a federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court—see note, 63 L.R.A. 471.

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purchased the Central Railroad, according to 380*] the terms of their charter, and *have since that time completed and run said railroad; that, at the time of the Act, the State of Michigan owned both the Central and Southern railroads; that the management of the Central road was found onerous and unprofitable; that it was an object to sell the same; that the road was not worth, to exceed $800,000; and that the franchises and exclusive rights secured by the charter alone made it worth the sum they paid, viz.: $2,000,000; and that it was for the interest of the State to grant such franchises and exclusive rights, and that the exclusive privileges secured to them by the following provision in section five of their charter were especially valuable to them, and without which they would not have purchased said road:

"And no railroad or railroads from the eastern or southern boundary of the State shall be built or constructed or maintained, or shall be authorized to be built, constructed or maintained, by or under any law of this State, any portion of which shall approach, westwardly of Wayne County, within five miles of the line of said railroad, as designated in this Act, without the consent of this Company."

The bill further alleges, that the State at the same time resolved to sell the Southern Railroad, but that said sale was only to take effect on the completion of the sale of the said Central Railroad; that it was well understood by the complainants, the State, and the defendants (the Southern Railroad Company), that the sale of said Southern Railroad was subordinate to the sale of the Central Railroad, and that the Act incorporating the said Michigan Southern Railroad Company, approved May 9, 1846, was subject to the complainant's charter; and that, by the 6th section of that Act of Incorporation, it is provided as follows:

"And the said Southern Railroad Company shall also, within three years after the passage of this Act, extend, construct, and complete the Tecumseh branch from the village of Tecumseh, by way of Clinton, to the Village of Jackson, by way of Manchester, and along the line of railroads formerly authorized to be constructed by the Jacksonburgh and Palmyra Railroad Company, or so far along the same as may not conflict with the provisions of an Act entitled 'An Act to authorize the sale of the Central Railroad, and to incorporate the Michigan Central Railroad Company,' approved March 28, 1846, and put the same in operation, with sufficient motive power to do the business of the country depending on said branch."

The bill further alleges, that the defendants are threatening to construct, and are taking the preliminary steps for constructing, said Tecumseh branch to the Village of Jackson, and that ten miles of said branch railroad, if con- 381*] structed, will be within *five miles of the complainants' railroad; and that said branch, together with the Erie and Kalamazoo Railroad from Toledo to Adrian, and the Michigan Southern Railroad to Monroe, will in fact and effect, constitute one railroad, both to the eastern and southern boundary of the State, and therefore will be an invasion of the rights and privileges guarantied to the complainants by that provision of their charter before cited, and beyond the powers granted to said Southern Company; and therefore an injunction is prayed for.

The answer of the defendants denies that the provision of the complainants' charter above cited applies to such a road as the Tecumseh branch, but only to parallel roads, or those nearly so; it avers that the Legislature could not grant powers so large and exclusive as those set up by the complainants; and that the Tecumseh branch, if built, would not, in fact or effect, together with the other railroads named, constitute one line of railroads, either to the eastern or southern boundary of the State, and the construction of the same would be no violation of the rights and privileges guarantied to the complainants by their charter, and that by their own charter they are not only authorized, but required, to construct said branch to Jackson.

The gravamen of the bill is, that the defendants are acting without legislative authority, and are usurping rights not granted to them by their charter. It nowhere asserts that they are acting under authority conferred on them by a legislative Act which infringes the rights previously granted in the complainants' charter, or impairs the obligation of their contract. The answer puts in issue nothing but the construction of certain statutes which both parties admit to be valid. It is therefore abundantly apparent that this court has no jurisdiction to review the judgment of the Supreme Court of Michigan in this case.

A manuscript opinion of one of the Judges of the Supreme Court of Michigan has been referred to by the counsel, in their argument in support of our jurisdiction. But even if this opinion had introduced some speculations on points not involved in the pleadings of the case, this court cannot resort to anything therein contained in order to support their jurisdiction. In the case of The Ocean Insurance Co. v. Polleys, we have decided, "that it is to the record, and to the record alone, that this court can resort to ascertain its appellate jurisdiction under the 25th section of the Judiciary Act.

The writ of error must, therefore, be dismissed for want of jurisdiction.

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*ALBERT BALLARD, Charles Chadbourn, Eliphalet Gilman, and Henry W. Heird, Plffs. in Er., [*382

v.

PHILIP F. THOMAS Collector of the Port of Baltimore.

(See S. C. 19 How. 382, 383.)

Duties Under Tariff Act.

The provision in the 8th section of the Act of 1846 (9 U. S. St. p. 43), "that under no circumstances shall the duty be assessed at less than the invoice value" is still in force.

That two and a half per cent. deduction from the invoice price would be made for prompt payment. does not vary or affect the price as stated in the invoice.

Argued Feb. 24, 1857. Decided Mar. 5, 1857.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

The case is stated by the court.

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Mr. William Schley for plaintiffs in error.

Mr. C. Cushing, Atty-Gen., for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Maryland.

The suit was brought in the court below by the plaintiffs against the defendant, Collector of the port of Baltimore, to recover back an excess of duties paid under protest on an importation of iron.

The iron was shipped from Liverpool, and, on an appraisal at the custom-house in Baltimore, the invoice price was adopted as the minimum market value upon which to assess the duties. The plaintiffs claimed that the iron ought to be appraised at the actual cash market value or wholesale price, instead of the actual market value or wholesale price, at a credit of four months, the usual time in the purchase of iron. But the Collector insisted upon the invoice price as the minimum valuation. Two invoices are given in the record as specimens of those produced at the trial. One of them contains the price of the iron, with a deduction of two and a half per cent. for prompt payment, which means cash; the other adds at the foot, four month's credit, which is the customary credit in the trade.

The court charged the jury, that it being admitted that the duties were levied on the prices at which the iron was charged in the invoices, they were lawfully exacted, and the plaintiffs not entitled to recover; and that the entry in the invoice, that the plaintiffs would be entitled to a reduction for prompt payment, could not affect the amount of duty chargeable.

The 8th section of the Act of 1846, 9 U. S. Stat. p. 43, provides, "that under no circum-383*] stances shall the duty be assessed *upon an amount less than the invoice value, any law of Congress to the contrary notwithstanding."

It is claimed that this section has been repealed by the Act of Congress of March 3, 1851, 9 Stat. U. S. p. 629, which provides that the Collector shall "cause the actual market value, or wholesale price thereof at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported, etc., to be appraised, etc., and to such value or price shall be added all costs and charges, etc., as the true value at the port where the same may be entered," etc.

Previous to this Act, the time when the value of the article in the foreign market was to be ascertained, was the time of the purchase, Act 30th August, 1842, sec. 16, 5 Stat. U. S. p. 563, now, by the Act of 1851, the time of exportation. There is no change, however, in the rule which must govern in making the valuation—it is the actual market value or wholesale price in the principal markets of the country from which the article shall have been imported. The only real change, therefore, in respect to this matter, under the law of 1851, from that of 1842 and 1846, would seem to be a change of the time when the valuation is to take place, without intending to interfere with any other of the regulations in the former laws. This was the interpretation given by the Department of the government having charge of this subject, soon after the passage of the Act in question, and, we think, may be sustained upon the principles that this court has uniformly applied in interpreting these Revenue Laws.

The construction is also borne out by the case of Stairs et al. v. Peaslee, 18 How. 522. That case recognizes the 8th section of the Act of 1846 as in force since the Act of 1851, and the clause in question is a part of it.

In respect to the deduction from the price on account of prompt payment, we think the fact does not vary or affect the price of the article, as stated in the invoice. It relates simply to the mode of payment, which may, if observed, operate as a satisfaction of the price to be paid by the acceptance of a less sum.

We think the ruling of the court below, right, and that the judgment should be affirmed.

DRED SCOTT, Plff. in Er.,
v.
JOHN F. A. SANDFORD.

(See S. C. 19 How. 393-633.)

Plea in abatement; when may be reviewed—the word "citizen" in the Constitution does not embrace one of the negro race—negro cannot become a citizen—slave not made free by residence in a free state or territory—Declaration of Independence does not include slaves as part of the people—the rights and privileges conferred by the Constitution upon citizens do not apply to the negro race—Constitution should have the meaning intended when it was adopted—court may examine other errors besides plea in abatement—Constitution expressly affirms right of property in slaves—Missouri compromise unconstitutional and void.

Where a plea in abatement, by defendant, to the jurisdiction of the court below is overruled on demurrer, and the defendant thereupon pleads in bar, upon which issues were joined and the trial and verdict were in his favor, and the plaintiff thereupon brought the case into this court by writ of error, and the plea and demurrer and judgment of the court below upon it are part of the record; held, that this court has power to review the decision of the court below upon the plea in abatement.

It is therefore the duty of the court to decide whether the facts stated in the plea, are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in the court of the United States.

The provisions of the Constitution of the United States in relation to the personal rights and privileges to which the citizen of a state should be entitled, do not embrace the negro African race, at that time in this country, or who might afterwards be imported, who had then been or should afterwards be made free in any state.

Such provisions of the Constitution do not put it in the power of a single state to make out one of the negro African race a citizen of the United States, and to endue him with the full rights of citizenship in every other state without their consent.

The Constitution of the United States does not act upon one of the negro race whenever he shall be made free under the laws of a state, and raise him to the rank of a citizen, and immediately clothe him with all the privileges of a citizen of any other state, and in its own courts.

The plaintiff in error was a negro slave, and brought into a free State (Illinois), and in the free territory of the United States for about four years, during which time he was married to another negro

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slave who also was in said free territory. One of their children (Eliza) was born on the River Mississippi, north of the north line of Missouri, and another of their children was born in the State of Missouri, to which state he had returned.

Held, that the plaintiff in error could not be and was not a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and consequently was not entitled to sue in its courts.

The legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that instrument.

The descendants of Africans who were imported into this country and sold as slaves, when they shall become emancipated, or who are born of parents who had become free before their birth, are not citizens of a state in the sense in which the word "citizen" is used in the Constitution of the United States.

The enslaved African race was not intended to be included in, and formed no part of, the people who framed and adopted the Declaration of Independence.

When the framers of the Constitution were conferring special rights and privileges upon the citizens of a state in every other part of the Union, it is impossible to believe that these rights and privileges were intended to be extended to the negro race.

The words of the Constitution should be given the meaning they were intended to bear, when that instrument was framed and adopted.

Where this court has decided against the jurisdiction of the Circuit Court on a plea of abatement, it has still the right to examine any question presented by exception or by the record, and may reverse the judgment for errors committed, and remand the case to the Circuit Court for it to dismiss the case for want of jurisdiction.

The right of property in a slave is distinctly and expressly affirmed in the Constitution.

The Act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned (thirty-six degrees thirty minutes north latitude), is not warranted by the Constitution, and is therefore void.

Neither Dred Scott himself, nor any of his family were made free by being carried into such territory: even if they had been carried there by their owner with the intention of becoming permanent residents.

Scott was not made free by being taken to Rock Island in the State of Illinois.

As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back into Missouri in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois. He and his family were not free, but were, by the laws of Missouri, the property of defendant.

Argued Feb. 11, 12, 13 and 14, 1856. May 12, 1856, ordered to be re-argued at the next term. Re-argued Dec. 15, 16, 17 and 18, 1856. Decided March 6, 1857.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

On November 2, 1853, Dred Scott, by his attorney, filed in the clerk's office of the Circuit Court of the United States for the District of Missouri, the following declaration against the defendant, John F. A. Sandford:

Dred Scott, of St. Louis, in the State of Missouri, and a citizen of the State of Missouri, complains of John F. A. Sandford, of the City of New York, and a citizen of the State of New York, in the plea of trespass for that the defendant heretofore, to wit: on the 1st day of January, A. D. 1853, at St. Louis, in the County of St. Louis and State of Missouri, with force and arms assaulted the plaintiff, and without law or right held him as a slave, and imprisoned him for the space of six hours and more, and then and there did threaten to beat the plaintiff and to hold him in prison, and restrained of his liberty, so that by means of such threats the plaintiff was put in fear and could not attend to his business, and thereby lost great gains and profits which he might have made and otherwise would have made in the prosecution of his business, to wit: $2,500, and other wrongs to the plaintiff then and there did, against the peace and to the damage of the plaintiff $3,000.

And also for that the defendant heretofore, on the 1st day of January, A. D. 1853, with force and arms at St. Louis aforesaid, an assault did make on Harriet Scott, then and still the wife of the plaintiff, and then and there did imprison said Harriet, and hold her as a slave, without law or right, for the space of six hours, and then and there did threaten to beat said Harriet and hold her as a slave, so that by means of the premises said Harriet was put in great fear and pain, and could not and did not attend to the plaintiff's business, and the plaintiff lost and was deprived of the society, comfort and assistance of his said wife, and thereby lost great gains and profits, of the value, to wit: of $2,500, and other wrongs to the plaintiff, the defendant then and there did, against the peace and to the plaintiff's damage, $3,000.

And also for that the defendant heretofore, to wit: on the 1st day of January, A. D. 1853, with force and arms at St. Louis aforesaid, made an assault on Eliza Scott and Lizzie Scott, then and still infant daughters and servants of the plaintiff, and then and there imprisoned and held as slaves said Eliza and Lizzie, for a long space of time, to wit: six hours, and then and there did threaten to beat said Eliza and Lizzie and hold them as slaves and restrained of their liberty, so that by means of the premises, said Eliza and Lizzie were put in great fear, and could not and did not attend to plaintiff's business as otherwise they might and would have done, and the plaintiff thereby lost the comfort, society, service and assistance of his said children and servants, of great value, to wit: $2,500, and other wrongs to the plaintiff, the defendant then and there did against the peace, and to the damage of plaintiff $3,000, and the plaintiff on account of the aforesaid several grievances, brings suit, etc., by his attorney, R. M. Field.

The defendant, by his attorney, filed the following plea:

Plea to the jurisdiction of the court. April Term, 1854.

And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them, if any such have accrued to the said Dred Scott, accrued to the said Dred Scott out of the jurisdiction of this court and exclusively within the jurisdiction of the courts of the State of Missouri; for that, to wit: the said plaintiff Dred Scott is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro

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slaves, and this the said Sandford is ready to verify; wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

The plea was verified.

The plaintiff filed the following demurrer to this plea:

And now comes the plaintiff and demurs in law to the plea of the defendant to the jurisdiction of the court, and says that the said plea and the matters therein contained are not sufficient in law to preclude the court of its jurisdiction of this case, and that the plaintiff is not bound by law to reply to said plea. Wherefore the plaintiff prays judgment of said plea, and that the defendant answer further to the plaintiff's said action, etc.

On April 24, 1854, the matters of law arising upon the demurrer were argued and submitted to the court. On April 25, the court rendered a decision that the law was for plaintiff on said demurrer, and that the said demurrer be, and the same is hereby sustained.

On May 4, 1854, in accordance with an agreement by the attorneys, the defendant filed pleas, Nos. 1, 2 and 3, to all of which pleas the plaintiff filed replications. Said attorneys also filed an agreement upon the statement of the facts in this case. The pleas are as follows:

1. And the said John F. A. Sandford, by H. A. Garland, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed trespass above laid to his charge, or any part thereof in manner and form as the said Dred Scott hath above thereof complained against him, and of this he, the said Sandford, putteth himself upon the country.

2. And for a further plea in this behalf, as to the making of said assault on said Dred Scott in the first count in said declaration mentioned, imprisoning him and keeping and detaining him in prison, etc., the said Sandford, by leave of the court first obtained, says that the said Dred Scott ought not have or maintain his aforesaid action thereof against him, because he says that before, and at the time when, etc., in the said first count mentioned, the said Dred Scott was a negro slave, the lawful property of the defendant, and as such slave he gently laid his hands upon him, and only restrained him of such liberty as he had a right to do, and this the said Sandford is ready to verify, wherefore he prays judgment whether the said Scott ought to have or maintain his aforesaid action thereof against him.

3. And for a further plea in this behalf, as to making the said assault upon Harriet, the wife, and Eliza and Lizzie, the daughters of the said Dred Scott, in the second and third counts of the said declaration mentioned, and imprisoning them and keeping and detaining them in prison, etc., the said John F. A. Sandford, by leave of the court obtained, says that said Dred Scott out not to have or maintain his aforesaid action thereof against him, because he says that before and at the said time, etc., when etc., in the said second and third counts mentioned, the said Harriet, wife of said Scott, and Eliza and Lizzie, his daughters, were the lawful slaves of the said Sandford, and as such slaves he gently laid his hands upon them and restrained them of their liberty as he had a right to do. And this he is ready to verify. Wherefore he prays judgment, etc.

Garland, for defendant.

The replications are as follows:

The plaintiff, as to the plea of the defendant firstly above pleaded, and whereof he has put himself on the country, doth do like. Field.

And the plaintiff, as to the plea of the defendant secondly above pleaded as to said several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, says that the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the defendant, because he says that said defendant at said time, when, etc., of his own wrong, and without the cause by him in his said second plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the plaintiff has above in his declaration complained, and this the plaintiff prays may be inquired of by the country.

The replication to the third plea was similar to the second.

The agreed statement of facts was as follows:

In the year 1834 the plaintiff was a negro slave belonging to Doctor Emerson, who was a surgeon in the Army of the United States. In that year, 1834, said Doctor Emerson took the plaintiff from the State of Missouri to the military post at Rock Island in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Doctor Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi River in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of 36 degrees 30 minutes north, and north of the State of Missouri. Said Doctor Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the Army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Doctor Emerson hereinbefore named. Said Doctor Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836 the plaintiff and said Harriet, at said Fort Snelling, with the consent of said Doctor Emerson, who then claimed to be their master and owner, intermarried and took each other for husband and wife, Eliza and Lizzie named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board of the steamboat Gipsey, north of the north line of the State of Missouri, and upon the River Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

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In the year 1838, said Doctor Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Doctor Emerson sold and conveyed the plaintiff, said Harriet, Eliza and Lizzie, to the defendant as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do, if they were of right his slaves at such time.

Further proof may be given on the trial for either party.

Mr. R. M. Field, for plaintiff.
Mr. H. A. Garland, for defendant.

The case was tried, at the Circuit Court held for the District of Missouri at St. Louis on May 15, 1854, before the court and a jury.

The jury found the following verdict, viz.: "As to the first issue joined in this case, we of the jury find the defendant not guilty; and as to the issue secondly above joined, we of the jury find, that before and at the time when, etc., in the first count mentioned, the said Dred Scott was a negro slave, the lawful property of the defendant. And as to the issue thirdly above joined, we the jury find, that before and at the time when, etc., in the second and third counts mentioned, the said Harriet, wife of said Dred Scott, and Eliza and Lizzie the daughters of the said Dred Scott were negro slaves, the lawful property of the defendant." Whereupon it is now considered by the court, that the plaintiff take nothing by his writ in this case, and that the defendant John F. A. Sandford go hence without day and recover against said plaintiff, Dred Scott, the costs by him expended in the defense of this suit.

A motion for a new trial was made by the attorneys for the plaintiff, which the court overruled. Thereupon the said plaintiff filed a bill of exception, which is as follows:

Dred Scott
v. } April Term, 1854.
John F. A. Sandford.

On the trial of this cause by the jury, the plaintiff, to maintain the issues on his part, read to the jury, the following agreed statement of facts.

"It is agreed that Dred Scott brought suit for his freedom, in the Circuit Court of St. Louis County; that there was a verdict and judgment in his favor; that on a writ of error to the Supreme Court, the judgment below was reversed, and the same remanded to the Circuit Court, where it has been continued to await the decision of this case.

Mr. Field, for plaintiff.
Mr. Garland, for defendant."

No further testimony was given to the jury by either party. Thereupon the plaintiff moved the court to give the jury, the following instructions:

Plaintiff's Instruction.

The jury are instructed, that upon the facts agreed to by the parties, they ought to find for the plaintiff.

The court refused to give such instruction to the jury, and the plaintiff to such refusal then and there duly excepted. The court then gave the following instruction to the jury, on motion of the defendant:

Defendant's Instruction.

The jury are instructed, that upon the facts in this case the law is with the defendant.

To the giving of such instruction the plaintiff then and there duly excepted.

The jury found the verdict as above. The plaintiff thereupon immediately filed in court the following motion for a new trial:

And now, after verdict, and before judgment, the plaintiff comes and moves the court to set aside the verdict and grant a new trial, because the court misdirected the jury in matter of law on said trial. Field.

The court overruled the said motion and gave judgment on verdict for the defendant; and to such action of the court the plaintiff then and there duly excepted.

The plaintiff writes this bill of exceptions and prays that it may be allowed, and signed and sealed. Field.

Allowed and signed and sealed, May 15, 1854.
R. W. Wells. [seal.]

A writ of error was issued, and in the Supreme Court of the United States, December Term, 1854, the following was filed:

And now comes said plaintiff in error and says that in the record of the proceedings, and in the giving of judgment below, there is manifest error, because the court below, in the trial of the cause, misdirected the jury in matter of law, and because the court below gave judgment for the defendant below, when the judgment should have been for plaintiff below, wherefore for said errors and others the plaintiff prays judgment of reversal here, and that he may be restored to all he has lost.

By his attorney, Nathaniel Holmes.

Filed, Dec. 30, 1854.

Messrs. M. Blair and Curtis, for the plaintiff in error:

1. The first question is, whether this court will consider the question raised in the Circuit Court by the plea to the jurisdiction, no final judgment having been rendered on the demurrer to that plea, and the defendant having pleaded over after the demurrer was sustained, and the final judgment assigned for error having been rendered on the issue on the merits.

2. Whether, if the ruling of the Circuit Court on the demurrer to the plea in abatement is subject to be reviewed here, the judgment of the court, in holding the plaintiff to be "a citizen" in such sense as to enable him to maintain an action in that character in the courts of the United States, was erroneous.

3. Whether the facts stated in the agreed case entitle the plaintiff and his family to freedom, supposing the 8th section of the Act of 1820, known as the Missouri Compromise, to be constitutional.

4. Whether the said Act is constitutional.

Upon the first point the counsel cited, Shep-

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pard v. Graves, 14 How. 519; U. S. v. Boyd, 5 How. 51; Smith v. Kernochen, 7 How. 216; Sims v. Hundley, 6 How. 1; Bailey v. Dozier, 6 How. 23; Conard v. Atlantic Ins. Co. 1 Pet. 386; De Wolf v. Rabaud, 1 Pet. 476; Evans v. Gee, 11 Pet. 89; 1 Wash. C. C. 70, 80; 2 Sumn. 251; 2 Dall. 341; 4 Dall. 330, and then said: In this case, as in those cited, the declaration gives jurisdiction, and the facts alleged in support of it can only be contested by making an issue as in other cases. If that issue be not made, or be waived in the conduct of the cause according to a well-settled practice of the court, there is no reason in this case more than in any other why the objection should be available at a later stage of the case. If the fact had been that plaintiff was not a resident of Missouri, and that was the reason why he was not a citizen, no advantage could be taken of the fact at any subsequent stage of the case. What difference does it make that another fact is relied on to show that he is not a citizen? It is the right to sue as "a citizen" of Missouri, which is questioned: and it is immaterial whether the right be questioned on account of residence, or on account of any other circumstance which deprives him of the character of a citizen of Missouri.

2. But if the court should be of opinion that the question raised by the plea in abatement, and the demurrer thereto, is not waived, and that the judgment of the Circuit Court therein must be maintained before it will consider the questions affecting his right to freedom, I submit the following considerations in support of the judgment on the demurrer:

The opinion of the court in Amy v. Smith, 1 Litt. 326, 4 Ga. 68, that free negroes are not citizens within the meaning of the 2d section of the 4th article of the Constitution, delivered in the spring of 1822, displays no research, logic or learning. On the other hand, the dissenting opinion of Judge Mills, p. 337, is sustained by the views of Judge Washington in Corfield v. Coryell, 4 Wash. C. C. 71.

21 Ala. 434; State v. Manuel, 4 Dev. & Bat. 24.

The other decisions relied on, Meigs, 339; 1 English, 509, are to the same effect as the decision in Amy v. Smith, and simply follow that.

The argument most relied on by those who deny the citizenship of free colored men is, that the Acts of Congress on the subject of naturalization provide for naturalizing white persons only. But even naturalization was not limited to the whites by the Constitution, and it has been extended repeatedly by treaty and Act of Congress to Indians and negroes.

Treaty with Choctaws, art. 14, 20th September, 1830; Treaty with the Cherokees, 12th art. Vol. V. U. S. Laws, 647; Treaties of 1803 for Louisiana, 1819 for Florida, 1847 for California; 21 Ala. 454; and as Judge Gaston says, 4 Dev. & Bat. 24, there is no connection between the subject of citizenship as acquired by birth and that acquired under the laws of Congress, and it would be a dangerous mistake to confound them. That citizenship is acquired by birth, is a well settled common law principle.

Vattel, ch. 19, secs. 212, 313, 314; Justinian, Lib. 1, Tit. 5, sec. 3; Constitution, sec. 5, art. 2.

The Constitution of the United States recognizes but two kinds of free persons, citizens and aliens. Nobody supposes that free negroes are aliens. They must therefore be citizens.

Opinions Atty.-Gen. Vol. IV. p. 417; 3d sec. Act March 6, 1820; 6th sec. Act of 1812, to form a territorial government in Missouri; Militia Act, May 17, 1792; Constitutions of Kentucky, Louisiana, Mississippi, Connecticut and Missouri.

All of the above define the qualifications of electors in terms, "free white male citizens;" and thus show that it is as a class of citizens that the negroes are excluded. These considerations would authorize the conclusion that the framers of the Constitution and the patriots of that era regarded this class of persons as citizens, and included them in that character in the provisions of the Constitution; and this is fully confirmed by reference to the laws and records of that day.

Act of Mass. 6th March, 1788; Proposal of South Carolina, Jan. 25, 1778, to amend the 4th article; Journals, Vol. II. p. 606; Journals, Vol. IV. p. 183; Organization of the Western Territory, Resolutions, April 23, 1784; Ordinance 1787, art. 4; 2 Kent's Com. p. 258, note b.

Missouri Rev. Laws of 1845, p. 755, and Code of 1835, allude to free negroes who were "citizens."

No reason can be imagined for permitting a suit between free white persons of different states, for wrongs which the local tribunals were deemed inadequate to redress, which will not apply with equal force to controversies to which a free negro may be a party. They have equal capacity with other citizens to hold property and carry on business, and therefore to create the mischief against which the national judiciary was provided. The words of a law are to be construed with reference to the object of the law.

16 Pet. 640; 12 Wheat. 441; 16 Pet. 104.

In 1 Paine, C. C. 394, the courts say that a person need not have acquired political rights; it is only necessary that he should have acquired a domicil, to enable him to sue as a citizen; and in 3 Wash. C. C. 546, that "citizenship means nothing but residence."

3. The next question to be considered is, whether Dred and his family, or either of them, was emancipated by being taken to Illinois, and to that part of Louisiana Territory lying north of 36 degrees 30 minutes, and being detained there in the manner described in the agreed case. The eldest child, Eliza, having been born north of the Missouri line, on the boat whilst descending the Mississippi, was free under the Constitution of Illinois, and well settled legal principles.

Constitution of Illinois, art. 6, secs. 1 and 2; 3 U. S. Stat. at L. p. 544; Spotts v. Gillaspie, 6 Rand. (Va.), 572; Commonwealth v. Holloway, 2 S. & R. 305.

The Circuit Court decided against the plaintiff on the strength of Scott v. Emerson, 15 Mo. 586.

But the question depends on general principles, and the courts of the United States, whilst they will respectfully consider the decisions of the State Court, decide such questions according to their own judgment of the law.

Swift v. Tyson, 16 Pet. 1; Carpenter v. Ins. Co. 16 Pet. 511; Lane v. Vick, 3 How. 476; Foxcroft v. Mallett, 4 How. 379.

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During the time that Dr. Emerson kept Dred at his station at Rock Island, and Harriet at Fort Snelling, there is no evidence that he had or claimed a residence elsewhere, and this court, in Ennis v. Smith, 14 How. 423, "where a party lives, is taken prima facie to be his domicil."

See, also, Sylvia v. Kirby, 17 Mo. 434.

In the case of Scott v. Emerson, 15 Mo. 576, the court base their decision on two grounds:

1st. That by returning to Missouri to reside the master's right, which was suspended during the residence in Illinois, and in the Territory, is revived.

2d. The Constitution of Illinois, and the 8th sec. of the Act of 1820, are penal statutes which the courts of other States were not bound to enforce.

In support of the first position, Ex parte Grace, 2 Hagg. 90; Commonwealth v. Aves, 18 Pick. 193, and Mahoney v. Ashton, 4 H. & McH. 295, were cited.

These decisions are inapplicable to the case at bar, for in the present case the Constitution and Statute of Illinois expressly provide that emancipation shall be the effect of the violation of the provision. The laws under which the above decisions were made were different.

David v. Porter, 4 H. & McH. 418; Betty v. Horton, 1 Lee, 615.

The second ground relied upon by the court was equally untenable. See opinion of Judge Gambles, of the same case of Emerson v. Scott, "in this State it has been recognized from the beginning of the government as a correct position in law, that the master who takes his slave to reside in a state or territory where slavery is prohibited, emancipates his slave.

Also McMicken v. Amos, 4 Rand. 134; Bank v. Earle, 13 Pet. 590; Spencer v. Dennis, 8 Gill 321.

4. The freedom of Harriet and her daughter Lizzie depends on the validity of the 8th section of the Act of March 6, 1820, entitled "An Act to authorize the people of Missouri Territory to form a constitution and state government," etc.

The section is as follows:

That in all that territory ceded by France to the United States, which lies north of 36 degrees 30 minutes north latitude, not included within the limits of the State contemplated by this Act, slavery and involuntary servitude, otherwise than in the punishment of crimes whereof the party shall have been duly convicted, shall be, and the same is hereby forever prohibited.

Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

The validity of this section is denied, on the ground that Congress possessed no power to prohibit slavery in the Territories.

It is not the power to govern the Territories, but the extent of the power which is questioned. Even those who deny any constitutional power to govern the Territories, admit the power on the ground of necessity; but they say where the necessity stops, there the power ceases. But this concedes the whole question; for if it be lawful to legislate at all, the quantum which may be necessary is purely a legislative question; and indeed, whether the Constitution confers directly the legislative power in question or not is immaterial, seeing that it owns the lands, and has power to pass what laws it may deem expedient to dispose of and make them available.

Undoubtedly, for temporary purposes, it is indispensable that provision be made to govern the people in order that the lands shall possess any value, or that what remains after part is sold, may not be seized and confiscated. What would be proper provisions to this end, is not within the scope of judicial inquiry. If it were, it is demonstrable that the provision in question is most judicious, as a mere regulation to facilitate the disposition of public lands.

But it is alleged that the particular provision prohibiting slavery is violative of some part of the Constitution, which establishes the equality of the States and the rights of slave holders to take that species of property into the Territories of the United States. I admit that whether the power of Congress to legislate be given expressly or by implication, it is given with the limitation that it shall be exercised in subordination to the Constitution, and that if it be exercised in violation of any provisions of the Constitution, the Act would be void. Subject to this limitation, Congress is at liberty to adopt any means to accomplish its object.

McCulloch v. Maryland, 4 Wheat. 316.

But where is it written in the Constitution that no law shall be passed prohibiting slavery in the territories? Not only was this measure adopted as one deemed advisable and proper to the well government of the territories under both the Confederation and the Constitution, but when the Mississippi Territory was ceded in 1798, it was deemed necessary to stipulate that slavery should not be prohibited, in order to limit the discretion of Congress. The limitation sought to be imposed is one dependent altogether upon state laws, and subjects Congress to the State Legislatures. The Act is now claimed as unconstitutional, because a species of property recognized in the laws of the States cannot be held in the Territories; but it would become constitutional if the States should cease to recognize such property; and again unconstitutional if the States should recognize it again. How the law in question affects the States as States, in any respect, is not perceived; it is not pretended that any State has legislative rights in the Territories.

Pollard v. Hagan, 3 How. 322.

On other subjects, there are difficulties in adjusting the rights of the general and state governments; but there can be no conflict on this. Over the Territories, the general government alone has any power; and in the exercise of that, as of all other powers, is a government of the people. "In form and substance (this court says), it emanates from them, its powers are granted by them, and are to be exercised on them and for their benefit."

On this branch of the subject, the counsel cited the following authorities: Story's Com. Const. Vol. III., pp. 193, 195; 1 Kent's Com. 360; Sergeant, Const. Law, 389; McCulloch v. Maryland, 4 Wheat. 422; Am. Ins. Co. v. Canter, 1 Pet. 543; Cherokee Nation v. Georgia, 5

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Pet. 44; Menard v. Aspasia, 5 Pet. 505; Strader v. Graham, 10 How. 93; Cross v. Harrison, 16 How. 193; Hogg v. Zanesville Canal Co. 5 Ohio, 410; Phœbe v. Jay, Breese, 210; Spooner v. McConnell, 1 McL. 341; Merry v. Chexnaider, 8 Mart. (N. S.) 699; Harry v. Decker, Walker (Miss.) 36; Rachael v. Walker, 4 Mo. 350; 3 How. 223. And the following Acts of Congress; 1 Stat. at L., pp. 50, 551; 2 Stat. at L., pp. 58, 283, 309, 514; 3 Stat. at L., p. 546; 4 Stat. at L., p. 740; 5 Stat. at L., pp. 10, 235, 797; 9 Stat. at L., pp. 223, 447.

Messrs. H. S. Geyer and R. Johnson, for the defendant in error:

This cause was argued before this court at the December Term, 1855, when it was ordered to be re-argued by counsel for their respective parties, at a next term of court, and especially upon the following points:

1. Whether or not the facts being admitted by the demurrer to the plea to the jurisdiction, the judgment on the demurrer being that the defendant answer over, and the submission of the defendant to that judgment, by pleading over to the merits, the appellate court can take notice of these facts thus admitted upon the record, in determining the question of the jurisdiction to the court below, to hear and fully dispose of the case.

2. Whether or not, assuming that the appellate court is bound to take notice of the facts thus appearing upon the record, the plaintiff is a citizen of the State of Missouri within the meaning of the 11th section of the Judiciary Act of 1789.

1. The averment that the plaintiff is a citizen of the State of Missouri, is a necessary averment. If it had been omitted or defectively stated, it would have been error in the Circuit Court to entertain jurisdiction, even though the defendant had not traversed the averment, but pleaded to the merits.

3 Dall. 382; 2 Cranch, 1, 126; Sullivan v. Fulton Steamboat Co. 6 Wheat. 450; Turner v. Enrille, 4 Dall. 7; Capron v. Van Noorden, 2 Cranch, 126.

If the plea demurred to, is to be regarded as a traverse or averment of citizenship of the plaintiff, then the fact on which the plaintiff claims a right to sue in the Circuit Court does not appear by the record; on the contrary, it appears affirmatively that he had no right to sue in that court. The whole question, whether the court could entertain jurisdiction and allow the defendant to plead over, depends on the decision on the demurrer. If that was erroneous, it was error to proceed further, and the defendants pleading over could not give jurisdiction.

2. It appears by the record that the defendant is a negro, born a slave; and therefore, whether he is entitled to freedom or not, by his temporary residence at Rock Island or Fort Snelling, or both, he is not and cannot be a citizen of the State of Missouri, within the meaning of the Constitution, or sec. 11 of the Judiciary Act.

Citizens, within the meaning of art. 3, sec. 2, are citizens of the United States, who are citizens of the state in which they respectively reside.

Read v. Bertrand, 4 Wash. C. C. 516; Knox v. Greenleaf, 4 Dall. 360; 3 Story on Const. 565, secs. 1687, 1688; 6 Pet. 761.

Citizens are natives or naturalized. All persons born in the United States are not citizens.

Exceptions are:

First. Children of foreign ambassadors.

Second. Indians.

Third. In general, persons of color.

1 Bouv. Inst. pp. 16, 64; Amy v. Smith, 1 Lit. Ky. 334; 2 Kent's Com. p. 258, note b.

Free blacks are not citizens within the provision of the Constitution, art. 4, sec. 2; so held by Dagget, Ch. J., in Connecticut. See note Kent's Com. supra.

See, also, State v. Claiborne, 1 Meigs, 331; Opinions Atty.-Gen. Vol. I. 382, ed. 41; Vol. I. p. 506, ed. 52. "An inquiry into the political grade of the free colored population, under the Constitution of the United States," by John P. Denny.

Persons who are not citizens of the United States by birth, can become such only by virtue of a treaty, or in pursuance of some law of the United States.

The power of naturalization is exclusively vested in Congress.

U. S. v. Villato, 2 Dall. 370; Chirac v. Chirac, 2 Wheat. 269; Houston v. Moore, 5 Wheat. 48.

A slave cannot become a citizen merely by a discharge from bondage.

3. Assuming that the Circuit Court had jurisdiction, the facts, as agreed by the parties, do not establish the right of the plaintiff, his wife and children, or either of them, to freedom.

Sec. 1 of art. 5 of the Constitution of Illinois, and sec. 8 of the Act of 6 March, 1820, do not declare the consequence of bringing a slave within the Territory, embraced. There is no exception or saving in respect to the rights of travelers. The effect of the provision is, in terms, the same, whether a slave is introduced to reside there or for some temporary purpose. Neither clause changes the condition of the slave brought into the Territory embraced by it. The slave is held to be free while he remains within such State or country, only because his owner has not the authority of law to restrain him of his liberty.

The owner's authority is restored if the slave is found within a State or country where slavery exists by law.

The Slave Grace, 2 Hagg. Adm. 94; Willard v. The People, 4 Scam. 461; Graham v. Strader, 5 B. Mon. 181; 7 B. Mon. 633; Collins v. America, 9 B. Mon. 565; Mercer v. Gilman, 11 B. Mon. 210; Maria v. Kirby, 12 B. Mon. 542; Lewis v. Fullerton, 1 Rand. 15.

It has been held that where an owner of a slave brings him into a State or country in which slavery does not exist, or is prohibited by law, with the intention to make it his domicil, it operates as an emancipation, and the master cannot resume domain, though the slave return to, or is found in a country where slavery exists by law.

Rankin v. Lydia, 2 A. K. Marsh. 467; Griffith v. Fanny, Gilm. (Va.) 143; Lunsford v. Coquillon, 2 Mart. N. S. 405; Josephine v. Poultney, 1 La. Ann. 329; Winney v. Whitesides, 1 Mo. 472; Milly v. Smith, 2 Mo. 172; Nat v. Ruddle, 8 Mo. 282; Rachel v. Walker, 4 Mo. 350; overruled in Scott v. Emerson, 15 Mo. 570; Sylvia v. Kirby, 17 Mo. 434.

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These are cases of emancipation by the voluntary act of the master, binding upon him everywhere, as would be emancipation upon any other proof recognized by law. Slaves, however, attending their owners temporarily sojourning in, or traveling through a State wherein slavery does not exist by law, are not thereby emancipated.

2 A. K. Marsh. 467; Graham v. Strader, 5 B. Mon. 181; Mercer v. Gilman, 11 B. Mon. 210; Maria v. Kirby, 12 B. Mon. 542; Lewis v. Fullerton, 1 Rand. 15; Henry v. Ball, 1 Wheat. 1; Spragg v. Mary, 3 Harr. & J.; Pocock v. Hendricks, 8 Gill & J. 421; The Slave Grace, 2 Hagg. 94; Commonwealth v. Aves, 18 Pick. 193; Mahoney v. Ashton, 4 H. & McH. 295.

The present plaintiff in error was held not entitled to his freedom, on the same state of facts as is now in evidence, in Scott v. Emerson, 15 Mo. 576.

This decision was affirmed in Sylvia v. Kirby, 17 Mo. 434.

By the laws of Missouri, therefore, the claimants are slaves, and these laws must determine their condition in the courts of the United States.

Strader v. Graham, 10 How. 93.

4. No residence of a slave at Fort Snelling could change his condition or devest the title of his owner.

Slavery existed by law in all the territory ceded by France to the United States, and Congress has not the constitutional power to repeal that law, or abolish or prohibit slavery within any part of that Territory.

Sec. 8 of the Act of March 6, 1820, is the first, and almost the only instance of an assumption by Congress of the power to abolish slavery in the Territory. It has never been recognized by this court. It is understood to be claimed that authority of Congress to erect territorial governments is confirmed by art. 4, sec. 3, of the Constitution, which gives the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," or to result from the power to acquire territory; and in either case, it comprehends a power of legislation exclusive, universal, absolute and unlimited.

3 Story, Const. secs. 1314, 1315, 1318, 1319, 1320, 1322; 1 Kent's Com. 423.

The clause of the Constitution, however, has been judicially interpreted to be a power to dispose of and make all needful rules and regulations respecting the lands and other property of the United States.

U. S. v. Gratiot, 14 Pet. 526, 537; Am. Ins. Co. v. Canter, 1 Pet. 342; see, also, Federalist, No. 43.

The subject of the power conferred by art. 4. sec. 3, is property, and the property only of the United States. This power is over unappropriated lands.

To organize a municipal government or corporation for the district or country, to prohibit slavery, or to interfere in any way with the law of property, is not to make needful rules and regulations respecting the territory or other property belonging within such district; therefore, the power to institute such a government, and more especially an unlimited power to legislate in all cases over the inhabitants in a territory and their property, cannot be deduced from the clause under consideration.

The power of Congress to institute temporary government over any territory, results necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. It is a power resulting from the necessity of the State, and is limited to the necessity from which it arises; to change the law of property, to emancipate slavery, to abolish slavery where, by the law it exists, to confiscate property, or devest vested rights, cannot be necessary or proper to the institution of a temporary government. The power of Congress over the territory belonging to the United States cannot authorize legislation which practically excludes from such territory the people of any portion of the Union, or prevents them from taking with them and holding in such territory any property recognized by the Constitution, and the local laws of the territory.

Mr. Chief Justice Taney delivered the opinion of the court:

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court; and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case, and direct a re-argument on some of the points, in order that we might have an opportunity of giving to the whole subject a more deliberate *consideration. [*400 It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And,

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri, and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined, and at the trial the verdict

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and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

If the question raised by it is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court is erroneous, and must be reversed.

It is suggested, however, that this plea is not before us; and that as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it, or bring it before the court for revision by his writ of error; and also that the defendant waived this defense by pleading over, and thereby admitted the jurisdiction of the court. 401*] *But in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England and in the different States of the Union which have adopted the common law rules.

In these last mentioned courts, where their character and rank are analogous to that of a circuit court of the United States; in other words, where they are what the law terms courts of general jurisdiction, they are presumed to have jurisdiction unless the contrary appears. No averment in the pleadings of the plaintiff is necessary, in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and unless the fact on which he relies is found to be true by a jury, or admitted to be true by the plaintiff, the jurisdiction cannot be disputed in an appellate court.

Now, it is not necessary to inquire whether in courts of that description a party who pleads over in bar, when a plea to the jurisdiction has been ruled against him, does or does not waive his plea; nor whether upon a judgment in his favor on the pleas in bar, and a writ of error brought by the plaintiff, the question upon the plea in abatement would be open for revision in the appellate court. Cases that may have been decided in such courts, or rules that may have been laid down by common law pleaders, can have no influence in the decision in this court. Because, under the Constitution and laws of the United States, the rules which govern the pleadings in its courts, in questions of jurisdiction, stand on different principles and are regulated by different laws.

This difference arises, as we have said, from the peculiar character of the government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the Legislative, Executive nor Judicial Departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the Judicial Department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should *show, in his pleading, that [*402 the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by an oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common law, English, or state court, unless the contrary appeared. But the record, when it comes before the appellate court, must show, affirmatively, that the inferior court had authority, under the Constitution, to hear and determine the case. And if the plaintiff claims a right to sue in a circuit court of the United States, under that provision of the Constitution which gives jurisdiction in controversies between citizens of different states, he must distinctly aver in his pleading that they are citizens of different states; and he cannot maintain his suit without showing that fact in the pleading.

This point was decided in the case of Bingham v. Cabot, in 3 Dall. 382, and ever since adhered to by the court. And in Jackson v. Ashton, 8 Pet. 148, it was held that the objection to which it was open could not be waived by the opposite party, because consent of parties could not give jurisdiction.

It is needless to accumulate cases on this subject. Those already referred to, and the cases of Capron v. Van Noorden, in 2 Cranch, 126, and Montalet v. Murray, 4 Cranch, 46, are sufficient to show the rule of which we have spoken. The case of Capron v. Van Noorden strikingly illustrates the difference between a common law court and a court of the United States.

If, however, the fact of citizenship is averred in the declaration, and the defendant does not deny it, and put it in issue by plea in abatement, he cannot offer evidence at the trial to disprove it, and consequently cannot avail himself of the objection in the appellate court, unless the defect should be apparent in some other part of the record. For if there is no plea in abatement, and the want of jurisdiction does not appear in any other part of the transcript brought up by the writ of error, the undisputed averment of citizenship in the declaration must be taken in this court to be true. In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And if the plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is, whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

*We think they are before us. The [*403 plea in abatement and the judgment of the

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court upon it, are a part of the judicial proceedings in the Circuit Court, and are there recorded as such; and a writ of error always brings up to the superior court the whole record of the proceedings in the court below. And in the case of The Bank of the U. S. v. Smith, 11 Wheat. 172, this court said, that the case being brought up by writ of error, the whole record was under the consideration of this court. And this being the case in the present instance, the plea in abatement is necessarily under consideration; and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen. One of these rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a state, in the sense in which the word "citizen" is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only; that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate 404*] *right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor Colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white: and their freedom has constantly been acknowledged, from the time of the first emigration to the English Colonies to the present day, by the different governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war: and the people who compose these Indian political communities have always been treated as foreigners not living under our government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of Congress, and become citizens of a State and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can, therefore, claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate *and inferior class of [*405 beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen

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in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the federal government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed 406*] with all the *rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any Act or law of its own, passed, since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a state should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent. Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several state communities, or who should afterwards, by birthright or otherwise, become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State *which [*407 he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the governments and institutions of the thirteen Colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it, in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in

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every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firm-
408*] ly fixed or more *uniformly acted upon than by the English government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen Colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different Colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different Colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British Colonies, to give the laws of two of them; one being still a large slaveholding State, and the other the first State in which slavery ceased to exist.

The Province of Maryland, in 1717 (ch. 13, sec. 5), passed a law declaring "that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the Justices of the County Court, where such marriage so happens, shall think fit; to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid, with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid."

The other colonial law to which we refer was passed by Massachusetts in 1705 (chap. 6). It is entitled "An Act for the better preventing of a spurious and mixed issue," etc.; and it provides, that "if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at
409*] *the discretion of the justices before whom the offender shall be convicted."

And "that none of Her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds; one moiety thereof to Her Majesty, for and towards the support of the government within this province, and the other moiety to him or them that shall inform and sue for the same in any of Her Majesty's courts of record within the Province, by will, plaint, or information."

We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State constitutions and governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive.

It begins by declaring that, "when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to *assume among the powers of the [*410 earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among them is life, liberty, and pursuit of happiness; that to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day, would be so understood. But it is too clear for dispute, that the enslaved African

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race were not intended to be included, and formed no part of the people who framed and adopted this Declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this Declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not, in any part of the civilized world, be supposed to embrace the negro race, which, by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose 411*] benefit and protection. It declares *that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not *even in the minds [*412 of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate, and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence; and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions of these States: for some of the States, where it had ceased or nearly ceased to exist, were actively engaged in the slave trade, procuring cargoes on the coast of Africa, and transporting them for sale to those parts of the Union where their labor was found to be profitable, and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in its worst form—that is, in the seizure and transportation—the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer, in support of this proposition, to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted, and some since the government went into operation.

We need not refer, on this point, particularly

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to the laws of the present slaveholding States. Their statute books are full of provisions in relation to this class, in the same spirit with the Maryland law which we have before quoted. They have continued to treat them as an inferior class, and to subject them to strict police regulation, drawing a broad line of distinction between the citizen and the slave races, and legislating in relation to them upon the same principle which prevailed at the time of the Declaration of Independence. As relates to these States, it is too plain for argument, that they have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their 413*] pleasure. *And as long ago as 1822, the Court of Appeals of Kentucky decided that free negroes and mulattoes were not citizens within the meaning of the Constitution of the United States; and the correctness of this decision is recognized, and the same doctrine affirmed, in 1 Meigs' Tenn. 321.

And if we turn to the legislation of the States where slavery had worn out, or measures taken for its speedy abolition, we shall find the same opinions and principles equally fixed and equally acted upon.

Thus, Massachusetts, in 1786, passed a law similar to the colonial one of which we have spoken. The Law of 1786, like the Law of 1705, forbids the marriage of any white person with any negro, Indian or mulatto, and inflicts a penalty of £50 upon anyone who shall join them in marriage; and declares all such marriages absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy. And this mark of degradation was renewed, and again impressed upon the race, in the careful and deliberate preparation of their Revised Code published in 1836. This Code forbids any person from joining in marriage any white person with any Indian, negro or mulatto, and subjects the party who shall offend in this respect, to imprisonment, not exceeding six months, in the common jail, or to hard labor, and to a fine of not less than fifty nor more than two hundred dollars; and, like the Law of 1786, it declares the marriage to be absolutely null and void. It will be seen that the punishment is increased by the Code upon the person who shall marry them, by adding imprisonment to a pecuniary penalty.

So, too, in Connecticut. We refer more particularly to the legislation of this State, because it was not only among the first to put an end to slavery within its own territory, but was the first to fix a mark of reprobation upon the African slave trade. The law last mentioned was passed in October, 1788, about nine months after the State had ratified and adopted the present Constitution of the United States; and by that law it prohibited its own citizens, under severe penalties, from engaging in the trade, and declared all policies of insurance on the vessel or cargo made in the State to be null and void. But, up to the time of the adoption of the Constitution, there is nothing in the legislation of the State indicating any change of opinion as to the relative rights and position of the white and black races in this country, or indicating that it meant to place the latter, when free, upon a level with its citizens. And certainly nothing which would have led the slaveholding States to suppose that Connecticut designed to claim for them, under *the new Constitution, the equal [*414 rights and privileges and rank of citizens in every other state.

The first step taken by Connecticut upon this subject was as early as 1774, when it passed an Act forbidding the further importation of slaves into the State. But the section containing the prohibition is introduced by the following preamble:

"And whereas the increase of slaves in this State is injurious to the poor, and inconvenient."

This recital would appear to have been carefully introduced, in order to prevent any misunderstanding of the motive which induced the Legislature to pass the law, and places it distinctly upon the interest and convenience of the white population—excluding the inference that it might have been intended in any degree for the benefit of the other.

And in the Act of 1784, by which the issue of slaves, born after the time therein mentioned, were to be free at a certain age, the section is again introduced by a preamble assigning a similar motive for the Act. It is in these words:

"Whereas sound policy requires that the abolition of slavery should be effected as soon as may be consistent with the rights of individuals, and the public safety and welfare"—showing that the right of property in the master was to be protected, and that the measure was one of policy, and to prevent the injury and inconvenience, to the whites, of a slave population in the State.

And still further pursuing its legislation, we find that in the same Statute passed in 1774, which prohibited the further importation of slaves into the State, there is also a provision by which any negro, Indian or mulatto servant, who was found wandering out of the town or place to which he belonged, without a written pass such as is therein described, was made liable to be seized by anyone, and taken before the next authority to be examined and delivered up to his master—who was required to pay the charge which had accrued thereby. And a subsequent section of the same law provides, that if any free negro shall travel without such pass, and shall be stopped, seized or taken up, he shall pay all charges arising thereby. And this law was in full operation when the Constitution of the United States was adopted, and was not repealed till 1797. So that up to that time free negroes and mulattoes were associated with servants and slaves in the police regulations established by the laws of the State.

And again, in 1833, Connecticut passed another law, which made it penal to set up or establish any school in that State for the instruction of persons of the African race not inhabitants of the State, or to instruct or teach in any such school or *institution, or [*415 board or harbor for that purpose, any such person, without the previous consent in writing of the civil authority of the town in which such school or institution might be.

And it appears by the case of Crandall v. The State, reported in 10 Conn. 340, that upon an information filed against Prudence Crandall

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for a violation of this law, one of the points raised in the defense was, that the law was a violation of the Constitution of the United States; and that the persons instructed, although of the African race, were citizens of other States, and therefore entitled to the rights and privileges of citizens in the State of Connecticut. But Chief Justice Daggett, before whom the case was tried, held, that persons of that description were not citizens of a State, within the meaning of the word "citizen" in the Constitution of the United States, and were not, therefore, entitled to the privileges and immunities of citizens in other States.

The case was carried up to the Supreme Court of Errors of the State, and the question fully argued there. But the case went off upon another point, and no opinion was expressed on this question.

We have made this particular examination into the legislative and judicial action of Connecticut, because, from the early hostility it displayed to the slave trade on the coast of Africa, we may expect to find the laws of that State as lenient and favorable to the subject race as those of any other State in the Union; and if we find that at the time the Constitution was adopted, they were not even there raised to the rank of citizens, but were still held and treated as property, and the laws relating to them passed with reference altogether to the interest and convenience of the white race, we shall hardly find them elevated to a higher rank anywhere else.

A brief notice of the laws of two other States, and we shall pass on to other considerations.

By the laws of New Hampshire, collected and finally passed in 1815, no one was permitted to be enrolled in the militia of the State but free white citizens; and the same provision is found in a subsequent collection of the laws made in 1855. Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded, because, being born in a foreign country, he cannot be a member of the community until he is naturalized. But why are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not by the institutions and laws of the State numbered among its people. He forms no part of the sovereignty of the State, and is not, therefore, called on to uphold and defend it.

416*] *Again in 1822, Rhode Island in its Revised Code, passed a law forbidding persons who were authorizel to join persons in marriage from joining in marriage any white person with any negro, Indian or mulatto, under the penalty of $200, and declaring all such marriages absolutely null and void; and the same law was again re-enacted in its Revised Code of 1844. So that, down to the last mentioned period, the strongest mark of inferiority and degradation was fastened upon the African race in that State.

It would be impossible to enumerate and compress, in the space usually allotted to an opinion of a court, the various laws, marking the condition of this race, which were passed from time to time after the Revolution, and before and since the adoption of the Constitution of the United States. In addition to those already referred to, it is sufficient to say that Chancellor Kent, whose accuracy and research no one will question, states in the sixth edition of his Commentaries, published in 1848, 2d vol. 258, note b, that in no part of the country, except Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word "citizens," or would have consented to a constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police *regulations which they [*417 considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

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Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No state was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. The right of naturalization was therefore, with one accord, surrendered by the States, and confined to the Federal Government. And this power granted to Congress to establish an uniform rule of naturalization is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign government. It is not a power to raise to the rank of a citizen anyone born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class. And when we find the States guarding themselves from the indiscreet or improper admission by other states of emigrants from other countries, by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the States a much 418*] *more important power—that is, the power of transforming into citizens a numerous class of persons, who in that character would be much more dangerous to the peace and safety of a large portion of the Union than the few foreigners one of the States might improperly naturalize. The Constitution, upon its adoption, obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States anyone, no matter where he was born, or what might be his character or condition; and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.

A clause, similar to the one in the Constitution, in relation to the rights and immunities of citizens of one State in the other States, was contained in the Articles of Confederation. But there is a difference of language, which is worthy of note. The provision in the Articles of Confederation was, "that the free inhabitants of each of the States, paupers, vagabonds, and fugitives from justice excepted, should be entitled to all the privileges and immunities of free citizens, in the several States."

It will be observed, that under this Confederation each State had the right to decide for itself, and in its own tribunals, whom it would acknowledge as a free inhabitant of another state. The term "free inhabitant," in the generality of its terms, would certainly include one of the African race who had been manumitted. But no example, we think, can be found of his admission to all the privileges of citizenship in any State of the Union after these Articles were formed, and while they continued in force. And notwithstanding the generality of the words "free inhabitants," it is very clear that, according to their accepted meaning in that day, they did not include the African race, whether free or not; for the 5th section of the 9th article provides that Congress should have the power "to agree upon the number of land forces to be raised, and to make requisitions from each State for its quota in proportion to the number of white inhabitants in such State, which requisition should be binding."

Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject—the free and the subjugated races. The latter were not even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defense. And it cannot for a moment be supposed, that a class of *per- [*419 sons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words "free inhabitants," in the preceding article, to whom privileges and immunities were so carefully secured in every State.

But although this clause of the Articles of Confederation is the same in principle with that inserted in the Constitution, yet the comprehensive word "inhabitant," which might be construed to include an emancipated slave, is omitted, and the privilege is confined to "citizens" of the State. And this alteration in words would hardly have been made unless a different meaning was intended to be conveyed, or a possible doubt removed. The just and fair inference is, that as this privilege was about to be placed under the protection of the general government, and the words expounded by its tribunals, and all power in relation to it taken from the State and its courts, it was deemed prudent to describe with precision and caution the persons to whom this high privilege was given—and the word "citizen" was on that account substituted for the words "free inhabitant." The word "citizen" excluded, and no doubt intended to exclude, foreigners who had not become citizens of some one of the States when the Constitution was adopted; and also every description of persons who were not fully recognized as citizens in the several States. This, upon any fair construction of the instruments to which we have referred, was evidently the object and purpose of this change of words.

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitution that we have given. Three laws, two of which were passed almost immediately after the government went into operation, will be abundantly sufficient to show this. The first two are particularly worthy of notice, because many of the men who assisted in framing the Constitution, and took an active part in procuring its adoption, were then in the halls of legislation, and certainly understood what they meant when they used the words "people of the United States" and "citizen" in that well considered instrument.

The first of these Acts is the Naturalization Law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "to aliens being free white persons."

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Now, the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of anyone, of any color, who was born under allegiance to another government. But the language of the law 420*] above quoted shows that citizenship *at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the government.

Congress might, as we before said, have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their then untutored and savage state, no one would have though of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary War, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word "white" was not used with any particular reference to them.

Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore there was no necessity for using particular words to exclude them.

It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the government, and the African race, which they held in subjection and slavery, and governed at their own pleasure.

Another of the early laws of which we have spoken, is the first Militia Law, which was passed in 1792, at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every "free able-bodied white male citizen" shall be enrolled in the militia. The word "white" is evidently used to exclude the African race, and the word "citizen" to exclude unnaturalized foreigners, the latter forming no part of the sovereignty; owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language.

The third Act to which we have alluded is even still more decisive; it was passed as late as 1813 (2 Stat. 809), and it provides: "That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, or persons of color, natives of the United States.

421*] *Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word "citizens," and they are described as another and different class of persons, and authorized to be employed, if born in the United States.

And even as late as 1820 (chap. 104, sec. 8), in the charter to the City of Washington, the Corporation is authorized "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes," thus associating them together in its legislation; and after prescribing the punishment that may be inflicted on the slaves, proceeds in the following words: "And to punish such free negroes and mulattoes by penalties not exceeding twenty dollars for any one offense; and in case of the inability of any such free negro or mulatto to pay any such penalty and cost thereon, to cause him or her to be confined to labor for any time not exceeding six calendar months." And in a subsequent part of the same section, the Act authorizes the Corporation "to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city."

This law, like the laws of the States, shows that this class of persons were governed by special legislation directed expressly to them, and always connected with provisions for the government of slaves, and not with those for the government of free white citizens. And after such an uniform course of legislation as we have stated, by the Colonies, by the States, and by Congress, running through a period of more than a century, it would seem that to call persons thus marked and stigmatized, "citizens" of the United States, "fellow-citizens," a constituent part of the sovereignty, would be an abuse of terms, and not calculated to exalt the character of an American citizen in the eyes of other nations.

The conduct of the Executive Department of the government has been in perfect harmony upon this subject with this course of legislation. The question was brought officially before the late William Wirt, when he was the Attorney-General of the United States, in 1821, and he decided that the words "citizens of the United States" were used in the Acts of Congress in the same sense as in the Constitution; and that free persons of color were not citizens, within the meaning of the Constitution and laws; and this opinion has been confirmed by that of the late Attorney-General, Caleb Cushing, in a recent case, and acted upon by the Secretary of State, who refused to grant passports to them as "citizens of the United States."

But it is said that a person may be a citizen, and entitled to *that character, al- [*422 though he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet, when he goes into another State, he is entitled to be recognized there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class, resident in the State, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly, a person may be a citizen, that is, a member of the community who from the sovereignty, although he exercises no share of the political power, and is incapacitated from

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holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his status or condition, and place him among the class of persons who are not recognized as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the state as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen of the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities 423*] which belong to citizens of the *State. And if persons of the African race are citizens of a state, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities, under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the State could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guarantees rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

The case of Legrand v. Darnall, 2 Pet. 664, has been referred to for the purpose of showing that this court has decided that the descendant of a slave may sue as a citizen in a court of the United States; but the case itself shows that the question did not arise and could not have arisen in the case.

It appears from the report that Darnall was born in Maryland, and was the son of a white man by one of his slaves, and his father executed certain instruments to manumit him, and devised to him some landed property in the State. This property Darnall afterwards sold to Legrand, the appellant, who gave his notes for the purchase money. But becoming afterwards apprehensive that the appellee had not been emanicipated according to the laws of Maryland, he refused to pay the notes until he could be better satisfied as to Darnall's right to convey. Darnall, in the meantime, had taken up his residence in Pennsylvania, and brought suit on the notes and recovered judgment in the Circuit Court for the District of Maryland.

The whole proceeding, as appears by the report, was an amicable one; Legrand being perfectly willing to pay the money, if he could obtain a title, and Darnall not wishing him to pay unless he could make him a good one. In point of fact, the whole proceeding was under the direction of the counsel who argued the case for the appellee, who was the mutual friend of the parties, and confided in by both of them, and whose only *object was to [*424 have the rights of both parties established by judicial decision in the most speedy and least expensive manner.

Legrand, therefore, raised no objection to the jurisdiction of the court in the suit at law, because he was himself anxious to obtain the judgment of the court upon his title. Consequently, there was nothing in the record before the court to show that Darnall was of African descent, and the usual judgment and award of execution was entered. And Legrand thereupon filed his bill on the equity side of the Circuit Court, stating that Darnall was born a slave, and had not been legally emancipated, and could not, therefore, take the land devised to him, nor make Legrand a good title; and praying an injunction to restrain Darnall from proceeding to execution on the judgment, which was granted. Darnall answered, averring in his answer that he was a free man, and capable of conveying a good title. Testimony was taken on this point, and at the hearing the Circuit Court was of opinion that Darnall was a free man and his title good, and dissolved the injunction and dismissed the bill; and that decree was affirmed here, upon the appeal of Legrand.

Now, it is difficult to imagine how any question about the citizenship of Darnell, or his right to sue in that character, can be supposed to have arisen or been decided in that case. The fact that he was of African descent was first brought before the court upon the bill in equity. The suit at law had then passed into judgment and award of execution, and the Circuit Court, as a court of law, had no longer any authority over it. It was a valid and legal judgment, which the court that rendered it had not the power to reverse or set aside. And unless it had jurisdiction as a court of equity to restrain him from using its process as

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a court of law, Darnall, if he thought proper, would have been at liberty to proceed on his judgment, and compel the payment of the money, although the allegations in the bill were true, and he was incapable of making a title. No other court could have enjoined him, for certainly no State equity court could interfere in that way with the judgment of a circuit court of the United States.

But the Circuit Court as a court of equity certainly had equity jurisdiction over its own judgment as a court of law, without regard to the character of the parties; and had not only the right, but it was its duty—no matter who were the parties in the judgment—to prevent them from proceeding to enforce it by execution, if the court was satisfied that the money was not justly and equitably due. The ability of Darnall to convey did not depend upon his citizenship, but upon his title to freedom. And 425*] if he was free, he could hold and *convey property, by the laws of Maryland, although he was not a citizen. But if he was by law still a slave, he could not. It was, therefore, the duty of the court, sitting as a court of equity in the latter case, to prevent him from using its process, as a court of common law, to compel the payment of the purchase money, when it was evident that the purchaser must lose the land. But if he was free, and could make a title, it was equally the duty of the court not to suffer Legrand to keep the land, and refuse the payment of the money, upon the ground that Darnall was incapable of suing or being sued as a citizen in a court of the United States. The character or citizenship of the parties had no connection with the question of jurisdiction, and the matter in dispute had no relation to the citizenship of Darnall. Nor is such a question alluded to in the opinion of the court.

Besides, we are by no means prepared to say that there are not many cases, civil as well as criminal, in which a circuit court of the United States may exercise jurisdiction, although one of the African race is a party; that broad question is not before the court. The question with which we are now dealing is, whether a person of the African race can be a citizen of the United States, and become thereby entitled to a special privilege, by virtue to his title to that character, and which, under the Constitution, no one but a citizen can claim. It is manifest that the case of Legrand v. Darnall has no bearing on that question, and can have no application to the case now before the court.

This case, however, strikingly illustrates the consequences that would follow the construction of the Constitution which would give the power contended for, to a State. It would, in effect, give it also to an individual. For if the father of young Darnall had manumitted him in his lifetime, and sent him to reside in a State which recognized him as a citizen, he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the United States; and the state officers and tribunals would be compelled, by the paramount authority of the Constitution, to receive him and treat him as one of its citizens, exempt from the laws and police of the state in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship, without respect to the laws of Maryland, although such laws were deemed by it absolutely essential to its own safety.

The only two provisions which point to them and include them, treat them as property, and make it the duty of the government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a government *of special, delegated pow- [*426 ers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."

And upon a full and careful consideration of the subject, *the court is of opinion [*427 that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitu-

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tion of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

We are aware that doubts are entertained by some of the members of the court, whether the plea in abatement is legally before the court upon this writ of error; but if that plea is regarded as waived, or out of the case upon any other ground, yet the question as to the jurisdiction of the Circuit Court is presented on the face of the bill of exception itself, taken by the plaintiff at the trial; for he admits that he and his wife were born slaves, but endeavors to make out his title to freedom and citizenship by showing that they were taken by their owner to certain places, hereinafter mentioned, where slavery could not by law exist, and that they thereby became free, and upon their return to Missouri became citizens of that State.

Now, if the removal of which he speaks did not give them their freedom, then by his own admission he is still a slave; and whatever opinions may be entertained in favor of the citizenship of a free person of the African race, no one supposes that a slave is a citizen of the State or of the United States. If, therefore, the acts done by his owner did not make them free persons, he is still a slave, and certainly incapable of suing in the character of a citizen.

The principle of law is too well settled to be disputed, that a court can give no judgment for either party, where it has no jurisdiction; and if, upon the showing of Scott himself, it appeared that he was still a slave, the case ought to have been dismissed, and the judgment against him and in favor of the defendant for costs, is, like that on the plea in abatement, erroneous, and the suit ought to have have been dismissed by the Circuit Court for want of jurisdiction in that court.

But, before we proceed to examine this part of the case, it may be proper to notice an objection taken to the judicial authority of this court to decide it; and it has been said, that as this court has decided against the jurisdiction of the Circuit Court on the plea in abatement, it has no right to examine any question presented by the exception; and that anything it may say upon that part of the case will be extrajudicial, and mere obiter dicta.

This is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgment of a circuit court, and to reverse it for any error apparent on the record, 428*] *whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this, too, whether there is a plea in abatement or not.

The objection appears to have arisen from confounding writs of error to a state court, with writs of error to a circuit court of the United States. Undoubtedly, upon a writ of error to a state court, unless the record shows a case that gives jurisdiction, the case must be dismissed for want of jurisdiction in this court. And if it is dismissed on that ground, we have no right to examine and decide upon any question presented by the bill of exceptions, or any other part of the record. But writs of error to a state court, and to a circuit court of the United States, are regulated by different laws, and stand upon entirely different principles. And in a writ of error to a circuit court of the United States, the whole record is before this court for examination and decision; and if the sum in controversy is large enough to give jurisdiction, it is not only the right, but it is the judicial duty of the court, to examine the whole case as presented by the record; and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment, and remand the case. And certainly an error in passing a judgment upon the merits in favor of either party, in a case which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit.

The plea in abatement is not a plea to the jurisdiction of this court, but to the jurisdiction of the Circuit Court. And it appears by the record before us, that the Circuit Court committed an error, in deciding that it had jurisdiction, upon the facts in the case, admitted by the pleadings. It is the duty of the appellate tribunal to correct this error; but that could not be done by dismissing the case for want of jurisdiction here—for that would leave the erroneous judgment in full force, and the injured party without remedy. And the appellate court, therefore, exercises the power for which alone appellate courts are constituted, by reversing the judgment of the court below for this error. It exercises its proper and appropriate jurisdiction over the judgment and proceedings of the Circuit Court as they appear upon the record brought up by the writ of error.

The correction of one error in the court below does not deprive the appellate court of the power of examining further into the record, and correcting any other material errors which may have been committed by the inferior court. There is certainly no rule of law—nor any practice—nor any decision of a *court—which even questions this [*429 power in the appellate tribunal. On the contrary, it is the daily practice of this court, and of all appellate courts where they reverse the judgment of an inferior court for error, to correct by its opinions whatever errors may appear on the record material to the case; and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy, and the point has been relied on by either side, and argued before the court.

In the case before us, we have already decided that the Circuit Court erred in deciding that it had jurisdiction upon the facts admitted by the pleadings. And it appears that, in the further progress of the case, it acted upon the erroneous principle it had decided on the pleadings, and gave judgment for the defendant, where, upon the facts admitted in the exception, it had no jurisdiction.

We are at a loss to understand upon what principle of law, applicable to appellate jurisdiction, it can be supposed that this court has not judicial authority to correct the last mentioned error because they had before corrected the former; or by what process of reasoning it can be made out, that the error of an inferior court in actually pronouncing judgment

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for one of the parties, in a case in which it had no jurisdiction, cannot be looked into or corrected by this court, because we have decided a similar question presented in the pleadings. The last point is distinctly presented by the facts contained in the plaintiff's own bill of exceptions, which he himself brings here by this writ of error. It was the point which chiefly occupied the attention of the counsel on both sides in the argument—and the judgment which this court must render upon both errors is precisely the same. It must, in each of them, exercise jurisdiction over the judgment, and reverse it for the errors committed by the court below; and issue a mandate to the Circuit Court to conform its judgment to the opinion pronounced by this court, by dismissing the case for want of jurisdiction in the Circuit Court. This is the constant and invariable practice of this court where it reverses a judgment for want of jurisdiction in the Circuit Court.

It can scarcely be necessary to pursue such a question further. The want of jurisdiction in the court below may appear on the record without any plea in abatement. This is familiarly the case where a court of chancery has exercised jurisdiction in a case where the plaintiff had a plain and adequate remedy at law, and it so appears by the transcript when brought here by appeal. So, also, where it appears that a court of admiralty has exercised jurisdiction in a case belonging exclusively 430*] *to a court of common law. In these cases there is no plea in abatement. And for the same reason, and upon the same principles, where the defect of jurisdiction is patent on the record, this court is bound to reverse the judgment, although the defendant has not pleaded in abatement to the jurisdiction of the inferior court.

The cases of Jackson v. Ashton, 8 Pet. 148, and of Capron v. Van Noorden, 2 Cranch, 126, to which we have referred in a previous part of this opinion, are directly in point. In the last mentioned case, Capron brought an action against Van Noorden in a circuit court of the United States, without showing, by the usual averments of citizenship, that the court had jurisdiction. There was no plea in abatement put in, and the parties went to trial upon the merits. The court gave judgment in favor of the defendant with costs. The plaintiff thereupon brought his writ of error, and this court reversed the judgment given in favor of the defendant, and remanded the case with directions to dismiss it, because it did not appear by the transcript that the Circuit Court had jurisdiction.

The case before us still more strongly imposes upon this court the duty of examining whether the court below has not committed an error, in taking jurisdiction and giving a judgment for costs in favor of the defendant; for in Capron v. Van Noorden the judgment was reversed, because it did not appear that the parties were citizens of different States. They might or might not be. But in this case it does appear that the plaintiff was born a slave; and if the facts upon which he relies have not made him free, then it appears affirmatively on the record that he is not a citizen, and consequently his suit against Sandford was not a suit between citizens of different States, and the court had no authority to pass any judgment between the parties. The suit ought, in this view of it, to have been dismissed by the Circuit Court, and its judgment in favor of Sandford is erroneous, and must be reversed.

It is true that the result either way, by dismissal or by a judgment for the defendant, makes very little, if any difference in a pecuniary or personal point of view to either party. But the fact that the result would be very nearly the same to the parties in either form of judgment, would not justify this court in sanctioning an error in the judgment which is patent on the record, and which, if sanctioned, might be drawn into precedent, and lead to serious mischief and injustice in some future suit.

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom.

*The case, as he himself states it, [*431 on the record, brought here by his writ of error, is this:

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the Army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was a negro slave of Major Taliaferro, who belonged to the Army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling, until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the River Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling, to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defend-

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ant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1st. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States 432*] hereinbefore *mentioned? And 2d. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The Act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of that territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon one who is held as a slave under the laws of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the Treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular Territory, and to meet a present emergency, and nothing more.

A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed, will show the correctness of this proposition.

It will be remembered that, from the commencement of the Revolutionary War, serious difficulties existed between the States, in relation to the disposition of large and unsettled territories which were included in the chartered limits of some of the States. And some of the other States, and more especially Maryland, which had no unsettled lands, insisted that as the unoccupied lands, if wrested from Great Britain, would owe their preservation to the common purse and the common sword, the money arising from them ought to be applied in just proportion among the several States to pay the expense of the war, and ought not to be appropriated to the use of State in whose chartered limits they might happen 433*] *to lie, to the exclusion of the other States by whose combined efforts and common expense the territory was defended and preserved against the claim of the British Government.

These difficulties caused much uneasiness during the War, while the issue was in some degree doubtful, and the future boundaries of the United States yet to be defined by treaty, if we achieved our independence.

The majority of the Congress of the Confederation obviously concurred in opinion with the State of Maryland, and desired to obtain from the States which claimed it a cession of this territory, in order that Congress might raise money on this security to carry on the War. This appears by the resolution passed on the 6th of September, 1780, strongly urging the States to cede these lands to the United States, both for the sake of peace and union among themselves, and to maintain the public credit; and this was followed by the resolution of October 10th, 1780, by which Congress pledged itself, that if the lands were ceded, as recommended by the resolution above mentioned, they should be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which should become members of the Federal Union, and have the same rights of sovereignty, and freedom, and independence as other States.

But these difficulties became much more serious after peace took place, and the boundaries of the United States were established. Every State, at that time, felt severely the pressure of its war debt; but in Virginia, and some other States there were large territories of unsettled lands, the sale of which would enable them to discharge their obligations without much inconvenience; while other States which had no such resource, saw before them many years of heavy and burdensome taxation, and the latter insisted, for the reasons before stated, that these unsettled lands should be treated as the common property of the States, and the proceeds applied to their common benefit.

The letters from the statesmen of that day will show how much this controversy occupied their thoughts, and the dangers that were apprehended from it. It was the disturbing element of the time, and fears were entertained that it might dissolve the Confederation by which the States were then united.

These fears and dangers were, however, at once removed, when the State of Virginia, in 1784, voluntarily ceded to the United States the immense tract of country lying northwest of the River Ohio, and which was within the acknowledged limits of the State. The only object of the State, in making *this ces- [*434 sion, was to put an end to the threatening and exciting controversy, and to enable the Congress of that time to dispose of the lands, and appropriate the proceeds as a common fund for the common benefit of the States. It was not ceded because it was inconvenient to the State to hold and govern it, nor from any expectation that it could be better or more conveniently governed by the United States.

The example of Virginia was soon afterwards followed by other States, and, at the time of the adoption of the Constitution, all of the States, similarly situated, had ceded their unappropriated lands, except North Carolina and Georgia. The main object for which these cessions were desired and made, was on account of their money value, and to put an end to a dangerous controversy, as to who was justly entitled to the proceeds when the lands

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should be sold. It is necessary to bring this part of the history of these cessions thus distinctly into view, because it will enable us the better to comprehend the phraseology of the Article of the Constitution so often referred to in the argument.

Undoubtedly the powers of sovereignty and the eminent domain were ceded with the land. This was essential, in order to make it effectual, and to accomplish its objects. But it must be remembered that, at that time, there was no Government of the United States in existence with enumerated and limited powers; what was then called the United States, were thirteen separate, sovereign, independent States, which had entered into a league or confederation for their mutual protection and advantage, and the Congress of the United States was composed of the representatives of these separate sovereignties, meeting together, as equals, to discuss and decide on certain measures which the States, by the Articles of Confederation, had agreed to submit to their decision. But this Confederation had none of the attributes of sovereignty in legislative, executive, or judicial power. It was little more than a congress of ambassadors, authorized to represent separate nations, in matters in which they had a common concern.

It was this Congress that accepted the cession from Virginia. They had no power to accept it under the Articles of Confederation. But they had an undoubted right, as independent sovereignties, to accept any cession of territory for their common benefit, which all of them assented to; and it is equally clear, that as their common property, and having no superior to control them, they had the right to exercise absolute dominion over it, subject only to the restrictions which Virginia had imposed in her Act of Cession. There was, as we have said, no Government of the United States [*435] then in existence *with special enumerated and limited powers. The territory belonged to sovereignties, who, subject to the limitations above mentioned, had a right to establish any form of government they pleased, by compact or treaty among themselves, and to regulate rights of person and property in the territory as they might deem proper. It was by a Congress, representing the authority of these several and separate sovereignties, and acting under their authority and command (but not from any authority derived from the Articles of Confederation), that the instrument, usually called the Ordinance of 1787, was adopted; regulating in much detail the principles and the laws by which this Territory should be governed; and among other provisions, slavery is prohibited in it. We do not question the power of the States, by agreement among themselves, to pass this Ordinance, nor its obligatory force in the Territory, while the confederation or league of the States in their separate sovereign character continued to exist.

This was the state of things when the Constitution of the United States was formed. The territory ceded by Virginia belonged to the several confederated States as common property, and they had united in establishing in it a system of government and jurisprudence, in order to prepare it for admission as States, according to the terms of the cession. They were about to dissolve this federative Union, and to surrender a portion of their independent sovereignty to a new government, which, for certain purposes, would make the people of the several States one people, and which was to be supreme and controlling within its sphere of action throughout the United States; but this government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish; and as this league of States would, upon the adoption of the new government, cease to have any power over the territory, and the Ordinance they had agreed upon be incapable of execution, and a mere nullity, it was obvious that some provision was necessary to give the new government sufficient power to enable it to carry into effect the objects for which it was ceded, and the compacts and agreements which the States had made each other in the exercise of their powers of sovereignty. It was necessary that the lands should be sold to pay the war debt; that a government and system of jurisprudence should be maintained in it, to protect the citizens of the United States, who should migrate to the Territory, in their rights of person and of property. It was also necessary that the new government, about to be *adopted, should be authorized to main- [*436 tain the claim of the United States to the unappropriated lands in North Carolina and Georgia, which had not then been ceded, but the cession of which was confidently anticipated upon some terms that would be arranged between the general government and these two States. And, moreover, there were many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the States, when acting in their independent characters as confederates, which neither the new government nor anyone else would have a right to take possession of, or control, without authority from them; and it was to place these things under the guardianship and protection of the new government, and to clothe it with the necessary powers, that the clause was inserted in the Constitution which gives Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new government the property then held in common by the States, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire.

The language used in the clause, the arrangement and combination of the powers, and the somewhat unusual phraseology it uses, when it speaks of the political power to be exercised in the government of the territory, all indicate the design and meaning of the clause to be such as we have mentioned. It does not speak of any Territory, nor of Territories, but uses language which, according to its legitimate

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meaning, points to a particular thing. The power is given in relation only to the territory of the United States—that is, to a Territory then in existence, and then known or claimed as the territory of the United States. It begins its enumeration of powers by that of disposing, in other words, making sale of the lands, or raising money from them, which, as we have already said, was the main object of the cession, and which is accordingly the first thing provided for in the Article. It then gives the power which was necessarily associated with the disposition and sale of the lands—that is, the power of making needful rules and regulations respecting the Territory. And whatever construction may now be given to these 437*] words, everyone, we think, *must admit that they are not the words usually employed by statesmen in giving supreme power of legislation. They are certainly very unlike the words used in the power granted to legislate over territory which the new government might afterwards itself obtain by cession from a state, either for its seat of government, or for forts, magazines, arsenals, dockyards, and other needful buildings.

And the same power of making needful rules respecting the Territory is, in precisely the same language, applied to the other property belonging to the United States—associating the power over the Territory in this respect with the power over movable or personal property—that is, the ships, arms, and munitions of war, which then belonged in common to the State sovereignties. And it will hardly be said, that this power, in relation to the last mentioned objects, was deemed necessary to be thus specially given to the new government, in order to authorize it to make needful rules and regulations respecting the ships it might itself build, or arms and munitions of war it might itself manufacture or provide for the public service.

No one, it is believed, would think a moment of deriving the power of Congress to make needful rules and regulations in relation to property of this kind from this clause of the Constitution. Nor can it, upon any fair construction, be applied to any property but that which the new government was about to receive from the confederated States. And if this be true as to this property, it must be equally true and limited as to the territory, which is so carefully and precisely coupled with it—and like it referred to as property in the power granted. The concluding words of the clause appear to render this construction irresistible; for, after the provisions we have mentioned, it proceeds to say, "that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

Now, as we have before said, all of the States, except North Carolina and Georgia, had made the cession before the Constitution was adopted, according to the resolution of Congress of October 10, 1780. The claims of other States, that the unappropriated lands in these two States should be applied to the common benefit, in like manner, was still insisted on, but refused by the States. And this member of the clause in question evidently applies to them, and can apply to nothing else. It was to exclude the conclusion that either party, by adopting the Constitution, would surrender what they deemed their rights. And when the latter provision relates so obviously to the unappropriated lands not yet ceded by the States, and the first clause makes provision for those then actually ceded, it is *impos- [*438 sible, by any just rule of construction, to make the first provision general, and extend to all territories, which the Federal Government might in any way afterwards acquire, when the latter is plainly and unequivocally confined to a particular territory; which was a part of the same controversy, and involved in the same dispute, and depended upon the same principles. The union of the two provisions in the same clause shows that they were kindred subjects, and that the whole clause is local, and relates only to lands, within the limits of the United States, which had been or then were claimed by a State; and that no other Territory was in the mind of the framers of the Constitution, or intended to be embraced in it. Upon any other construction it would be impossible to account for the insertion of the last provision in the place where it is found, or to comprehend why, or for what object, it was associated with the previous provision.

This view of the subject is confirmed by the manner in which the present Government of the United States dealt with the subject as soon as it came into existence. It must be borne in mind that the same States that formed the Confederation also formed and adopted the new government, to which so large a portion of their former sovereign powers were surrendered. It must also be borne in mind that all of these same States which had then ratified the new Constitution were represented in the Congress which passed the first law for the government of this territory; and many of the members of that legislative body had been deputies from the States under the Confederation—had united in adopting the Ordinance of 1787, and assisted in forming the new government under which they were then acting, and whose powers they were then exercising. And it is obvious from the law they passed to carry into effect the principles and provisions of the Ordinance, that they regarded it as the Act of the States done in the exercise of their legitimate powers at the time. The new government took the territory as it found it, in the condition in which it was transferred, and did not attempt to undo anything that had been done. And among the earliest laws passed under the new government, is one reviving the Ordinance of 1787, which had become inoperative and a nullity upon the adoption of the Constitution. This law introduces no new form or principles for its government, but recites, in the preamble, that it is passed in order that this Ordinance may continue to have full effect, and proceeds to make only those rules and regulations which were needful to adapt it to the new government, into whose hands the power had fallen. It appears, therefore, that this Congress regarded the purposes *to which the land in [*439 this territory was to be applied, and the form of government and principles of jurisprudence which were to prevail there, while it remained in the territorial state, as already determined on by the States when they had full power and right to make the decision; and that the new government, having received it in this condition, ought to carry substantially into effect the plans and principles which had been previously adopted by the States, and which no doubt the

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States anticipated when they surrendered their power to the new government. And if we regard this clause of the Constitution as pointing to this Territory, with a territorial government already established in it, which had been ceded to the States for the purposes hereinbefore mentioned—every word in it is perfectly appropriate and easily understood, and the provisions it contains are in perfect harmony with the objects for which it was ceded, and with the condition of its government as a Territory at the time. We can, then, easily account for the manner in which the first Congress legislated on the subject—and can also understand why this power over the Territory was associated in the same clause with the other property of the United States, and subjected to the like power of making needful rules and regulations. But if the clause is construed in the expanded sense contended for, so as to embrace any territory acquired from a foreign nation by the present government, and to give it in such territory a despotic and unlimited power over persons and property, such as the confederated States might exercise in their common property, it would be difficult to account for the phraseology used, when compared with other grants of power—and also for its association with the other provisions in the same clause.

The Constitution has always been remarkable for the felicity of its arrangement of different subjects, and the perspicuity and appropriateness of the language it uses. But if this clause is construed to extend to territory acquired by the present government from a foreign nation, outside of the limits of any charter from the British Government to a Colony, it would be difficult to say, why it was deemed necessary to give the government the power to sell any vacant lands belonging to the sovereignty which might be found within it; and if this was necessary, why the grant of this power should precede the power to legislate over it and establish a government there; and still more difficult to say, why it was deemed necessary so specially and particularly to grant the power to make needful rules and regulations in relation to any personal or movable property it might acquire there. For the words, "other property," necessarily, by every known rule of 440*] interpretation, must mean *property of a different description from territory or land. And the difficulty would perhaps be insurmountable in endeavoring to account for the last member of the sentence, which provides that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State," or to say how any particular State could have claims in or to a Territory ceded by a foreign government, or to account for associating this provision with the preceding provisions of the clause, with which it would appear to have no connection.

The words "needful rules and regulations" would seem, also, to have been cautiously used for some definite object. They are not the words usually employed by statesmen, when they mean to give the powers of sovereignty, or to establish a government, or to authorize its establishment. Thus, in the law to renew and keep alive the Ordinance of 1787, and to re-establish the government, the title of the law is: "An Act to provide for the government of the territory northwest of the River Ohio." And in the Constitution, when granting the power to legislate over the territory that may be selected for the seat of government independently of a state, it does not say Congress shall have power "to make all needful rules and regulations respecting the territory;" but it declares that "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States.

The words "rules and regulations" are usually employed in the Constitution in speaking of some particular specified power which it means to confer on the government, and not, as we have seen, when granting general powers of legislation. As, for example, in the particular power of Congress "to make rules for the government and regulation of the land and naval forces, or the particular and specific power to regulate commerce;" "to establish an uniform rule of naturalization;" "to coin money and regulate the value thereof." And to construe the words of which we are speaking as a general and unlimited grant of sovereignty over territories which the government might afterwards acquire, is to use them in a sense and for a purpose for which they were not used in any other part of the instrument. But if confined to a particular territory, in which a government and laws had already been established, but which would require some alterations to adapt it to the new government, the words are peculiarly applicable and appropriate for that purpose.

*The necessity of this special provi- [*441 sion in relation to property and the rights or property held in common by the confederated State, is illustrated by the 1st clause of the 6th article. This clause provides that "all debts, contracts and engagements entered into before the adoption of this Constitution, shall be as valid against the United States under this government as under the Confederation." This provision, like the one under consideration, was indispensable if the new Constitution was adopted. The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations. It took nothing by succession from the Confederation. It had no right, as its successor, to any property or rights of property which it had acquired, and was not liable for any of its obligations. It was evidently viewed in this light by the framers of the Constitution. And as the several States would cease to exist in their former confederated character upon the adoption of the Constitution, and could not, in that character, again assemble together, special provisions were indispensable to transfer to the new government the property and rights which at that time they held in common; and at the same time to authorize it to lay taxes and appropriate money to pay the common debt which they had contracted; and this power could only be given to it by special provisions in the Constitution.

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The clause in relation to the territory and other property of the United States provided for the first, and the clause last quoted provided for the other. They have no connection with the general powers and rights of sovereignty delegated to the new government, and can neither enlarge nor diminish them. They were inserted to meet a present emergency, and not to regulate its powers as a government.

Indeed, a similar provision was deemed necessary, in relation to treaties made by the Confederation; and when in the clause next succeeding the one of which we have last spoken, it is declared that treaties shall be the supreme law of the land, care is taken to include, by express words, the Treaties made by the confederated States. The language is: "and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Whether, therefore, we take the particular clause in question, by itself, or in connection with the other provisions of the Constitution, we think it clear, that it applies only to the 442*] particular *territory of which we have spoken, and cannot, by any just rule of interpretation, be extended to a territory which the new government might afterwards obtain from a foreign nation. Consequently, the power which Congress may have lawfully exercised in this territory, while it remained under a territorial government, and which may have been sanctioned by judicial decision, can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the Federal Government. We put aside, therefore, any argument, drawn from precedents, showing the extent of the power which the general government exercised over slavery in this territory, as altogether inapplicable to the case before us.

But the case of The American and Ocean Insurance Companies v. Canter, 1 Pet. 511, has been quoted as establishing a different construction of this clause of the Constitution. There is, however, not the slightest conflict between the opinion now given and the one referred to; and it is only by taking a single sentence out of the latter and separating it from the context, that even an appearance of conflict can be shown. We need not comment on such a mode of expounding an opinion of the court. Indeed it most commonly misrepresents instead of expounding it. And this is fully exemplified in the case referred to, where, if one sentence is taken by itself, the opinion would appear to be in direct conflict with that now given; but the words which immediately follow that sentence show that the court did not mean to decide the point, but merely affirmed the power of Congress to establish a government in the Territory, leaving it an open question, whether that power was derived from this clause in the Constitution, or was to be necessarily inferred from a power to acquire territory by cession from a foreign government. The opinion on this part of the case is short, and we give the whole of it to show how well the selection of a single sentence is calculated to mislead.

The passage referred to is in page 542, in which the court, in speaking of the power of Congress to establish a territorial government in Florida until it should become a State, uses the following language:

"In the meantime Florida continues to be a Territory of the United States, governed by that clause of the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular *State, and is within the power and ju- [*443 risdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source from which the power is derived, the possession of it is unquestionable."

It is thus clear, from the whole opinion on this point, that the court did not mean to decide whether the power was derived from the clause in the Constitution, or was the necessary consequence of the right to acquire. They do decide that the power in Congress is unquestionable, and in this we entirely concur. and nothing will be found in this opinion to the contrary. The power stands firmly on the latter alternative put by the court, that is, as "the inevitable consequence of the right to acquire territory."

And what still more clearly demonstrates that the court did not mean to decide the question, but leave it open for future consideration, is the fact that the case was decided in the Circuit Court by Mr. Justice Johnson, and his decision was affirmed by the Supreme Court. His opinion at the Circuit is given in full in a note to the case, and in that opinion he states, in explicit terms, that the clause of the Constitution applies only to the territory then within the limits of the United States, and not to Florida, which had been acquired by cession from Spain. This part of his opinion will be found in the note in page 517 of the report. But he does not dissent from the opinion of the Supreme Court; thereby showing that, in his judgment, as well as that of the court, the case before them did not call for a decision on that particular point, and the court abstained from deciding it. And in a part of its opinion subsequent to the passage we have quoted, where the court speak of the legislative power of Congress in Florida, they still speak with the same reserve. And in page 546, speaking of the power of Congress to authorize the Territorial Legislature to establish courts there, the court say: "They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

It has been said that the construction given to this clause is new, and now for the first time brought forward. The case of which we are speaking, and which has been so much discussed, shows that the fact is otherwise. It shows that precisely the same question came before Mr. Justice Johnson, at his circuit, thirty years ago—was fully considered by him, and the same construction given to the clause in the Constitution which is now given by this court. And that upon an appeal *from [*444

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his decision the same question was brought before this court, but was not decided because a decision upon it was not required by the case before the court.

There is another sentence in the opinion which has been commented on, which even in a still more striking manner shows how one may mislead or be misled by taking out a single sentence from the opinion of a court, and leaving out of view what precedes and follows. It is in page 546, near the close of the opinion, in which the court say: "In legislating for them" (the Territories of the United States), "Congress exercises the combined powers of the general and of a state government." And it is said, that as a State may unquestionably prohibit slavery within its territory, this sentence decides in effect that Congress may do the same in a Territory of the United States, exercising there the powers of a State, as well as the power of the general government.

The examination of this passage in the case referred to, would be more appropriate when we come to consider in another part of this opinion what power Congress can constitutionally exercise in a Territory, over the rights of person or rights of property of a citizen. But, as it is in the same case with the passage we have before commented on, we dispose of it now, as it will save the court from the necessity of referring again to the case. And it will be seen upon reading the page in which this sentence is found, that it has no reference whatever to the power of Congress over rights of person or rights of property—but relates altogether to the power of establishing judicial tribunals to administer the laws constitutionally passed, and defining the jurisdiction they may exercise.

The law of Congress establishing a territorial government in Florida, provided that the Legislature of the Territory should have legislative powers over "all rightful objects of legislation; but no law should be valid which was inconsistent with the laws and Constitution of the United States."

Under the power thus conferred, the Legislature of Florida passed an Act, erecting a tribunal at Key West to decide cases of salvage. And in the case of which we are speaking, the question arose whether the Territorial Legislature could be authorized by Congress to establish such a tribunal, with such powers; and one of the parties, among other objections, insisted that Congress could not under the Constitution authorize the Legislature of the Territory to establish such a tribunal with such powers, but that it must be established by Congress itself; and that a sale of cargo made under its order, to pay salvors, was void, as made without legal authority, and passed no property to the purchaser.

445*] *It is in disposing of this objection that the sentence relied on occurs, and the court begin that part of the opinion by stating with great precision the point which they are about to decide.

They say: "It has been contended that by the Constitution of the United States, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of the judicial power must be vested 'in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Hence it has been argued that Congress cannot vest admiralty jurisdiction in courts created by the Territorial Legislature."

And after thus clearly stating the point before them, and which they were about to decide, they proceed to show that these territorial tribunals were not constitutional courts, but merely legislative, and that Congress might, therefore, delegate the power to the territorial government to establish the court in question; and they conclude that part of the opinion in the following words: "Although admiralty jurisdiction can be exercised in the states in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and state governments."

Thus it will be seen by these quotations from the opinion, that the court, after stating the question it was about to decide, in a manner too plain to be misunderstood, proceeded to decide it, and announced, as the opinion of the tribunal, that in organizing the Judicial Department of the government in a Territory of the United States, Congress does not act under, and is not restricted by, the 3d article in the Constitution, and is not bound, in a Territory, to ordain and establish courts in which the judges hold their offices during good behavior; but may exercise the discretionary power which a state exercises in establishing its judicial department, and regulating the jurisdiction of its courts, and may authorize the territorial government to establish, or may itself establish, courts in which the judges hold their offices for a term of years only, and may vest in them judicial power upon subjects confided to the judiciary of the United States. And in doing this, Congress undoubtedly exercises the combined power of the general and a state government. It exercises the discretionary power of a state government in authorizing the establishment of a court in which the judges hold their appointments for a term of years only, and not during good behavior; and it exercises the power of the general government in investing that *court with admiralty [*446 jurisdiction, over which the general government had exclusive jurisdiction in the Territory.

No one, we presume, will question the correctness of that opinion; nor is there anything in conflict with it in the opinion now given. The point decided in the case cited has no relation to the question now before the court. That depended on the construction of the 3d article of the Constitution, in relation to the judiciary of the United States, and the power which Congress might exercise in a territory in organizing the Judicial Department of the government. The case before us depends upon other and different provisions of the Constitution, altogether separate and apart from the one above mentioned. The question as to what courts Congress may ordain or establish in a territory to administer laws which the Constitution authorizes it to pass, and what laws it is or is not authorized by the Constitution to pass, are widely different—are regulated by different and separate articles of the Constitution, and stand

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upon different principles. And we are satisfied that no one who reads attentively the page in Peters' Reports to which we have referred, can suppose that the attention of the court was drawn for a moment to the question now before this court, or that it meant in that case to say that Congress had a right to prohibit a citizen of the United States from taking any property which he lawfully held, into a Territory of the United States.

This brings us to examine by what provision of the Constitution the present Federal Government under its delegated and restricted powers, is authorized to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States, while it remains a territory, and until it shall be admitted as one of the States of the Union.

There is certainly no power given by the Constitution to the Federal Government to establish or maintain Colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.

And indeed the power exercised by Congress to acquire territory and establish a government there, according to its own unlimited discretion, was viewed with great jealously by the 447*] *leading statesmen of the day. And in the Federalist, No. 38, written by Mr. Madison, he speaks of the acquisition of the Northwestern Territory by the confederated States, by the cession from Virginia and the establishment of a government there, as an exercise of power not warranted by the Articles of Confederation, and dangerous to the liberties of the people. And he urges the adoption of the Constitution as a security and safeguard against such an exercise of power.

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a state upon an equal footing with the other States, must rest upon the same discretion. It is a question for the Political Department of the government, and not the judicial; and whatever the Political Department of the government shall recognize as within the limits of the United States, the Judicial Department is also bound to recognize, and to administer in it the laws of the United States, so far as they apply, and to maintain in the territory the authority and rights of the government; and also the personal rights and rights of property of individual citizens, as secured by the Constitution. All we mean to say on this point is, that, as there is no express regulation in the Constitution defining the power which the general government may exercise over the person or property of a citizen in a territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed.

Taking this rule to guide us, it may be safely assumed that citizens of the United States who migrate to a territory belonging to the people of the United States, cannot be ruled as mere colonists, dependent upon the will of the general government, and to be governed by any laws it may think proper to impose. The principle upon which our governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in *their inter- [*448 nal and domestic concerns, and bound together as one people by a general government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States. A power, therefore, in the general government to obtain and hold Colonies and dependent Territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.

At the time when the Territory in question was obtained by cession from France, it contained no population fit to be associated together and admitted as a State; and it therefore was absolutely necessary to hold possession of it as a Territory belonging to the United States until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the general government as the representative and trustee of the people of the United States, and it must, therefore, be held in that character for their common and equal benefit; for it was the people of the several States, acting through the agent and representative, the Federal Government, who in fact acquired the territory in question, and the government holds it for their common use until it shall be associated with the other States as a member of the Union.

But until that time arrives, it is undoubtedly necessary that some government should be established, in order to organize society, and to protect the inhabitants in their persons and property; and as the people of the United States could act in this matter only through the government which represented them, and

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through which they spoke and acted when the territory was obtained, it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition, and to gather there a population which would enable it to assume the position to which it was destined among the States of the Union. The power to acquire, necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The form of government to be established neces-449*] sarily rested in the discretion *of Congress. It was their duty to establish the one that would be best suited for the protection and security of the citizens of the United States and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the existing condition of the Territory, as to the number and character of its inhabitants, and the situation in the Territory. In some cases a government, consisting of persons appointed by the Federal Government, would best subserve the interests of the Territory, when the inhabitants were few and scattered, and new to one another. In other instances, it would be more advisable to commit the powers of self-government to the people who had settled in the territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society, and prepare it to become a state; and what is the best form must always depend on the condition of the territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside or for any other lawful purpose. It was acquired by the exercise of this discretion and it must be held and governed in like manner, until it is fitted to be a state.

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The powers of the government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government *can [*450 exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the territory peaceably to assemble and to petition the government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding.

These powers, and others in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the general government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty and property, without due process of law. And an Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are *concerned, on the same footing with [*451 citizens of the States, and guards them as firmly and plainly against any inroads which the general government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a territorial government to exercise them. It could confer no power on any local government, established by its authority, to violate the provisions of the Constitution.

It seems, however, to be supposed, that there is a difference between property in a slave and

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other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their government and interfering with their relation to each other. The powers of the government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the government, or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the governments.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the government in express terms is pledged to 452*] protect *it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the Act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on state power and state law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of Strader et al. v. Graham, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a state court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction, turned upon it, as will be seen by the report of the case.

So in this case: as Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on his return, and that this case, *therefore, cannot be governed by the [*453 case of Strader et al. v. Graham, where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may, at one time, have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave and not a citizen.

Moreover, the plaintiff, it appears, brought a similar action against the defendant in the State court of Missouri, claiming the freedom of himself and his family upon the same grounds and the same evidence upon which he relies in the case before the court. The case was carried before the Supreme Court of the State; was fully argued there; and that court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant; and reversed the judgment of the inferior State court, which had given a different decision. If the plaintiff supposed that this judgment of the Supreme Court of the State was erroneous, and that this court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this court was by writ of error directed to the Supreme Court of the State, requiring it to transmit the record to this court. If this had been done, it is too plain for argu-

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ment that the writ must have been dismissed for want of jurisdiction in this court. The case of Strader et al. v. Graham is directly in point; and, indeed, independent of any decision, the language of the 25th section of the Act of 1789 is too clear and precise to admit of controversy.

But the plaintiff did not pursue the mode prescribed by law for bringing the judgment of a state court before this court for revision, but suffered the case to be remanded to the inferior State court, where it is still continued, and is, by agreement of parties, to await the judgment of this court on the point. All of this appears on the record before us and by the printed report of the case.

And while the case is yet open and pending in the inferor State court, the plaintiff goes into the Circuit Court of the United States, upon the same case and the same evidence, and against the same party, and proceeds to judgment, and then brings here the same case from the Circuit Court, which the law would not have permitted him to bring directly from the 454*] *State court. And if this court takes jurisdiction in this form, the result, so far as the rights of the respective parties are concerned, is in every respect substantially the same as if it had, in open violation of law, entertained jurisdiction over the judgment of the State court upon a writ of error, and revised and reversed its judgment upon the ground that its opinion upon the question of law was erroneous. It would ill become this court to sanction such an attempt to evade the law, or to exercise an appellate power in this circuitous way, which it is forbidden to exercise in the direct and regular and invariable forms of judicial proceedings.

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it.

Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction.

Mr. Justice **Wayne:**

Concurring as I do entirely in the opinion of the court, as it has been written and read by the Chief Justice—without any qualification of its reasoning or its conclusions—I shall neither read nor file an opinion of my own in this case which I prepared when I supposed it might be necessary and proper for me to do so.

The opinion of the court meets fully and decides every point which was made in the argument of the case by the counsel on either side of it. Nothing belonging to the case has been left undecided, nor has any point been discussed and decided which was not called for by the record, or which was not necessary for the judicial disposition of it, in the way that it has been done, by more than a majority of the court.

In doing this the court neither sought nor made the case. It was brought to us in the course of the administration of the laws which Congress has enacted, for the review of cases from the circuit courts by the Supreme Court.

In our action upon it, we have only discharged our duty as a distinct and efficient department of the government, as the framers of the Constitution meant the judiciary to be, and as the States of the Union and the people of those States intended it should be, when they ratified the Constitution of the United States.

The case involves private rights of value, and constitutional principles of the highest importance, about which there had *become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision. [*455

It would certainly be a subject of regret, that the conclusions of the court have not been assented to by all of its members, if I did not know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment, and if our decision in this case had not been made by as large a majority of them as has been usually had on constitutional questions of importance.

Two of the judges, Mr. Justices McLean and Curtis, dissent from the opinion of the court. A third, Mr. Justice Nelson, gives a separate opinion upon a single point in the case, with which I concur, assuming that the Circuit Court had jurisdiction; but he abstains altogether from expressing any opinion upon the 8th section of the Act of 1820, known commonly as the Missouri Compromise Law, and six of us declare that it was unconstitutional.

But it has been assumed, that this court has acted extrajudicially in giving an opinion upon the 8th section of the Act of 1820, because, as it has decided that the Circuit Court had no jurisdiction of the case, this court has no jurisdiction to examine the case upon its merits.

But the error of such an assertion has arisen in part from a misapprehension of what has been heretofore decided by the Supreme Court, in cases of a like kind with that before us; in part, from a misapplication to the circuit courts of the United States, of the rules of pleading concerning pleas to the jurisdiction which prevail in common law courts; and from its having been forgotten that this case was not brought to this court by appeal or writ of error from a state court, but by a writ of error to the Circuit Court of the United States.

The cases cited by the Chief Justice to show that this court has now only done what it has repeatedly done before in other cases, without any question of its correctness, speak for themselves. The differences between the rules concerning pleas to the jurisdiction in the courts of the United States and common law courts have been stated and sustained by reasoning and adjudged cases; and it has been shown that writs of error to a state court and to the circuit courts of the United States are to be determined by different laws and principles. In the first, it is our duty to ascertain if this court has jurisdiction, under the 25th section of the Judiciary Act, to review the case from the State court; and if it shall be found that it has not, the case is at end, so far as this court is concerned; for our power *to review the case upon its merits has been made, by the 25th section, to depend upon its having jurisdiction; when it has not, this court cannot criti- [*456

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cise, controvert, or give any opinion upon the merits of a case from a state court.

But in a case brought to this court, by appeal or by writ of error from a circuit court of the United States, we begin a review of it, not by inquiring if this court has jurisdiction, but if that court has it. If the case has been decided by that court upon its merits, but the record shows it to be deficient in those averments which by the law of the United States must be made by the plaintiff in the action, to give the court jurisdiction of his case, we send it back to the court from which it was brought, with directions to be dismissed, though it has been decided there upon its merits.

So, in a case containing the averments by the plaintiff which are necessary to give the Circuit Court jurisdiction, if the defendant shall file his plea in abatement denying the truth of them, and the plaintiff shall demur to it, and the court should erroneously sustain the plaintiff's demurrer, or declare the plea to be insufficient, and doing so require the defendant to answer over by a plea to the merits, and shall decide the case upon such pleading, this court has the same authority to inquire into the jurisdiction of that court to do so, and to correct its error in that regard, that it had in the other case to correct its error, in trying a case in which the plaintiff had not made those averments which were necessary to give the court jurisdiction. In both cases the record is resorted to, to determine the point of jurisdiction, but, as the power of review of cases from a federal court, by this court, is not limited by the law to a part of the case, this court may correct an error upon the merits; and there is the same reason for correcting an erroneous judgment of the Circuit Court, where the want of jurisdiction appears from any part of the record, that there is for declaring a want of jurisdiction for a want of necessary averments. Any attempt to control the court from doing so by the technical common law rules of pleading in cases of jurisdiction, when a defendant has been denied his plea to it, would tend to enlarge the jurisdiction of the Circuit Court, by limiting this court's review of its judgments in that particular. But I will not argue a point already so fully discussed. I have every confidence in the opinion of the court upon the point of jurisdiction, and do not allow myself to doubt that the error of a contrary conclusion will be fully understood by all who shall read the argument of the Chief Justice.

I have already said that the opinion of the court has my unqualified assent.

457*] *Mr. Justice Nelson:

I shall proceed to state the grounds upon which I have arrived at the conclusion that the judgment of the court below should be affirmed. The suit was brought in the court below by the plaintiff. for the purpose of asserting his freedom, and that of Harriet, his wife, and two children.

The defendant pleaded, in abatement to the suit, that the cause of action, if any, accrued to the plaintiff out of the jurisdiction of the court, and exclusively within the jurisdiction of the courts of the State of Missouri; for that the said plaintiff is not a citizen of the State of Missouri, as alleged in the declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court below sustained the demurrer, holding that the plea was insufficient in law to abate the suit.

The defendant then pleaded over in bar of the action.

1. The general issue. 2. That the plaintiff was a negro slave, the lawful property of the defendant. And 3. That Harriet, the wife of said plaintiff, and the two children, were the lawful slaves of the said defendant. Issue was taken upon these pleas, and the cause went down to trial before the court and jury, and an agreed state of facts was presented, upon which the trial proceeded, and resulted in a verdict for the defendant, under the instructions of the court.

The facts agreed upon were substantially as follows:

That in the year 1834, the plaintiff, Scott, was a negro slave of Dr. Emerson, who was a surgeon in the Army of the United States; and in that year he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At this date, Dr. Emerson removed, with the plaintiff, from the Rock Island post to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory of Upper Louisiana, and north of the latitude thirty-six degrees thirty minutes, and north of the State of Missouri. That he held the plaintiff in slavery at Fort Snelling, from the last mentioned date until the year 1838.

That in the year 1835, Harriet, mentioned in the declaration, was a negro slave of Major Taliaferro, who belonged to the Army of the United States; and in that year he took her to Fort Snelling, already mentioned, and kept her there as a slave until the year 1836, and then sold and delivered her to Dr. Emerson, who held her in slavery, at Fort Snelling, until the year 1838. That in the year 1836 the plaintiff and Harriet *were married, at Fort [458 Snelling, with the consent of their master. The two children, Eliza and Lizzie, are the fruit of this marriage. The first is about fourteen years of age, and was born on board the steamboat Gipsey, north of the State of Missouri, and upon the Mississippi River; the other, about seven years of age, was born in the State of Missouri, at the military post called Jefferson Barracks.

In 1838 Dr. Emerson removed the plaintiff Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided. And that before the commencement of this suit, they were sold by the Doctor to Sandford, the defendant, who has claimed and held them as slaves ever since.

The agreed case also states that the plaintiff brought a suit for his freedom, in the Circuit Court of the State of Missouri, on which a judgment was rendered in his favor; but that, on a writ of error from the Supreme Court of the State, the judgment of the court below was reversed, and the cause remanded to the circuit for a new trial.

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On closing the testimony on the court below, the counsel for the plaintiff prayed the court to instruct the jury, upon the agreed state of facts, that they ought to find for the plaintiff; when the court refused, and instructed them that, upon the facts, the law was with the defendant.

With respect to the plea in abatement, which went to the citizenship of the plaintiff, and his competency to bring a suit in the federal courts, the common law rule of pleading is, that upon a judgment against the plea on demurrer, and that the defendant answer over, and the defendant submits to the judgment, and pleads over to the merits, the plea in abatement is deemed to be waived, and is not afterwards to be regarded as a part of the record in deciding upon the rights of the parties. There is some question, however, whether this rule of pleading applies to the peculiar system and jurisdiction of the federal courts. As, in these courts, if the facts appearing on the record show that the Circuit Court had no jurisdiction, its judgment will be reversed in the appellate court for that cause, and the case remanded with directions to be dismissed.

In the view we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits. The question upon the merits, in general terms, is whether or not the removal of the plaintiff, who was a slave, with his master, from the State of Missouri to the State of Illinois, with a view to a temporary residence, and after such 459*] residence and *return to the slave State, such residence in the free State works an emancipation.

As appears from an agreed statement of facts, this question has been before the highest court of the State of Missouri, and a judgment rendered that this residence in the free State has no such effect; but, on the contrary, that his original condition continued unchanged.

The court below, the Circuit Court of the United States for Missouri, in which this suit was afterwards brought, followed the decision of the State court, and rendered a like judgment against the plaintiff.

The argument against these decisions is, that the laws of Illinois, forbidding slavery within her territory, had the effect to set the slave free while residing in that State, and to impress upon him the condition and status of a freeman; and that, by force of these laws, this status and condition accompanied him on his return to the slave State, and of consequence he could not be there held as a slave.

This question has been examined in the courts of several of the slaveholding States, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is, that the question is one which belongs to each State to decide for itself, either by its Legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri—a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction.

As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery, and prohibiting its introduction into their territories. Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of this Union; sovereign, not merely as respects the federal government—except as they have consented to its limitation—but sovereign as respects each other. Whether, therefore, the State of Missouri will recognize or give effect to the laws of Illinois within her territories, on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this government that can rightfully control her.

*Every State or nation possesses an [*460 exclusive sovereignty and jurisdiction within her own territory; and her laws effect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity and state, of all persons therein; and, also, the remedy and modes of administering justice. And it is equally true, that no State or nation can affect or bind property out of its territory, or persons not residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extraterritorially. This is the necessary result of the independence of distinct and separate sovereignties.

Now, it follows from these principles, that whatever force or effect the laws of one State or nation may have in the territories of another, must depend solely upon the laws and municipal regulations of the latter, upon its own jurisprudence and polity, and upon its own express or tacit consent.

Judge Story observes, in his Conflict of Laws, p. 24, "that a State may prohibit the operation of all foreign laws, and the rights growing out of them, within its territories." "And that when its code speaks positively on the subject, it must be obeyed by all persons who are within reach of its sovereignty; when its customary unwritten or common law speaks directly on the subject, it is equally to be obeyed."

Nations, from convenience and comity, and from mutual interest, and a sort of moral necessity to do justice, recognize and administer the laws of other countries. But, of the nature, extent and utility, of them, respecting property, or the state and conditions of persons within her territories, each nation judges for itself; and is never bound, even upon the ground of comity, to recognize them, if prejudicial to her own interests. The recognition is purely from comity, and not from any absolute or paramount obligation.

Judge Story again observes (398), "that the true foundation and extent of the obligation of the laws of one nation within another is the voluntary consent of the latter, and is inadmissible when they are contrary to its known

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interests." And he adds, "in the silence of any positive rule affirming or denying or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests." See, also, 2 Kent's Com. p. 457; 13 Pet. 519, 589.

These principles fully establish that it be- 461*] longs to the sovereign *State of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution; and, further, that the laws of other States of the Confederacy, whether enacted by their Legislatures or expounded by their courts, can have no operation within her territory, or affect rights growing out of her own laws on the subject. This is the necessary result of the independent and sovereign character of the State. The principle is not peculiar to the State of Missouri, but is equally applicable to each State belonging to the Confederacy. The laws of each have no extraterritorial operation within the jurisdiction of another, except such as may be voluntarily conceded by her laws or courts of justice. To the extent of such concession upon the rule of comity of nations, the foreign law may operate, as it then becomes a part of the municipal law of the State. When determined that the foreign law shall have effect, the municipal law of the State retires, and gives place to the foreign law.

In view of these principles, let us examine a little more closely the doctrine of those who maintain that the law of Missouri is not to govern the status and condition of the plaintiff. They insist that the removal and temporary residence with his master in Illinois, where slavery is inhibited, had the effect to set him free, and that the same effect is to be given to the law of Illinois, within the State of Missouri, after his return. Why was he set free in Illinois? Because the law of Missouri, under which he was held as a slave, had no operation by its own force extraterritorially; and the State of Illinois refused to recognize its effect within her limits, upon principles of comity, as a state of slavery was inconsistent with her laws, and contrary to her policy. But, how is the case different on the return of the plaintiff to the State of Missouri? Is she bound to recognize and enforce the law of Illinois? For, unless she is, the status and condition of the slave upon his return remains the same as originally existed. Has the law of Illinois any greater force within the jurisdiction of Missouri, than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing. Neither has any force extraterritorially, except what may be voluntarily conceded to them.

It has been supposed, by the counsel for the plaintiff, that a rule laid down by Huberus had some bearing upon that question. Huberus observes that "personal qualities, impressed by the laws of any place, surround and accompany the person wherever he goes, with this effect: that in every place he enjoys and is subject to the same law which other persons of his 462*] *class elsewhere enjoy or are subject to." De Confl. Leg. lib. 1, tit. 3, sec. 12; 4 Dall. 375, n; 1 Story, Com. Laws, pp. 59, 60.

The application sought to be given to the rule was this; that as Dred Scott was free while residing in the State of Illinois, by the laws of that State, on his return to the State of Missouri he carried with him the personal qualities of freedom, and that the same effect must be given to his status there as in the former State. But the difficulty in the case is in the total misapplication of the rule.

These personal qualities, to which Huberus refers, are those impressed upon the individual by the law of the domicil; it is this that the author claims should be permitted to accompany the person into whatever country he might go, and should supersede the law of the place where he had taken up a temporary residence.

Now, as the domicil of Scott was in the State of Missouri, where he was a slave, and from whence he was taken by his master into Illinois for a temporary residence, according to the doctrine of Huberus, the law of his domicil would have accompanied him, and during his residence there he would remain in the same condition as in the State of Missouri. In order to have given effect to the rule, as claimed in the argument, it should have been first shown that a domicil had been acquired in the free State, which cannot be pretended upon the agreed facts in the case. But the true answer to the doctrine of Huberus is, that the rule, in any aspect in which it may be reviewed, has no bearing upon either side of the question before us, even if conceded to the extent laid down by the author; for he admits that foreign governments give effect to these laws of the domicil no further than they are consistent with their own laws, and not prejudicial to their own subjects; in other words, their force and effect depend upon the law of comity of the foreign government. We should add, also, that this general rule of Huberus, referred to, has not been admitted in the practice of nations, nor is it sanctioned by the most approved jurists of international law. Story, Com. secs. 91, 96, 103, 104; 2 Kent's Com. pp. 457, 458; 1 Burge, Con. Laws, pp. 12, 127.

We come now to the decision of this court in the case of Strader et al. v. Graham, 10 How. p. 82. The case came up from the Court of Appeals, in the State of Kentucky. The question in the case was, whether certain slaves of Graham, a resident of Kentucky, who had been employed temporarily at several places in the State of Ohio, with their master's consent, and had returned to Kentucky into his service, had thereby *become entitled to their free- [*463 dom. The Court of Appeals held that they had not. The case was brought to this court under the 25th section of the Judiciary Act. This court held that it had no jurisdiction, for the reason, the question was one that belonged exclusively to the State of Kentucky. The Chief Justice, in delivering the opinion of the court, observed that "every State has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them by the Constitution of the United States. There is nothing in the Constitution of the United States, he observes, that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as

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to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine, for herself, whether their employment in another State should or should not make them free on their return."

It has been supposed, in the argument on the part of the plaintiff, that the 8th section of the Act of Congress passed March 6, 1820 (3 Stat. at L. p. 544), which prohibited slavery north of thirty-six degrees thirty minutes, within which the plaintiff and his wife temporarily resided at Fort Snelling, possessed some superior virtue and effect, extraterritorially and within the State of Missouri, beyond that of the laws of Illinois, or those of Ohio in the case of Strader et al. v. Graham. A similar ground was taken and urged upon the court in the case just mentioned, under the Ordinance of 1787, which was enacted during the time of the Confederation, and re-enacted by Congress after the adoption of the Constitution, with some amendments adapting it to the new government. 1 Stat. at L. p. 50.

In answer to this ground, the Chief Justice, in delivering the opinion of the court, observed: The argument assumes that the six articles which that Ordinance declares to be perpetual, are still in force in the States since formed within the territory, and admitted into the Union. If this proposition could be maintained, it would not alter the question; for the Regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States, within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court control over them.

464*] *"The Ordinance in question," he observes, "if still in force, could have no more operation than the laws of Ohio, in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State."

This view, thus authoritatively declared, furnishes a conclusive answer to the distinction attempted to be set up between the extraterritorial effect of a state law and the Act of Congress in question.

It must be admitted that Congress possesses no power to regulate or abolish slavery within the States; and that if this Act had attempted any such legislation, it would have been a nullity. And yet the argument here, if there be any force in it, leads to the result, that effect may be given to such legislation; for it is only by giving the Act of Congress operation within the State of Missouri, that it can have any effect upon the question between the parties. Having no such effect directly, it will be difficult to maintain, upon any consistent reasoning, that it can be made to operate indirectly upon the subject.

The argument, we think, in any aspect in which it may be viewed, is utterly destitute of support upon any principles of constitutional law, as, according to that, Congress has no power whatever over the subject of slavery within the State; and is also subversive of the established doctrine of international jurisprudence, as, according to that, it is an axiom that the laws of one government have no force within the limits of another, or extraterritorially, except from the consent of the latter.

It is perhaps not unfit to notice, in this connection, that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the Act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution. The doctrine here contended for, not only upholds its validity in the territory, but claims for it effect beyond and within the limits of a sovereign state—an effect, as insisted, that displaces the laws of the State, and substitutes its own provisions in their place.

The consequences of any such construction are apparent. If Congress possesses the power, under the Constitution, to abolish slavery in a territory, it must necessarily possess the like power to establish it. It cannot be a one sided power, as may suit the convenience or particular views of the advocates. It is a power, if it exists at all, over the whole subject; and then, upon the process of reasoning which seeks to extend its influence beyond the territory, and within the limits of a state, if Congress should establish, instead of abolish, slavery, we do *not see but that, if a slave should be [*465 removed from the territory into a free State his status would accompany him, and continue, notwithstanding its laws against slavery. The laws of the free State, according to the argument, would be displaced, and the Act of Congress, in its effect, be substituted in their place. We do not see how this conclusion could be avoided, if the construction against which we are contending should prevail. We are satisfied, however, it is unsound, and that the true answer to it is, that even conceding, for the purposes of the argument, that this provision of the Act of Congress is valid within the territory for which it was enacted, it can have no operation or effect beyond its limits, or within the jurisdiction of a state. It can neither displace its laws nor change the status or condition of its inhabitants.

Our conclusion, therefore, is, upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the federal court sitting in the State, and trying the case before us, was bound to follow it.

The remaining question for consideration is: what is the law of the State of Missouri on this subject. And it would be a sufficient answer to refer to the judgment of the highest court of the State in the very case, were it not due to that tribunal to state somewhat at large the course of decision and the principles involved, on account of some diversity of opinion in the cases. As we have already stated, this case was originally brought in the Circuit Court of the State, which resulted in a judgment for the plaintiff. The case was carried up to the Supreme Court for revision. That court reversed the judgment below, and remanded the cause to the Circuit, for a new trial. In that state of the proceeding, a new suit was brought by the plaintiff in the Circuit Court of the United States, and tried upon the issues and agreed case before us, and a verdict and judgment for the defendant, that court following the decision of the Supreme Court of the State.

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The judgment of the Supreme Court is reported in the 15 Mo. p. 576. The court placed the decision upon the temporary residence of the master with the slaves in the State and territory to which they removed, and their return to the slave State; and upon the principles of international law, that foreign laws have no extraterritorial force, except such as the State within which they are sought to be enforced may see fit to extend to them, upon the doctrine of comity of nations.

This is the substance of the grounds of the decision.

The same question has been twice before that court since, and the same judgment given. 15 Mo. 595; 17 Ib. 434. It must be admitted, therefore, as the settled law of the State, 466*] *and, according to the decision in the case of Strader et al. v. Graham, 10 How. 82, is conclusive of the case in this court.

It is said, however, that the previous cases and course of decision in the State of Missouri on this subject were different, and that the courts had held the slave to be free on his return from a temporary residence in the free State. We do not see, were this to be admitted, that the circumstance would show that the settled course of decision at the time this case was tried in the court below, was not to be considered the law of the State. Certainly, it must be, unless the first decision of a principle of law by a state court is to be permanent and irrevocable. The idea seems to be, that the courts of a state are not to change their opinions, or, if they do, the first decision is to be regarded by this court as the law of the State. It is certain, if this be so, in the case before us, it is an exception to the rule governing this court in all other cases. But what court has not changed its opinions? What judge has not changed his?

Waiving, however, this view, and turning to the decisions of the courts of Missouri, it will be found that there is no discrepancy between the earlier and the present cases upon this subject. There are some eight of them reported previous to the decision in the case before us, which was decided in 1852. The last of the earlier cases was decided in 1836. In each one of these, with two exceptions, the master or mistress removed into the free State with the slave, with a view to a permanent residence—in other words, to make that his or her domicil. And in several of the cases, this removal and permanent residence were relied on as the ground of the decision in favor of the plaintiff. All these cases, therefore, are not necessarily in conflict with the decision in the case before us, but consistent with it. In one of the two excepted cases, the master had hired the slave in the State of Illinois from 1817 to 1825. In the other, the master was an officer in the army, and removed with his slave to the military post of Fort Snelling, and at Prairie du Chien, in Michigan, temporarily, while acting under the orders of his government. It is conceded the decision in this case was departed from in the case before us, and in those that have followed it. But it is to be observed that these subsequent cases are in conformity with those in all the slave States bordering on the free—in Kentucky, 2 Marsh. 476; 5 B. Monroe, 176; 9 Ib. 565,—in Virginia, 1 Rand. 15; 1 Leigh, 172; 10 Grat. 495,—in Maryland, 4 Harr. & McH. 295, 322, 325. In conformity, also, with the law of England on this subject, Ex parte Grace, 2 Hagg. Adm. 94, and with the opinions of the *most eminent jurists of the [*467 country. Story's Confl. 396 a; 5 Kent's Com. 258 n; 18 Pick. 193, Chief Justice Shaw. See Corresp. between Lord Stowell and Judge Story, 1 vol. Life of Story, p. 552, 558.

Lord Stowell, in communicating his opinion in the case of The Slave Grace to Judge Story, states, in his letter, what the question was before him, namely: "Whether the emancipation of a slave brought to England insured a complete emancipation to him on his return to his own country, or whether it only operated as a suspension of slavery in England, and his original character devolved on him again upon his return." He observed, "the question had never been examined since an end was put to slavery fifty years ago," having reference to the decision of Lord Mansfield in the case of Somersett; but the practise, he observed, "has regularly been, that on his return to his own country, the slave resumed his original character as a slave." And so Lord Stowell held in the case.

Judge Story, in his letter in reply, observes: "I have read with great attention your judgment in the slave case, etc. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should have certainly arrived at the same result." Again he observes: "In my native State (Massachusetts), the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law attached upon him, and that his servile character would be redintegrated."

We may remark in this connection, that the case before the Maryland court, already referred to, and which was decided in 1799, presented the same question as that before Lord Stowell and received a similar decision. This was nearly thirty years before the decision in that case, which was in 1828. The Court of Appeals observed, in deciding the Maryland case, that "however the laws of Great Britain in such instances, operating upon such persons there, might interfere so as to prevent the exercise of certain acts by the masters, not permitted, as in the case of Somersett, yet, upon the bringing Ann Joice into this State (then the Province of Maryland), the relation of master and slave continued in its extent, as authorized by the laws of this State." And Luther Martin, one of the counsel in that case, stated, on the argument, that the question had been previously decided the same way in the case of slaves returning from a residence in Pennsylvania, where they had become free under her laws.

The State of Louisiana, whose courts had gone further in *holding the slave free [*468 on his return from a residence in a free State than the courts of her sister States, has settled the law, by an Act of her Legislature, in conformity with the law of the court of Missouri in the case before us. Sess. Law, 1846.

The case before Lord Stowell presented much stronger features for giving effect to the law of England in the case of The Slave Grace than exists in the cases that have arisen in this

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country, for in that case the slave returned to a colony of England over which the imperial government exercised supreme authority. Yet, on the return of the slave to the colony, from a temporary residence in England, he held that the original condition of the slave attached. The question presented in cases arising here, is as to the effect and operation to be given to the laws of a foreign State, on the return of the slave within an independent sovereignty.

Upon the whole, it must be admitted that the current of authority, both in England and in this country, is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below was not only right, but bound to follow it.

Some question has been made as to the character of the residence in this case in the free State. But we regard the facts as set forth in the agreed case as decisive. The removal of Dr. Emerson from Missouri to the military posts was in the discharge of his duties as surgeon in the army, and under the orders of his government. He was liable at any moment to be recalled, as he was in 1838, and ordered to another post. The same is also true as it respects Major Taliaferro. In such a case, the officer goes to his post for a temporary purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode. The question we think too plain to require argument. The case of The Attorney General v. Napier, 6 Welsb. H. & G. Exch. 216, illustrates and applies the principle in the case of an officer of the English army.

A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a federal right, or the discharge of a federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic, under the Constitution of the United States. When that question arises, we shall be prepared to decide it.

469*] *Our conclusion is, that the judgment of the court below should be affirmed.

Mr. Justice Grier:

I concur in the opinion delivered by Mr. Justice Nelson on the questions discussed by him.

I also concur with the opinion of the court as delivered by the Chief Justice, that the Act of Congress of 6th March, 1820, is unconstitutional and void; and that, assuming the facts as stated in the opinion, the plaintiff cannot sue as a citizen of Missouri in the courts of the United States. But, that the record shows a prima facie case of jurisdiction, requiring the court to decide all the questions properly arising in it; and as the decision of the pleas in bar shows that the plaintiff is a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment is of little importance; for whether the judgment be affirmed or dismissed for want of jurisdiction, it is justified by the decision of the court, and is the same in effect between the parties to the suit.

Mr. Justice Daniel:

It may with truth be affirmed, that since the establishment of the several communities now constituting the States of this Confederacy, there never has been submitted to any tribunal within its limits questions surpassing in importance those now claiming the consideration of this court. Indeed it is difficult to imagine, in connection with the systems of polity peculiar to the United States, a conjuncture of graver import than that must be, within which it is aimed to comprise, and to control, not only the faculties and practical operation appropriate to the American Confederacy as such, but also the rights and powers of its separate and independent members, with reference alike to their internal and domestic authority and interests, and the relations they sustain to their confederates.

To my mind it is evident that nothing less than the ambitious and far-reaching pretension to compass these objects of vital concern, is either directly essayed, or necessarily implied in the positions attempted in the argument for the plaintiff in error.

How far these positions have any foundation in the nature of the rights and relations of separate, equal and independent governments, or in the provisions of our own federal compact, or the laws enacted under and in pursuance of the authority of that compact, will be presently investigated.

In order correctly to comprehend the tendency and force of those positions, it is proper here succinctly to advert to the *facts [*470 upon which the questions of law propounded in the argument have arisen.

This was an action of trespass vi et armis, instituted in the Circuit Court of the United States for the District of Missouri, in the name of the plaintiff in error, a negro held as a slave, for the recovery of freedom for himself, his wife, and two children, also negroes.

To the declaration in this case the defendant below, who is also the defendant in error, pleaded in abatement that the court could not take cognizance of the cause because the plaintiff was not a citizen of the State of Missouri, as averred in the declaration, but was a negro of African descent, and that his ancestors were of pure African blood, and were brought into this country and sold as negro slaves; and hence it followed, from the 2d section of the 3d article of the Constitution, which creates the judicial power of the United States, with respect to controversies between citizens of different States, that the Circuit Court could not take cognizance of the action.

To this plea in abatement, a demurrer having been interposed on behalf of the plaintiff, it was sustained by the court. After the decision sustaining the demurrer, the defendant, in pursuance of a previous agreement between counsel, and with the leave of the court, pleaded in bar of the action: 1st, not guilty; 2d, that the plaintiff was a negro slave, the lawful property of the defendant, and as such the defendant gently laid his hands upon him, and thereby had only restrained him, as the defendant had a right to do; 3d, that with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them,

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only acted in the same manner, and in virtue of the same legal right.

Issues having been joined upon the above pleas in bar, the following statement, comprising all the evidence in the cause, was agreed upon and signed by the counsel of the respective parties, viz.:

"In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the Army of the United States. In that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north 471*] of the latitude of thirty-six *degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the Army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson, hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet, at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the River Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at a military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.

Further proof may be given on the trial for either party.

R. M. Field, for plaintiff,
H. A. Garland, for defendant."

"It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis County; that there was a verdict and judgment in his favor; that on a writ of error to the Supreme Court, the judgment below was reversed, and the *cause remanded to [*472 the Circuit Court, where it has been continued to await the decision of this case.

Field, for plaintiff,
Garland, for defendant."

Upon the aforegoing agreed facts, the plaintiff prayed the court to instruct the jury that they ought to find for the plaintiff, and upon the refusal of the instruction thus prayed for, the plaintiff excepted to the court's opinion. The court then, upon the prayer of the defendant, instructed the jury, that upon the facts of this case agreed as above, the law was with the defendant. To this opinion, also, the plaintiff's counsel excepted, as he did to the opinion of the court denying to the plaintiff a new trial after the verdict of the jury in favor of the defendant.

The question first in order presented by the record in this cause, is that which arises upon the plea in abatement, and the demurrer to that plea; and upon this question it is my opinion that the demurrer should have been overruled, and the plea sustained.

On behalf of the plaintiff it has been urged, that by the pleas interposed in bar of a recovery in the court below (which pleas both in fact and in law are essentially the same with the objections averred in abatement), the defense in abatement has been displaced or waived; that it could, therefore, no longer be relied on in the Circuit Court, and cannot claim the consideration of this court in reviewing this cause. This position is regarded as wholly untenable. On the contrary, it would seem to follow conclusively from the peculiar character of the courts of the United States, as organized under the Constitution and the statutes, and as defined by numerous and unvarying adjudications from this bench; and there is not one of those courts whose jurisdiction and powers can be deduced from mere custom or tradition; not one, whose jurisdiction and powers must not be traced palpably to, and invested exclusively by, the Constitution and statutes of the United States; not one that is not bound, therefore, at all times, and at all stages of its proceedings, to look and to regard the special and declared extent and bounds of its commission and authority. There is no such tribunal of the United States as a court of general jurisdiction, in the sense in which that phrase is applied to the superior courts under the common law; and even with respect to the courts existing under that system, it is a well settled principle, that consent can never give jurisdiction.

The principles above stated, and the consequences regularly deducible from them, have, as already remarked, been repeatedly *and unvaryingly propounded from this [*473 bench. Beginning with the earliest decisions of this court, we have the cases of Bingham v. Cabot et al. 3 Dall. 382; Turner v. Enrille, 4 Dall. 7; Abercrombie v. Dupuis et al. 1 Cranch, 343; Wood v. Wagnon, 2 Cranch, 9; The United States v. The Brig Union et al. 4 Cranch, 216; Sulivan v. The Fulton Steamboat Company,

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6 Wheat. 450; Mollan et al. v. Torrence, 9 Wheat. 537; Brown v. Keene, 8 Pet. 112, and Jackson v. Ashton, 8 Pet. 148; ruling, in uniform and unbroken current, the doctrine that it is essential to the jurisdiction of the courts of the United States, that the facts upon which it is founded should appear upon the record. Nay, to such an extent and so inflexibly has this requisite to the jurisdiction been enforced, that in the case of Capron v. Van Noorden, 2 Cranch, 126, it is declared, that the plaintiff in this court may assign for error his own omission in the pleadings in the court below, where they go to the jurisdiction. This doctrine has been, if possible, more strikingly illustrated in a latter decision, the case of The State of R. I. v. The State of Mass. 12 Pet. 657, 755.

In this case, on p. 718 of the volume, this court, with reference to a motion to dismiss the cause for want of jurisdiction, have said: "However late this objection has been made or may be made, in any cause in an inferior or appellate court of the United States, it must be considered and decided before any court can move one farther step in the cause, as any movement is necessarily to exercise the jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit; to adjudicate or exercise any judicial power over them. The question is, whether on the case before the court their action is judicial or extrajudicial; with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. A motion to dismiss a cause pending in the courts of the United States, is not analogous to a plea to the jurisdiction of a court of common law or equity in England; there, the superior courts have a general jurisdiction over all persons within the realm, and all causes of action between them. It depends on the subject matter, whether the jurisdiction shall be exercised by a court of law or equity; but that court to which it appropriately belongs can act judicially upon the party and the subject of the suit, unless it shall be made apparent to the court that the judicial determination of the case has been withdrawn from the court of general jurisdiction to an inferior and limited one. It is a necessary presumption that the court of general jurisdiction can act upon the given case; when nothing to the 474*] *contrary appears; hence has arisen the rule that the party claiming an exemption from its process must set out the reason by a special plea in abatement, and show that some inferior court of law or equity has the exclusive cognizance of the case; otherwise the superior court must proceed in virtue of its general jurisdiction. A motion to dismiss, therefore, cannot be entertained, as it does not disclose a case of exception; and if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. There are other classes of cases where the objection to the jurisdiction is of a different nature, as on a bill in chancery, that the subject matter is cognizable only by the King in Council, or that the parties defendant cannot be brought before any municipal court on account of their sovereign character or the nature of the controversy; or to the very common cases which present the question, whether the cause belong to a court of law or equity. To such cases, a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court. The objection goes to a denial of any jurisdiction of a municipal court in the one class of cases, and to the jurisdiction of any court of equity or of law in the other, on which last the court decides according to its discretion.

"An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue; but when the objection goes to the power of the court over the parties or the subject matter, the defendant need not, for he cannot, give the plaintiff a better writ. Where an inferior court can have no jurisdiction of a case of law or equity, the ground of objection is not taken by plea in abatement, as an exception of the given case from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, or at the trial or hearing. As a denial of jurisdiction over the subject matter of a suit between parties within the realm, over which and whom the court has power to act, cannot be successful in an English court of general jurisdiction, a motion like the present could not be sustained consistently with the principles of its constitution. But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act; any proceeding without the limits prescribed is coram non judice, and its action a nullity. And whether the want or excess of power is objected by a party, or is apparent *to the court, it must surcease [*475 its action or proceed extrajudicially."

In the constructing of pleadings either in abatement or in bar, every fact or position constituting a portion of the public law, or of known or general history, is necessarily implied. Such fact or position need not be specially averred and set forth; it is what the world at large and every individual are presumed to know—nay, are bound to know and to be governed by.

If, on the other hand, there exists facts or circumstances by which a particular case would be withdrawn or exempted from the influence of public law or necessary historical knowledge, such facts and circumstances form an exception to the general principle, and these must be specially set forth and established by those who would avail themselves of such exception.

Now, the following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know—that the African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognized by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not

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as members of civil or political society, but as slaves, as property in the strictest sense of the term.

In the plea in abatement, the character or capacity of citizen on the part of the plaintiff is denied; and the causes which show the absence of that character or capacity are set forth by averment. The verity of those causes, according to the settled rules of pleading, being admitted by the demurrer, it only remained for the Circuit Court to decide upon their legal sufficiency to abate the plaintiff's action. And it now becomes the province of this court to determine whether the plaintiff below (and in error here), admitted to be a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves—such being his status, and such the circumstances surrounding his position—whether he can by correct legal induction from that status and those circumstances, be clothed with the character and capacities of a citizen of the State of Missouri.

It may be assumed as a postulate, that to a slave, as such, there appertains and can appertain no relation, civil or political, with the State or the government. He is himself strictly property, to be used in subserviency to the in-
476*] terests, the convenience *or the will, of his owner; and to suppose, with respect to the former, the existence of any privilege or discretion, or of any obligation to others incompatible with the magisterial rights just defined, would be by implication, if not directly, to deny the relation of master and slave, since none can possess and enjoy as his own, that which another has a paramount right and power to withhold. Hence it follows necessarily, that a slave, the peculium or property of a master, and possessing within himself no civil nor political rights or capacities, cannot be a citizen. For who, it may be asked, is a citizen? What do the character and status of citizen import? Without fear of contradiction, it does not import the condition of being private property, the subject of individual power and ownership. Upon a principle of etymology alone, the term "citizen," as derived from civitas, conveys the ideas of connection or identification with the State or government, and a participation of its functions. But beyond this, there is not, it is believed, to be found, in the theories of writers on government, or in any actual experiment heretofore tried, an exposition of the term "citizen," which has not been understood as conferring the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political.

Thus Vattel, in the preliminary chapter to his treatise on the Law of Nations, says: "Nations or States are bodies politic; societies of men united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their mutual strength. Such a society has her affairs and her interests; she deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to herself." Again, in the first chapter of the first book of the treatise just quoted, the same writer, after repeating his definition of a State, proceeds to remark, that, "from the very design that induces a number of men to form a society, which has its common interests and which is to act in concert, it is necessary that there should be established a public authority, to order and direct what is to be done by each, in relation to the end of the association. This political authority is the sovereignty." Again this writer remarks: "The authority of all over each member essentially belongs to the body politic or the state."

By this same writer it is also said: "The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority; they equally participate in its advantages. The natives, or natural born citizens, are those born in the country, of parents who are citizens. As society *cannot perpetuate itself otherwise than [*477 by the children of the citizens, those children naturally follow the condition of their parents, and succeed to all their rights." Again: "I say, to be of the country, it is necessary to be born of a person who is a citizen; for if he be born there of a foreigner, it will be only the place of his birth, and not his country. The inhabitants, as distinguished from citizens, are foreigners who are permitted to settle and stay in the country." Vattel, Book 1, cap. 19, p. 101.

From the views here expressed, and they seem to be unexceptionable, it must follow, that with the slave, with one devoid of rights or capacities, civil or political, there could be no pact; that one thus situated could be no party to, or actor in the association of those possessing free will, power, discretion. He could form no part of the design, no constituent ingredient or portion of a society based upon common, that is, upon equal interests and powers. He could not at the same time be the sovereign and the slave.

But it has been insisted, in argument, that the emancipation of a slave, effected either by the direct act and assent of the master, or by causes operating in contravention of his will, produces a change in the status or capacities of the slave, such as will transform him from a mere subject of property, into a being possessing a social, civil, and political equality with a citizen; in other words, will make him a citizen of the State within which he was, previously to his emancipation, a slave.

It is difficult to perceive by what magic the mere surcease or renunciation of an interest in a subject of property, by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation. Can it be pretended that an individual in any State, by his single act, though voluntarily or designedly performed, yet without the co-operation or warrant of the government, perhaps in opposition to its policy or its guaranties, can create a citizen of that State? Much more emphatically may it be asked, how such a result could be accomplished by means wholly extraneous, and entirely foreign to the government of the State. The argument thus urged must lead to these extraordinary conclusions. It is regarded at once as wholly untenable, and as unsustained by the direct authority or by the analogies of history.

The institution of slavery, as it exists and has existed from the period of its introduction

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into the United States, though more humane and mitigated in character than was the same institution, either under the republic or the empire of Rome, bears, both in its tenure and in 478*] the simplicity incident to the *mode of its exercise, a closer resemblance to Roman slavery than it does to the condition of villanage, as it formerly existed in England. Connected with the latter, there were peculiarities, from custom or positive regulation, which varied it materially from the slavery of the Romans, or from slavery at any period within the United States.

But with regard to slavery amongst the Romans, it is by no means true that emancipation, either during the republic or the empire, conferred, by the act itself, or implied, the status or the rights of citizenship.

The proud title of Roman citizen, with the immunities and rights incident thereto, and as contradistinguished alike from the condition of conquered subjects or of the lower grades of native domestic residents, was maintained throughout the duration of the Republic, and until a late period of the eastern empire and at last was in effect destroyed less by an elevation of the inferior classes than by the degradation of the free, and the previous possessors of rights and immunities civil and political, to the indiscriminate abasement incident to absolute and simple despotism.

By the learned and elegant historian of the decline and fall of the Roman Empire, we are told that "In the decline of the Roman Empire, the proud distinctions of the republic were gradually abolished; and the reason or instinct of Justinian completed the simple form of an absolute monarchy. The Emperor could not eradicate the popular reverence which always waits on the possession of hereditary wealth or the memory of famous ancestors. He delighted to honor with titles and emoluments his generals, magistrates and senators, and his precarious indulgence communicated some rays of their glory to their wives and children. But in the eye of the law all Roman citizens were equal, and all subjects of the empire were citizens of Rome. That inestimable character was degraded to an obsolete and empty name. The voice of a Roman could no longer enact his laws, or create the annual ministers of his powers; his constitutional rights might have checked the arbitrary will of a master; and the bold adventurer from Germany or Arabia was admitted with equal favor to the civil and military command which the citizen alone had been once entitled to assume over the conquests of his fathers. The first Cæsars had scrupulously guarded the distinction of ingenuous and servile birth, which was decided by the condition of the mother. The slaves who were liberated by a generous mater, immediately entered into the middle class of libertini or freedmen; but they could never be enfranchised from the duties of obedience and gratitude; whatever were the fruits 479*] of *their industry, their patron and his family inherited the third part, or even the whole of their fortune, if they died without children and without a testament. Justinian respected the rights of patrons, but his indulgence removed the badge of disgrace from the two inferior orders of freedmen; whoever ceased to be a slave, obtained, without reserve or delay, the station of a citizen; and at length the dignity of an ingenuous birth was created or supposed by the omnipotence of the Emperor."[1]

The above account of slavery and its modifications will be found in strictest conformity with the institutes of Justinian. Thus, (book 1st, title 3d), it is said: "The first general division of persons in respect to their rights is into freemen and slaves." The same title, sec. 4th: "Slaves are born such, or become so. They are born such of bondwomen; they become so either by the law of nations, as by capture, or by the civil law." Section 5th: "In the condition of slaves there is no diversity; but among free persons there are many. Thus some are ingenui or freemen, others libertini or freedmen."

Tit. 4th De Ingenuis.—"A freeman is who is born free by being born in matrimony, of parents who both are free, or both freed; or of parents one free and the other freed. But one born of a free mother, although the father be a slave or unknown, is free."

Tit. 5th. De Libertinis.—"Freedmen are those who have been manumitted from just servitude."

Section 3d of the same title states that "freedmen were formerly distinguished by a threefold division." But the Emperor proceeds to say: "Our piety leading us to reduce all things into a better state, we have amended our laws, and re-established the ancient usage; for anciently liberty was simple and undivided—that is, was conferred upon the slave as his manumittor possessed it, admitting this single difference, that the person manumitted became only a freed man, although his manumittor was a free man." And he further declares: "We have made all freed men in general become citizens of Rome, regarding neither the age of the manumitted, nor the manumittor, nor the ancient forms of manumission. We have also introduced many new methods by which slaves may become Roman citizens."

By the references above given it is shown, from the nature and objects of civil and political associations, and upon the direct authority of history, that citizenship was not conferred *by the simple fact of emancipation. [*480 but that such a result was deduced therefrom in violation of the fundamental principles of free political association; by the exertion of despotic will to establish, under a false and misapplied denomination, one equal and universal slavery; and to effect this result required the exertions of absolute power—of a power both in theory and practice, being, in its most plenary acceptation, the sovereignty, the State itself—it could not be produced by a less or inferior authority, much less by the will or the act of one who, with reference to civil and political rights, was himself a slave. The master might abdicate or abandon his interest or ownership in his property, but his act would be a mere abandonment. It seems to involve an absurdity to impute to it the investiture of rights which the sovereignty alone had power to impart. There is not, per-

1.—Vide Gibbon's Decline and Fall of the Roman Empire. London edition of 1825, Vol. III., chap. 44, p. 183.

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haps, a community in which slavery is recognized, in which the power of emancipation, and the modes of its exercise are not regulated by law—that is, by the sovereign authority; and none can fail to comprehend the necessity for such regulation, for the preservation of order, and even of political and social existence.

By the argument for the plaintiff in error, a power equally despotic is vested in every member of the association, and the most obscure or unworthy individual it comprises may arbitrarily invade and derange its most deliberate and solemn ordinances. At assumptions anomalous as these, so fraught with mischief and ruin, the mind at once is revolted, and goes directly to the conclusions, that to change or to abolish a fundamental principle of the society, must be the act of the society itself —of the sovereignty; and that none other can admit to a participation of that high attribute. It may further expose the character of the argument urged for the plaintiff, to point out some of the revolting consequences, which it would authorize. If that argument possesses any integrity, it asserts the power in any citizen, or quasi citizen, or a resident foreigner of any one of the States, from a motive either of corruption or caprice, not only to infract the inherent and necessary authority of such state, but also materially to interfere with the organization of the Federal Government, and with the authority of the separate and independent States. He may emancipate his negro slave, by which process he first transforms that slave into a citizen of his own State; he may next, under color of article 4th, section 2d, of the Constitution of the United States, obtrude him, and on terms of civil and political equality, upon any and every State in this Union, in defiance of all regulations of necessity or policy, ordained by those States for their internal happiness or safety. Nay, more: this manumitted 481*] slave *may, by a proceeding springing from the will or act of his master alone, be mixed up with the institutions of the Federal Government, to which he is not a party, and in opposition to the laws of that government which, in authorizing the extension by naturalization of the rights and immunities of citizens of the United States to those not originally parties to the federal compact, have restricted that boon to free white aliens alone. If the rights and immunities connected with or practiced under the institutions of the United States can by any indirection be claimed or deduced from sources or modes other than the Constitution and laws of the United States, it follows that the power of naturalization vested in Congress is not exclusive—that it has in effect no existence, but is repealed or abrogated.

But it has been strangely contended that the jurisdiction of the Circuit Court might be maintained upon the ground that the plaintiff was a resident of Missouri, and that, for the purpose of vesting the court with jurisdiction over the parties, residence within the State was sufficient.

The first, and to my mind a conclusive reply to this singular argument, is presented in the fact that the language of the Constitution restricts the jurisdiction of the courts to cases in which the parties shall be citizens, and is entirely silent with respect to residence. A second answer to this strange and latitudinous notion is, that it so far stultifies the sages by whom the Constitution was framed, as to impute to them ignorance of the material distinction existing between citizenship and mere residence or domicil, and of the well known facts, that a person confessedly an alien may be permitted to reside in a country in which he can possess no civil or political rights, or of which he is neither a citizen nor subject; and that for certain purposes a man may have a domicil in different countries, in no one of which he is an actual personal resident.

The correct conclusions upon the question here considered would seem to be these:

That in the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as property merely, and as such was not and could not be a party or an actor, much less a peer in any compact or form of government established by the States or the United States. That if, since the adoption of the state governments, he has been or could have been elevated to the possession of political rights or powers, this result could have been effected by no authority less potent than that of the sovereignty—the State—exerted *to [*482 that end, either in the form of legislation, or in some other mode of operation. It could certainly never have been accomplished by the will of an individual operating independently of the sovereign power, and even contravening and controlling that power. That so far as rights and immunities appertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognized either by the language or purposes of the former; and it has been expressly excluded by every Act of Congress providing for the creation of citizens by naturalization, these laws, as has already been remarked, being restricted to free white aliens exclusively.

But it is evident that, after the formation of the Federal Government by the adoption of the Constitution, the highest exertion of State power would be incompetent to bestow a character or status created by the Constitution, or conferred in virtue of its authority only. Upon those, therefore, who were not originally parties to the federal compact, or who are not admitted and adopted as parties thereto, in the mode prescribed by its paramount authority, no State could have power to bestow the character or the rights and privileges exclusively reserved by the States for the action of the Federal Government by that compact.

The States, in the exercise of their political power, might, with reference to their peculiar government and jurisdiction, guaranty the rights of person and property, and the enjoyment of civil and political privileges, to those whom they should be disposed to make the objects of their bounty; but they could not reclaim or exert the powers which they had vested exclusively in the government of the United States. They could not add to or change in any respect the class of persons to whom alone the character of citizen of the United States appertained, at the time of the

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adoption of the Federal Constitution. They could not create citizens of the United States by any direct or indirect proceeding.

According to the view taken of the law, as applicable to the demurrer to the plea in abatement in this cause, the questions subsequently raised upon the several pleas in bar might be passed by, as requiring neither a particular examination, nor an adjudication directly upon them. But as these questions are intrinsically of primary interest and magnitude, and have been elaborately discussed in argument, and as with respect to them the opinions of a majority of the court, including my own, are perfectly coincident, to me it seems proper that they should here be fully considered, and, so far as it is practicable for this court to accomplish such an end, finally put to rest.

483*] *The questions, then, to be considered upon the several pleas in bar, and upon the agreed statement of facts between the counsel, are: 1st. Whether the admitted master and owner of the plaintiff, holding him as his slave in the State of Missouri, and in conformity with his rights guarantied to him by the laws of Missouri then and still in force, by carrying with him for his own benefit and accommodation, and as his own slave, the person of the plaintiff into the State of Illinois, within which State slavery had been prohibited by the Constitution thereof, and by retaining the plaintiff during the commorancy of the master within the State of Illinois, had, upon his return with his slave into the State of Missouri, forfeited his rights as master, by reason of any supposed operation of the prohibitory provision in the Constitution of Illinois, beyond the proper territorial jurisdiction of the latter State. 2d. Whether a similar removal of the plaintiff by his master from the State of Missouri, and his retention in service at a point included within no State, but situated north of thirty-six degrees thirty minutes of north latitude, worked a forfeiture of the right of property of the master, and the manumission of the plaintiff.

In considering the first of these questions, the acts or declarations of the master, as expressive of his purpose to emancipate, may be thrown out of view, since none will deny the right of the owner to relinquish his interest in any subject of property, at any time or in any place. The inquiry here bears no relation to acts or declarations of the owner as expressive of his intent or purpose to make such a relinquishment; it is simply a question whether, irrespective of such purpose, and in opposition thereto, that relinquishment can be enforced against the owner of property within his own country, in defiance of every guaranty promised by its laws; and this through the instrumentality of a claim to power entirely foreign and extraneous with reference to himself, to the origin and foundation of his title, and to the independent authority of his country. A conclusive negative answer to such an inquiry is at once supplied, by announcing a few familiar and settled principles and doctrines of public law.

Vattel, in his chapter on the general principles of the laws of nations, section 15th, tells us, that "nations being free and independent of each other in the same manner that men are naturally free and independent, the second general law of their society is, that each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature."

"The natural society of nations," says this writer, "cannot subsist unless the natural rights of each be respected." In *section [*484 16th he says, "as a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes for her—of what it is proper or improper for her to do; and of course it rests solely with her to examine and determine whether she can perform any office for another nation without neglecting a duty she owes to herself. In all cases, therefore, in which a nation has the right of judging what her duty requires, no other nation can compel her to act in such or such a particular manner, for any attempt at such compulsion would be an infringement on the liberty of nations." Again, in section 18th of the same chapter, "nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not produce any difference. A small republic is no less a sovereign state than the most powerful kingdom."

So, in section 20: "A nation, then, is mistress of her own actions, so long as they do not affect the proper and perfect rights of any other nation—so long as she is only internally bound, and does not lie under any external and perfect obligation. If she makes an ill use of her liberty, she is guilty of a breach of duty; but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her. Since nations are free, independent, and equal, and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue, in order to fulfill her duties, the effect of the whole is to produce, at least externally, in the eyes of mankind, perfect equality of rights between nations, in the administration of their affairs, and in the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment."

Chancellor Kent, in the 1st volume of his Commentaries, lecture 2d, after collating the opinions of Grotius, Heineccius, Vattel, and Rutherford, enunciates the following positions as sanctioned by these and other learned publicists, viz.: that "nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions and strength, or however greatly they may differ in government, religion, or manners. This perfect equality and entire independence of all distinct States is a fundamental principle of public law. It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government or religion, or a course of internal *policy to another." [*485 This writer gives some instances of the violation of this great national immunity, and amongst them the constant interference by the ancient Romans, under the pretext of settling disputes between their neighbors, but with the real purpose of reducing those neighbors to bondage; the interference of Russia, Prussia,

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and Austria, for the dismemberment of Poland; the more recent invasion of Naples by Austria in 1821, and of Spain by the French Government in 1823, under the excuse of suppressing a dangerous spirit of internal revolution and reform.

With reference to this right of self-government in independent sovereign States, an opinion has been expressed, which, whilst it concedes this right as inseparable from, and as as a necessary attribute of sovereignty and independence, asserts, nevertheless, some implied and paramount authority of a supposed international law, to which this right of self-government must be regarded and exerted as subordinate; and from which independent and sovereign States can be exempted only by a protest, or by some public and formal rejection of that authority. With all respect for those by whom this opinion has been professed, I am constrained to regard it as utterly untenable, as palpably inconsistent, and as presenting in argument a complete felo de se.

Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and an exemption from all claims by any extraneous power, however expressly they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. Again; could such claims from extraneous sources be regarded as legitimate, the effort to resist or evade them, by protest or denial, would be as irregular and unmeaning as it would be futile. It could in nowise affect the question of superior right. For the position here combated, no respectable authority has been, and none, it is thought, can be adduced. It is certainly irreconcilable with the doctrines already cited from the writers upon public law.

Neither the case of James Somersett, 20 Howell's St. Tr. so often vaunted as the proud evidence of devotion to freedom under a government which has done as much perhaps to extend the reign of slavery as all the world besides; nor does any decision founded upon the authority of Somersett's case, when correctly expounded, assail or impair the principle of national equality, enunciated by each and all of the publicists already referred to. In the case of Somersett, although the applicant for the habeas corpus and the individual claiming property in that applicant were both subjects 486*] and residents *within the British Empire, yet the decision cannot be correctly understood as ruling absolutely and under all circumstances against the right of property in the claimant. That decision goes no farther than to determine, that within the realm of England there was no authority to justify the detention of an individual in private bondage. If the decision in Somersett's case had gone beyond that point, it would have presented the anomaly of a repeal by laws enacted for and limited in their operation to the realm alone, of other laws and institutions established for places and subjects without the limits of the realm of England; laws and institutions at that very time, and long subsequently, sanctioned and maintained under the authority of the British Government, and which the full and combined action of the King and Parliament was required to abrogate.

But could the decision in Somersett's case be correctly interpreted as ruling the doctrine which it has been attempted to deduce from it, still that doctrine must be considered as having been overruled by the lucid and able opinion of Lord Stowell in the more recent case of The Slave Grace, reported in the second volume of Haggard, p. 94; in which opinion, whilst it is conceded by the learned judge that there existed no power to coerce the slave whilst in England, that yet, upon her return to the Island of Antigua, her status as a slave was revived, or, rather, that the title of the owner to the slave as property had never been extinguished, but had always existed in that Island. If the principle of this decision be applicable as between different portions of one and the same empire, with how much more force does it apply as between nations or governments entirely separate, and absolutely independent of each other? For in this precise attitude the States of this Union stand with reference to this subject, and with reference to the tenure of every description of property vested under their laws and held within their territorial jurisdiction.

A strong illustration of the principle ruled by Lord Stowell, and of the effect of that principle, even in a case of express contract, is seen in the case of Lewis v. Fullerton, decided by the Supreme Court of Virginia, and reported in the first volume of Randolph, p. 15. The case was this: a female slave, the property of a citizen of Virginia, whilst with her master in the State of Ohio, was taken from his possession under a writ of habeas corpus, and set at liberty. Soon, or immediately after, by agreement between this slave and her master, a deed was executed in Ohio by the latter, containing a stipulation that this slave should return to Virginia, and after a service of two years in that State, should there be free. The law of Virginia *regulating emancipa- [*487 tion required that deeds of emancipation should, within a given time from their date, be recorded in the court of the county in which the grantor resided, and declared that deeds with regard to which this requisite was not complied with should be void. Lewis, an infant son of this female, under the rules prescribed in such cases, brought an action, in forma pauperis, in one of the courts of Virginia, for the recovery of his freedom, claimed in virtue of the transactions above mentioned. Upon an appeal to the Supreme Court from a judgment against the plaintiff, Roane, Justice, in delivering the opinion of the court, after disposing of other questions discussed in that case, remarks:

"As to the deed of emancipation contained in the record, that deed, taken in connection with the evidence offered in support of it, shows that it had a reference to the State of Virginia; and the testimony shows that it formed a part of this contract, whereby the slave Milly was to be brought back (as she was brought back) into the State of Virginia. Her object was, therefore, to secure her freedom by the deed within the State of Viriginia, after the time should have expired for which she had indented herself, and when she should be found abiding within the State of Virginia.

If, then, this contract had an eye to the State of Virginia for its operation and effect,

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the lex loci ceases to operate. In that case it must, to have its effect, conform to the laws of Virginia. It is insufficient under those laws to effectuate an emancipation, for want of a due recording in the county court, as was decided in the case of Givens v. Mann, 6 Munf. 190, in this court. It is also ineffectual within the Commonwealth of Virginia for another reason. The lex loci is also to be taken subject to the exception, that it is not to be enforced in another country, when it violates some moral duty or the policy of that country, or is not consistent with a positive right secured to a third person or party by the laws of that country in which it is sought to be enforced. In such a case we are told, 'magis jus nostrum quam jus alienum servemus.' " Huberus, tom. 2, lib. 1, tit. 3; 2 Fonblanque, p. 444. "That third party, in this instance, is the Commonwealth of Virginia, and her policy and interests are also to be attended to. These turn the scale against the lex loci in the present instance."

The second or last mentioned position assumed for the plaintiff under the pleas in bar, as it rests mainly if not solely upon the provision of the Act of Congress of March 6, 1820, prohibiting slavery in Upper Louisiana north of thirty-six degrees thirty minutes north latitude, popularly called the Missouri Compromise, that assumption renews the question, for-488*] merly so *zealously debated, as to the validity of the provision in the Act of Congress, and upon the constitutional competency of Congress to establish it.

Before proceeding, however, to examine the validity of the prohibitory provision of the law, it may, so far as the rights involved in this cause are concerned, be remarked, that conceding to that provision the validity of a legitimate exercise of power, still this concession could by no rational interpretation imply the slightest authority for its operation beyond the territorial limits comprised within its terms; much less could there be inferred from it a power to destroy or in any degree to control rights, either of person or property, entirely within the bounds of a distinct and independent sovereignty—rights invested and fortified by the guaranty of that sovereignty. These surely would remain in all their integrity, whatever effect might be ascribed to the prohibition within the limits defined by its language.

But beyond and in defiance of this conclusion, inevitable and undeniable as it appears, upon every principle of justice or sound induction, it has been attempted to convert this prohibitory provision of the Act of 1820 not only into a weapon with which to assail the inherent —the necessarily inherent—powers of independent sovereign governments, but into a mean of forfeiting that equality of rights and immunities which are the birthright or the donative from the Constitution of every citizen of the United States within the length and breadth of the nation. In this attempt, there is asserted a power in Congress, whether from incentives of interest, ignorance, faction, partiality or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all—the power, in fine, of confiscation, in retribution for no offense, or, if for an offense, for that of accidental locality only.

It may be that, with respect to future cases, like the one now before the court, there is felt an assurance of the impotence of such a pretension; still, the fullest conviction of that result can impart to it no claim to forbearance, nor dispense with the duty of antipathy and disgust at its sinister aspect, whenever it may be seen to scowl upon the justice, the order, the tranquillity, and fraternal feeling, which are the surest, nay, the only means, of promoting or preserving the happiness and prosperity of the nation, and which were the great and efficient incentives to the formation of this government.

The power of Congress to impose the prohibition in the 8th section of the Act of 1820 has been advocated upon an attempted construction of the 2d clause of the 3d section *of the 4th article of the Constitution, [*489 which declares that "Congress shall have power to dispose of and to make all needful rules and regulations respecting the territory and other property belonging to the United States."

In the discussions in both houses of Congress, at the time of adopting this 8th section of the Act of 1820, great weight was given to the peculiar language of this clause, viz.: territory and other property belonging to the United States, as going to show that the power of disposing of and regulating, thereby vested in Congress, was restricted to a proprietary interest in the territory or land comprised therein, and did not extend to the personal or political rights of citizens or settlers, inasmuch as this phrase in the Constitution, "territory or other property," identified territory with property, and inasmuch as citizens or persons could not be property, and especially were not property belonging to the United States. And upon every principle of reason or necessity, this power to dispose of and to regulate the territory of the nation could be designed to extend no farther than to its preservation and appropriation to the uses of those to whom it belonged, viz.: the nation. Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution a power to destroy or in any wise to impair the civil and political rights of the citizens of the United States, and much more so the power to establish inequalities amongst those citizens by creating privileges in one class of those citizens, and by the disfranchisement of other portions or classes, by degrading them from the position they previously occupied.

There can exist no rational or natural connection or affinity between a pretension like this and the power vested by the Constitution in Congress with regard to the territories; on the contrary, there is an absolute incongruity between them.

But whatever the power vested in Congress, and whatever the precise subject to which that power extended, it is clear that the power related to a subject appertaining to the United States, and one to be disposed of and regulated for the benefit and under the authority of the United States. Congress was made simply the agent or trustee for the United States, and could not, without a breach of trust and a fraud, appropriate the subject of the trust to any other beneficiary or cestui que trust than the United States, or to the people of the Unit-

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ed States, upon equal grounds, legal or equitable. Congress could not appropriate that subject to any one class or portion of the people, to the exclusion of others, politically and constitutionally equals; but every citizen would, if 490*] anyone *could claim it, have the like rights of purchase, settlement, occupation, or any other right, in the national territory.

Nothing can be more conclusive to show the equality of this with every other right in all the citizens of the United States, and the iniquity and absurdity of the pretension to exclude or to disfranchise a portion of them because they are the owners of slaves, than the fact that the same instrument, which imparts to Congress its very existence and its every function, guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation; and farther, that the only private property which the Constitution has specifically recognized, and has imposed it as a direct obligation both on the States and the Federal Government to protect and enforce, is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.

Can there be imputed to the sages and patriots by whom the Constitution was framed, or can there be detected in the text of that Constitution, or in any rational construction or implication deducible therefrom, a contradiction so palpable as would exist between a pledge to the slaveholder of an equality with his fellow-citizens, and of the formal and solemn assurance for the security and enjoyment of his property, and a warrant given, as it were, uno flatu, to another, to rob him of that property, or to subject him to proscription and disfranchisement for possessing or for endeavoring to retain it? The injustice and extravagance necessarily implied in a supposition like this, cannot be rationally imputed to the patriotic or the honest, or to those who were merely sane.

A conclusion in favor of the prohibitory power in Congress, as asserted in the 8th section of the Act of 1820, has been attempted, as deducible from the precedent of the Ordinance of the Convention of 1787, concerning the cession by Virginia of the territory northwest of the Ohio; the provision in which Ordinance, relative to slavery, it has been attempted to impose upon other and subsequently acquired territory.

The first circumstance which, in the consideration of this provision, impresses itself upon my mind, is its utter futility and want of authority. This court has, in repeated instances, ruled, that whatever may have been the force according to this Ordinance of 1787 at the period of its enactment, its authority and effect ceased, and yielded to the paramount authority of the Constitution, from the period of the adoption of the latter. Such is the principle ruled in the cases of Pollard's Lessee v. Hagan, 3 How. 212; Permoli v. New Orleans, 3 How. 491*] 589; *Strader v. Graham, 10 How. 82. But apart from the superior control of the Constitution, and anterior to the adoption of that instrument, it is obvious that the inhibition in question never had and never could have any legitimate and binding force. We may seek in vain for any power in the convention, either to require or to accept a condition or restriction upon the cession like that insisted on; a condition inconsistent with, and destructive of, the object of the grant. The cession was, as recommended by the old Congress in 1780, made originally and completed in terms to the United States, and for the benefit of the United States, i. e., for the people, all the people, of the United States. The condition subsequently sought to be annexed in 1787 (declared, too, to be perpetual and immutable), being contradictory to the terms and destructive of the purposes of the cession, and after the cession was consummated, and the powers of the ceding party terminated, and the rights of the grantees, the people of the United States, vested, must necessarily, so far, have been ab initio void. With respect to the power of the convention to impose this inhibition, it seems to be pertinent in this place to recur to the opinion of one cotemporary with the establishment of the government, and whose distinguished services in the formation and adoption of our national charter, point him out as the artifex maximus of our federal system. James Madison, in the year 1819, speaking with reference to the prohibitory power claimed by Congress, then threatening the very existence of the Union, remarks of the language of the 2d clause of the 3d section of article 4th of the Constitution, "that it cannot be well extended beyond a power over the territory as property, and the power to make provisions really needful or necessary for the government of settlers, until ripe for admission into the Union."

Again he says, "with respect to what has taken place in the Northwest Territory, it may be observed that the Ordinance giving it its distinctive character on the subject of slaveholding proceeded from the old Congress, acting with the best intentions, but under a charter which contains no shadow of the authority exercised; and it remains to be decided how far the states formed within that Territory, and admitted into the Union, are on a different footing from its other member as to their legislative sovereignty. As to the power of admitting new States into the federal compact, the questions offering themselves are, whether Congress can attach conditions, or the new States concur in conditions, which after admission would abridge or enlarge the constitutional rights of legislation common to other States; whether Congress can, by a compact *with a new State, take power either to [*492 or from itself, or place the new member above or below the equal rank and rights possessed by the others; whether all such stipulations expressed or implied would not be nullities, and be so pronounced when brought to a practical test. It falls within the scope of your inquiry to state the fact, that there was a proposition in the convention to discriminate between the old and the new States by an article in the Constitution. The proposition, happily, was rejected. The effect of such a discrimination is sufficiently evident."[1]

In support of the Ordinance of 1787, there

1.—Letter from James Madison to Robert Walsh, November 27th, 1819, on the subject of the Missouri Compromise.

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may be adduced the semblance at least of obligation deducible from compact, the form of assent or agreement between the grantor and grantee; but this form of similitude, as is justly remarked by Mr. Madison, is rendered null by the absence of power or authority in the contracting parties, and by the more intrinsic and essential defect of incompatibility with the rights and avowed purposes of those parties, and with their relative duties and obligations to others. If, then, with the attendant formalities of assent or compact, the restrictive power claimed was void as to the immediate subject of the Ordinance, how much more unfounded must be the pretension to such a power as derived from that source (viz.: the Ordinance of 1787), with respect to territory acquired by purchase or conquest under the supreme authority of the Constitution—territory not the subject of mere donation, but obtained in the name of all, by the combined efforts and resources of all, and with no condition annexed or pretended.

In conclusion, my opinion is, that the decision of the Circuit Court, upon the law arising upon the several pleas in bar, is correct, but that it is erroneous in having sustained the demurrer to the plea in abatement of the jurisdiction; that for this error the decision of the Circuit Court should be reversed, and the cause remanded to that court, with instructions to abate the action, for the reason set forth and pleaded in the plea in abatement.

In the foregoing examination of this cause, the circumstance that the questions involved therein had been previously adjudged between these parties by the court of the State of Missouri, has not been adverted to; for although it has been ruled by this court, that in instances of concurrent jurisdiction, the court first obtaining possession or cognizance of the controversy should retain and decide it, yet, as in this 493*] case there had *been no plea. either of a former judgment or of autre action pendent, it was thought that the fact of a prior decision, however conclusive it might have been if regularly pleaded, could not be incidentally taken into view.

Mr. Justice **Campbell**:

I concur in the judgment pronounced by the Chief Justice, but the importance of the cause, the expectation and interest it has awakened, and the responsibility involved in its determination, induce me to file a separate opinion.

The case shows that the plaintiff, in the year 1834, was a negro slave in Missouri, the property of Dr. Emerson, a surgeon in the Army of the United States. In 1834, his master took him to the military station at Rock Island, on the border of Illinois, and in 1836 to Fort Snelling, in the present Minnesota, then Wisconsin Territory. While at Fort Snelling, the plaintiff married a slave who was there with her master, and two children have been born of this connection; one during the journey of the family in returning to Missouri, and the other after their return to that State.

Since 1838, the plaintiff and the members of his family have been in Missouri in the condition of slaves. The object of this suit is to establish their freedom. The defendant, who claims the plaintiff and his family, under the title of Dr. Emerson, denied the jurisdiction of the Circuit Court, by the plea that the plaintiff was a negro of African blood, the descendant of Africans who had been imported and sold in this country as slaves, and thus he had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea; a trial was then had upon the general issue, and special pleas to the effect that the plaintiff and his family were slaves belonging to the defendant.

My opinion in this case is not affected by the plea to the jurisdiction, and I shall not discuss the questions it suggests. The claim of the plaintiff to freedom depends upon the effect to be given to his absence from Missouri, in company with his master, in Illinois and Minnesota, and this effect is to be ascertained by a reference to the laws of Missouri. For the trespass complained of was committed upon one claiming to be a freeman and a citizen, in that State, and who had been living for years under the dominion of its laws. And the rule is, that whatever is a justification where the thing is done, must be a justification in the forum where the case is tried.

20 How. St. Tri. 234; Cowp. S. C. 161.

The Constitution of Missouri recognizes slavery as a legal condition, extends guaranties to the masters of slaves, and invites *im- [*494 migrants to introduce them, as property, by a promise of protection. The laws of the State charge the master with the custody of the slave, and provide for the maintenance and security of their relation.

The Federal Constitution and the Acts of Congress provide for the return of escaping slaves within the limits of the Union. No removal of the slave beyond the limits of the State, against the consent of the master, nor residence there in another condition, would be regarded as an effective manumission by the courts of Missouri, upon his return to the State. "Sicut liberis captis status restituitur sic servus domino." Nor can the master emancipate the slave within the State except through the agency of a public authority. The inquiry arises, whether the manumission of the slave is effected by his removal, with the consent of the master, to a community where the law of slavery does not exist, in a case where neither the master nor slave discloses a purpose to remain permanently, and where both parties have continued to maintain their existing relations. What is the law of Missouri in such a case? Similar inquiries have arisen in a great number of suits, and the discussions in the State courts have relieved the subject of much of its difficulty.

12 B. M. Ky. 545; Foster v. Foster, 10 Gratt. Va. 485; 4 Harr. & McH. Md. 295; Scott v. Emerson, 15 Mo. 576; 4 Rich. S. C. 186; 17 Mo. 434; 15 Mo. 596; 5 B. M. 173; 8 B. M. 540, 633; 9 B. M. 565; 5 Leigh, 614; 1 Rand. 15; 18 Pick. 193.

The result of these discussions is, that, in general, the status, or civil and political capacity of a person, is determined, in the first instance, by the law of the domicil where he is born: that the legal effect on persons, arising from the operation of the law of that domicil, is not indelible, but that a new capacity or status may be acquired by a change of domicil.

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That questions of status are closely connected with considerations arising out of the social and political organization of the State where they originate, and each sovereign power must determine them within its own territories.

A large class of cases has been decided upon the second of the propositions above stated, in the Southern and Western courts—cases in which the law of the actual domicil was adjudged to have altered the native condition and status of the slave, although he had never actually possessed the status of freedom in that domicil.

Rankin v. Lydia, 2 A. K. Marsh. 467; Harny v. Decker, Walk. Miss. 36; 4 Mart. 385; 1 Mo. 472; Hunter v. Fulcher, 1 Leigh, 172.

I do not impugn the authority of these cases. No evidence is found in the record to establish 495*] the existence of a domicil *acquired by the master and slave, either in Illinois or Minnesota. The master is described as an officer of the army, who was transferred from one station to another, along the Western frontier, in the line of his duty, and who, after performing the usual tours of service, returned to Missouri; these slaves returned to Missouri with him, and had been there for near fifteen years, in that condition, when this suit was instituted. But absence, in the performance of military duty, without more, is a fact of no importance in determining a question of a change of domicil. Questions of that kind depend upon acts and intentions, and are ascertained from motives, pursuits, the condition of the family, and fortune of the party, and no change will be inferred, unless evidence shows that one domicil was abandoned, and there was an intention to acquire another.

11 L. & Eq. 6; 6 Exch. 217; 6 M. & W. 511; 2 Curt. Ecc. 368.

The cases first cited deny the authority of a foreign law to dissolve relations which have been legally contracted in the State where the parties are, and have their actual domicil—relations which were never questioned during their absence from that State—relations which are consistent with the native capacity and condition of the respective parties, and with the policy of the State where they reside; but which relations were inconsistent with the policy or laws of the State or Territory within which they had been for a time, and from which they had returned, with these relations undisturbed. It is upon the assumption, that the law of Illinois or Minnesota was indelibly impressed upon the slave, and its consequences carried into Missouri, that the claim of the plaintiff depends. The importance of the case entitles the doctrine on which it rests to a careful examination.

It will be conceded, that in countries where no law or regulation prevails, opposed to the existence and consequences of slavery, persons who are born in that condition in a foreign State, would not be liberated by the accident of their introgression. The relation of domestic slavery is recognized in the law of nations, and the interference of the authorities of one State with the rights of a master belonging to another, without a valid cause is a violation of that law.

Wheat. Law of Na. 724; 5 Stats. at L. 601; Calh. Sp. 378; Reports of the Com. U. S. and G. B. 187, 238, 241.

The public law of Europe formerly permitted a master to reclaim his bondsman, within a limited period, wherever he could find him, and one of the capitularies of Charlemagne abolishes the rule of prescription. He directs, "that wheresoever, within the bounds of Italy, either the runaway slave of the King, or of *the church, or of any other man, shall [*496 be found by his master, he shall be restored without any bar or prescription of years; yet upon the provision that the master be a Frank or German, or of any other nation (foreign); but if he be a Lombard or a Roman, he shall acquire or receive his slaves by that law which has been established from ancient times among them." Without referring for precedents abroad, or to the colonial history, for similar instances, the history of the Confederation and Union affords evidence to attest the existence of this ancient law. In 1783, Congress directed General Washington to continue his remonstrances to the commander of the British forces respecting the permitting negroes belonging to the citizens of these States to leave New York, and to insist upon the discontinuance of that measure. In 1788, the resident minister of the United States at Madrid was instructed to obtain from the Spanish Crown orders to its governors in Louisiana and Florida, "to permit and facilitate the apprehension of fugitive slaves from the States, promising that the States would observe the like conduct respecting fugitives from Spanish subjects." The committee that made the report of this resolution consisted of Hamilton, Madison and Sedgwick (2 Hamilton's Works, 473); and the clause in the Federal Constitution providing for the restoration of fugitive slaves is a recognition of this ancient right, and of the principle that a change of place does not effect a change of condition. The diminution of the power of a master to reclaim his escaping bondsman in Europe commenced in the enactment of laws of prescription in favor of privileged communes. Bremen, Spire, Worms, Vienna, and Ratisbon, in Germany; Carcassonne, Béziers, Toulouse, and Paris, in France, acquired privileges on this subject at an early period. The Ordinance of William the Conqueror, that a residence of any of the servile population of England, for a year and a day, without being claimed, in any city, burgh, walled town, or castle of the King, should entitle them to perpetual liberty, is a specimen of these laws.

The earliest publicist who has discussed this subject is Bodin, a jurist of the sixteenth century, whose work was quoted in the early discussions of the courts in France and England on this subject. He says: "In France, although there be some remembrance of old servitude, yet it is not lawful here to make a slave or to buy any one of others, in so much as the slaves of strangers, as soon as they set their foot within France, become frank and free, as was determined by an old decree of the court of Paris against an ambassador of Spain, who had brought a slave with him into France." He states another case, which arose in the City of Toulouse, of a Genoese merchant, who had *carried a slave into that city on his [*497 voyage from Spain; and when the matter was brought before the magistrates, the "procureur of the city, out of the records, showed certain ancient privileges given unto them of Toul-

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cause, wherein it was granted that slaves, so soon as they should come into Toulouse, should be free." These cases were cited with much approbation in the discussion of the claims of the West India slaves of Verdelin for freedom, in 1738, before the judges in admiralty (15 Causes Celébrés, p. 1; 2 Masse Droit Com. sec. 58), and were reproduced before Lord Mansfield, in the cause of Somersett, in 1772. Of the cases cited by Bodin, it is to be observed that Charles V. of France exempted all the inhabitants of Paris from serfdom, or other feudal incapacities, in 1371, and this was confirmed by several of his successors (3 Dulaire Hist. de Par. 546; Broud. Cout. de Par. 21), and the Ordinance of Toulouse is preserved as follows: "Civitas Tholosana fuit et erit sine fine libera, adeo ut servi et ancillæ sclavi et sclavæ, dominos habentes, cum rebus vel sine rebus suis, ad Tholosam vel infrâ terminos extra urbem terminatos accedentes acquirant libertatem."

Hist. de Langue, tome 3, p. 69; Ibid. 6, p. 8; Loysel Inst. b. 1. sec. 6.

The decisions were made upon special ordinances, or charters, which contained positive prohibitions of slavery, and where liberty had been granted as a privilege; and the history of Paris furnishes but little support for the boast that she was a "sacro sancta civitas," where liberty always had an asylum, or for the "self-complacent rhapsodies" of the French advocates in the case of Verdelin, which amused the grave lawyers who argued the case of Somersett. The case of Verdelin was decided upon a special ordinance, which prescribed the conditions on which West India slaves might be introduced into France, and which had been disregarded by the master.

The case of Somersett was that of a Virginia slave carried to England by his master in 1770, and who remained there two years. For some cause, he was confined on a vessel destined to Jamaica, where he was to be sold. Lord Mansfield, upon a return to a habeas corpus, states the question involved. "Here, the person of the slave himself," he says, "is the immediate subject of inquiry. Can any dominion, authority or coercion be exercised in this country, according to the American laws?" He answers: "The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of England." Again, he says: "The return states that the slave departed, and refused to serve; whereupon, he was kept to be sold abroad." "So 498*] high *an act of dominion must be recognized by the law of the country where it is used. The power of the master over his slave has been extremely different in different countries." "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, are erased from the memory. It is so odious, that nothing can be suffered to support it but positive law." That there is a difference in the systems of States, which recognize and which do not recognize the institution of slavery, cannot be disguised. Constitutional law, punitive law, police, domestic economy, industrial pursuits, and amusements, the modes of thinking and of belief of the population of the respective communities, all show the profound influence exerted upon society by this single arrangement. This influence was discovered in the Federal Convention, in the deliberations on the plan of the Constitution. Mr. Madison observed, "that the States were divided into different interests, not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concur in forming the great division of interests in the United States."

The question to be raised with the opinion of Lord Mansfield, therefore, is not in respect to the incongruity of the two systems, but whether slavery was absolutely contrary to the law of England; for if it was so, clearly, the American laws could not operate there. Historical research ascertains that at the date of the Conquest the rural population of England were generally in a servile condition, and under various names, denoting slight variances in condition, they were sold with the land like cattle, and were a part of its living money. Traces of the existence of African slaves are to be found in the early chronicles. Parliament, in the time of Richard II., and also of Henry VIII., refused to adopt a general law of emancipation. Acts of emancipation by the last-named monarch and by Elizabeth are preserved.

The African slave trade had been carried on, under the unbounded protection of the Crown, for near two centuries, when the case of Somersett was heard, and no motion for its suppression had ever been submitted to Parliament, while it was forced upon and maintained in unwilling colonies by the Parliament and Crown of England at that moment. Fifteen thousand negro slaves were then living in that island, where they had been introduced under the counsel of the most illustrious jurists of the realm, and such slaves had been publicly *sold [*499 for near a century in the markets of London. In the northern part of the kingdom of Great Britain there existed a class of from 30,000 to 40,000 persons of whom the Parliament said, in 1775 (15 George III, chap. 28), "many colliers, coal heavers, and salters, are in a state of slavery or bondage, bound to the collieries and salt works, where they work for life, transferable with the collieries and salt works when their original masters have no use for them; and whereas the emancipating or setting free the colliers, coal heavers, and salters, in Scotland, who are now in a state of servitude, gradually and upon reasonable conditions, would be the means of increasing the number of colliers, coal heavers, and salters, to the great benefit of the public, without doing any injury to the present masters, and would remove the reproach of allowing such a state of servitude to exist in a free country," etc.; and again, in 1799, "they declare that many colliers and coal heavers still continue in a state of bondage." No statute, from the Conquest till the 15 George III., had been passed upon the subject of personal slavery. These facts have led the most eminent civilian of England to question the accuracy of this judgment, and to insinuate that in this judgment the offense of ampliare jurisdiction-

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em by private authority was committed by the eminent magistrate who pronounced it.

This sentence is distinguishable from those cited from the French courts in this: that there positive prohibitions existed against slavery, and the right to freedom was conferred on the immigrant slave by positive law; whereas here the consequences of slavery merely—that is, the public policy—were found to be contrary to the law of slavery. The case of The Slave Grace, 2 Hagg. 94, with four others, came before Lord Stowell in 1827, by appeals from the West India vice admiralty courts. They were cases of slaves who had returned to those islands, after a residence in Great Britain, and where the claim to freedom was first presented in the colonial forum. The learned judge in that case said: "This suit fails in its foundation. She (Grace) was not a free person; no injury is done her by her continuance in slavery, and she has no pretensions to any other station than that which was enjoyed by every slave of a family. If she depends upon such freedom conveyed by a mere residence in England, she complains of a violation of right which she possessed no longer than whilst she resided in England, but which totally expired when that residence ceased, and she was imported into Antigua."

The decision of Lord Mansfield was, "that so high an act of dominion" as the master exercises over his slave, in sending him abroad for sale, could not be exercised in England 500*] *under the American laws, and contrary to the spirit of their own.

The decision of Lord Stowell is, that the authority of the English laws terminated when the slave departed from England. That the laws of England were not imported into Antigua, with the slave, upon her return, and that the colonial forum had no warrant for applying a foreign code to dissolve relations which had existed between persons belonging to that island, and which were legal according to its own system. There is no distinguishable difference between the case before us and that determined in the admiralty of Great Britain.

The complaint here, in my opinion, amounts to this: that the judicial tribunals of Missouri have not denounced as odious the Constitution and laws under which they are organized, and have not superseded them on their own private authority, for the purpose of applying the laws of Illinois, or those passed by Congress for Minnesota, in their stead. The 8th section of the Act of Congress of the 6th of March, 1820 (3 Stat. at L. 545), entitled, "An Act to authorize the people of Missouri to form a State government," etc., etc., is referred to as affording the authority to this court to pronounce the sentence which the Supreme Court of Missouri felt themselves constrained to refuse. That section of the Act prohibits slavery in the district of country west of the Mississippi, north of thirty-six degrees thirty minutes north latitude, which belonged to the ancient Province of Louisiana, not included in Missouri.

It is a settled doctrine of this court, that the Federal Government can exercise no power over the subject of slavery within the States, nor control the intermigration of slaves, other than fugitives, among the States. Nor can that government affect the duration of slavery within the States, other than by a legislation over the foreign slave trade. The power of Congress to adopt the section of the Act above cited must, therefore, depend upon some condition of the Territories which distinguishes them from States, and subjects them to a control more extended. The 3d section of the 4th article of the Constitution is referred to as the only and all-sufficient grant to support this claim. It is, that "new States may be admitted by the Congress to this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property *belonging to the United States; and [*501 nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

It is conceded, in the decisions of this court, that Congress may secure the rights of the United States in the public domain, provide for the sale or lease of any part of it, and establish the validity of the titles of the purchasers, and may organize territorial governments, with powers of legislation.

3 How. 212; 12 How. 1; 1 Pet. 511; 13 Pet. 436; 16 How. 164.

But the recognition of a plenary power in Congress to dispose of the public domain, or to organize a government over it, does not imply a corresponding authority to determine the internal polity, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated. A supreme power to make needful rules respecting the public domain, and a similar power of framing laws to operate upon persons and things within the territorial limits where it lies, are distinguished by broad lines of demarcation in American history. This court has assisted us to define them. In Johnson v. McIntosh, 8 Wheat. 543-605, they say: "According to the theory of the British Constitution, all vacant lands are vested in the Crown; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative.

All the lands we hold were originally granted by the Crown, and the establishment of a royal government has never been considered as impairing its right to grant lands within the chartered limits of such colony."

And the British Parliament did claim a supremacy of legislation co-extensive with the absoluteness of the dominion of the sovereign over the crown lands. The American doctrine, to the contrary, is embodied in two brief resolutions of the people of Pennsylvania, in 1774: 1st. "That the inhabitants of these Colonies are entitled to the same rights and liberties, within the Colonies, that the subjects born in England are entitled within the realm." 2d. "That the power assumed by Parliament to bind the people of these Colonies by statutes, in all cases whatever, is unconstitutional, and therefore the source of these unhappy difficulties." The Congress of 1774, in their statement of rights and grievances, affirm "a free and exclusive power of legislation" in their several provincial Legislatures, "in all cases of taxa-

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tion and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed." 1 Jour. Cong. 32.

The unanimous consent of the people of the 502*] Colonies, then, *to the power of their sovereign, "to dispose of and make all needful rules and regulations respecting the territory" of the Crown, in 1774, was deemed by them as entirely consistent with opposition, remonstrance, the renunciation of allegiance, and proclamation of civil war, in preference to submission to his claim of supreme power in the Territories.

I pass now to the evidence afforded during the Revolution and Confederation. The American Revolution was not a social revolution. It did not alter the domestic condition or capacity of persons within the Colonies, nor was it designed to disturb the domestic relations existing among them. It was a political revolution, by which thirteen dependent Colonies became thirteen independent States. "The Declaration of Independence was not," says Justice Chase, "a declaration that the united Colonies jointly, in a collective capacity, were independent States, etc., etc., etc., but that each of them was a sovereign and independent State; that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power on earth."

3 Dall. 199; 4 Cranch, 212.

These sovereign and independent States, being united as a Confederation, by various public acts of cession, became jointly interested in territory, and concerned to dispose of and make all needful rules and regulations respecting it. It is a conclusion not open to discussion in this court, "that there was no territory within the (original) United States, that was claimed by them in any other right than that of some of the confederate States." Harcourt v. Gaillard, 12 Wheat. 523. "The question whether the vacant lands within the United States," says Chief Justice Marshall, "became joint property, or belonged to the separate States, was a momentous question, which threatened to shake the American Confederacy to its foundations. This important and dangerous question has been compromised, and the compromise is not now to be contested." 6 Cranch, 87.

The cessions of the States to the Confederation were made on the condition that the territory ceded should be laid out and formed into distinct republican States which would be admitted as members to the Federal Union, having the same rights of sovereignty, freedom and independence, as the other States. The first effort to fulfill this trust was made in 1785, by the offer of a charter or compact to the inhabitants who might come to occupy the land.

Those inhabitants were to form for themselves temporary state governments, founded on the constitutions of any of the States, but to be alterable at the will of their Legislature; and 503*] *permanent governments were to succeed these, whenever the population became sufficiently numerous to authorize the State to enter the Confederacy; and Congress assumed to obtain powers from the States to facilitate this object. Neither in the deeds of cession of the States, nor in this compact, was a sovereign power for Congress to govern the Territories asserted. Congress retained power, by this Act, "to dispose of and to make rules and regulations respecting the public domain," but submitted to the people to organize a government harmonious with those of the confederate States.

The next stage in the progress of colonial government was the adoption of the Ordinance of 1787, by eight States, in which the plan of a territorial government, established by Act of Congress, is first seen. This was adopted while the Federal Convention to form the Constitution was sitting. The plan placed the government in the hands of a governor, secretary, and judges, appointed by Congress, and conferred power on them to select suitable laws from the codes of the States, until the population should equal 5,000. A legislative council, elected by the people, was then to be admitted to a share of the legislative authority, under the supervision of Congress; and States were to be formed whenever the number of the population should authorize the measure.

This Ordinance was addressed to the inhabitants as a fundamental compact, and six of its articles define the conditions to be observed in their Constitution and laws. These conditions were designed to fulfill the trust in the agreements of cession, that the States to be formed of the ceded Territories should be "distinct republican States." This Ordinance was submitted to Virginia in 1788, and the 5th article, embodying as it does a summary of the entire Act, was specifically ratified and confirmed by that State. This was an incorporation of the Ordinance into her Act of Cession. It was conceded, in the argument, that the authority of Congress was not adequate to the enactment of the ordinance, and that it cannot be supported upon the Articles of Confederation. To a part of the engagements, the assent of nine states was required, and for another portion no provision had been made in those Articles. Mr. Madison said, in a writing nearly contemporary but before the Confirmatory Act of Virginia, "Congress have proceeded to form new states, to erect temporary governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy; all this has been done, and done without the least color of constitutional authority." Federalist, No. 38. Richard Henry Lee, one of the committee who reported the Ordinance to Congress, *transmitted it to [*504 General Washington (15th July, 1787), saying: "It seemed necessary, for the security of property among uninformed and perhaps licentious people, as the greater part of those who go there are, that a strong-toned government should exist, and the rights of property be clearly defined." The consent of all the States represented in Congress, the consent of the Legislature of Virginia, the consent of the inhabitants of the territory, all concur to support the authority of this enactment. It is apparent, in the frame of the Constitution, that the Convention recognized its validity, and adjusted parts of their work with reference to it. The authority to admit new States into the Union, the omission to provide distinctly for territorial governments, and the clause limiting the foreign slave trade to States then existing, which might not prohibit it, show that they regarded this territory as provided with a government and organized permanently with a restriction

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on the subject of slavery. Justice Chase, in the opinion already cited, says of the government before, and it is in some measure true during the Confederation, "that the powers of Congress originated from necessity, and arose out of and were only limited by events, or, in other words, they were revolutionary in their very nature. Their extent depended upon the exigencies and necessities of public affairs;" and there is only one rule of construction, in regard to the acts done, which will fully support them, viz.: that the powers actually exercised were rightfully exercised, wherever they were supported by the implied sanction of the State Legislatures, and by the ratifications of the people.

The clauses in the 3d section of the 4th article of the Constitution, relative to the admission of new States, and the disposal and regulation of the territory of the United States, were adopted without debate in the Convention.

There was a warm discussion on the clauses that relate to the subdivision of the States, and the reservation of the claims of the United States and each of the States from any prejudice. The Maryland members revived the controversy in regard to the Crown lands of the Southwest. There was nothing to indicate any reference to a government of territories not included within the limits of the Union; and the whole discussion demonstrates that the Convention was consciously dealing with a Territory whose condition, as to government, had been arranged by a fundamental and unalterable compact.

An examination of this clause of the Constitution, by the light of the circumstances in which the Convention was placed, will aid us to determine its significance. The first clause is, "that new States may be admitted by the 505*] Congress into this *Union." The condition of Kentucky, Vermont, Rhode Island and the new States to be formed in the Northwest, suggested this, as a necessary addition to the powers of Congress. The next clause, providing for the subdivision of States, and the parties to consent to such an alteration, was required, by the plans on foot, for changes in Massachusetts, New York, Pennsylvania, North Carolina and Georgia. The clause which enables Congress to dispose of and make regulations respecting the public domain, was demanded by the exigencies of an exhausted treasury and a disordered finance, for relief by sales, and the preparation for sales, of the public lands: and the last clause, that nothing in the Constitution should prejudice the claims of the United States or a particular State, was to quiet the jealousy and irritation of those who had claimed for the United States all the unappropriated lands. I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an enunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress. This disturbing element of the Union entirely escaped the apprehensive provisions of Samuel Adams, George Clinton, Luther Martin, and Patrick Henry; and, in respect to dangers from power vested in a central government over distant settlements, colonies, or provinces, their instincts were always alive. Not a word escaped them, to warn their countrymen that here was a power to threaten the landmarks of this federative Union, and with them the safeguards of popular and constitutional liberty; or that under this Article there might be introduced, on our soil, a single government over a vast extent of country—a government foreign to the persons over whom it might be exercised, and capable of binding those not represented by statutes, in all cases whatever. I find nothing to authorize these enormous pretensions, nothing in the expositions of the friends of the Constitution, nothing in the expressions of alarm by its opponents—expressions which have since been developed as prophecies. Every portion of the United States was then provided with a municipal government, which this Constitution was not designed to supersede, but merely to modify as to its conditions.

The compacts of cession by North Carolina and Georgia, are subsequent to the Constitution. They adopt the Ordinance of 1787, except the clause respecting slavery. But the precautionary repudiation of that article forms an argument quite as satisfactory to the advocates for federal power, as its introduction *would have done. The refusal of a [*506 power to Congress to legislate in one place, seems to justify the seizure of the same power when another place for its exercise is found.

This proceeds from a radical error, which lies at the foundation of much of this discussion. It is, that the Federal Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error, if no amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th Amendment, is, that the powers of the Federal Government are limited to the grants of the Constitution.

Before the cession of Georgia was made, Congress asserted rights, in respect to a part of her territory, which require a passing notice. In 1798 and 1800, Acts for the settlement of limits with Georgia, and to establish a government in the Mississippi Territory were adopted. A territorial government was organized, between the Chattahoochee and Mississippi Rivers. This was within the limits of Georgia. These Acts dismembered Georgia. They established a separate government on her soil, while they rather derisively professed, "that the establishment of that government shall in no respect impair the rights of the State of Georgia, either to the jurisdiction or soil of the territory." The Constitution provided that the importation of such persons as any of the existing States shall think proper to admit, shall not be prohibited by Congress before 1808. By these enactments, a prohibition was placed upon the importation of slaves into Georgia, although her Legislature had made none.

This court have repeatedly affirmed the paramount claim of Georgia to this territory. They have denied the existence of any title in the United States. 6 Cranch. 87; 12 Wheat. 523; 3 How. 212; 13 How. 381. Yet these Acts were cited in the argument as precedents to show the power of Congress in the Territories. These Statutes were the occasion of earnest expostulation and bitter remonstrance on the part

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of the authorities of the State, and the memory of their injustice and wrong remained long after the legal settlement of the controversy by the compact of 1802. A reference to these Acts terminates what I have to say upon the constitutions of the territory within the original limits of the United States. These constitutions were framed by the concurrence of the States making the cessions, and Congress, and were tendered to immigrants who might be attracted to the vacant territory. The legislative powers of the officers of this government were limited to the selection of laws from the States; and provision was made for the introduction of popular institutions, and their emancipation 507*] *from federal control, whenever a suitable opportunity occurred. The limited reservation of legislative power to the officers of the Federal Government was excused on the plea of necessity: and the probability is, that the clauses respecting slavery embody some compromise among the statesmen of that time; beyond these, the distinguishing features of the system which the patriots of the Revolution had claimed as their birthright, from Great Britain, predominated in them.

The acquisition of Louisiana, in 1803, introduced another system into the United States. This vast Province was ceded by Napoleon, and its population had always been accustomed to a viceroyal government, appointed by the Crowns of France or Spain. To establish a government constituted on similar principles, and with like conditions, was not an unnatural proceeding.

But there was a great difficulty in finding constitutional authority for the measure. The 3d section of the 4th article of the Constitution, was introduced into the Constitution on the motion of Mr. Gouverneur Morris. In 1803, he was appealed to for information in regard to its meaning. He answers: "I am very certain I had it not in contemplation to insert a decree de coercendo imperio in the Constitution of America. * * * I knew then, as well as I do now, that all North America must at length be annexed to us. Happy, indeed, if the lust of dominion stop here. It would, therefore, have been perfectly Utopian to oppose a paper restriction to the violence of popular sentiment, in a popular government." 3 Mor. Writ. 185. A few days later, he makes another reply to his correspondents. "I perceive," he says, "I mistook the drift of your inquiry, which substantially is, whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion, they cannot. I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the 3d section of the 4th article, I went as far as circumstances would permit, to establish the exclusion. Candor obliges me to add my belief, that had it been more pointedly expressed, a strong opposition would have been made." 3 Mor. Writ. 192. The first territorial government of Louisiana was an Imperial one, founded upon a French or Spanish model. For a time, the Governor, judges, legislative council, marshal, secretary, and officers of the militia, were appointed by the President.[1]

*Besides these anomalous arrange- [*508
ments, the acquisition gave rise to jealous inquiries, as to the influence it would exert in determining the men and States that were to be "the arbiters and the rulers" of the destinies of the Union: and unconstitutional opinions, having for their aim to promote sectional divisions, were announced and developed. "Something," said an eminent statesman, "something has suggested to the members of Congress the policy of acquiring geographical majorities. This is a very direct step towards disunion, for it must foster the geographical enmities by which alone it can be effected. This something must be a contemplation of particular advantages to be derived from such majorities; and is it not notorious that they consist of nothing else but usurpations over persons and property, by which they can regulate the internal wealth and prosperity of States and individuals?"

The most dangerous of the efforts to employ geographical political power, to perpetuate a geographical preponderance in the Union, is to be found in the deliberations upon the Act of the 6th of March, 1820, before cited. The attempt consisted of a proposal to exclude Missouri from a place in the Union, unless her people would adopt a constitution containing a prohibition upon the subject of slavery, according to a prescription of Congress. The sentiment is now general, if not universal, that Congress had no constitutional power to impose the restriction. This was frankly admitted at the bar in the course of this argument. The principles which this court have pronounced condemn the pretension then made on behalf of the Legislative Department. In Groves v. Slaughter, 15 Pet., the Chief Justice said: "The power over this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits." Justice McLean said: "The Constitution of the United States operates alike in all the States, and one State has the same power over the subject of slavery as every other State." In Pollard's Lessee v. Hagan, 3 How. 212, the court say: "The United States have no constitutional capacity to exercise municipal *jurisdiction, sovereignty, or em- [*509
inent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact."

This is a necessary consequence, resulting from the nature of the Federal Constitution,

1.—Mr. Varnum said: "The bill provided such a government as had never been known in the United States." Mr. Eustis: "The government laid down in this bill is certainly a new thing in the United States." Mr. Lucas: "It has been remarked, that this bill establishes elementary principles never previously introduced in the government of any territory of the United States. Granting the truth of this observation," etc. etc. Mr. Macon: "My first objection to the principle contained in this section is, that it establishes a species of government unknown to the United States." Mr. Boyle: "Were the President an angel instead of a man, I would not clothe him with this power." Mr. G. W. Campbell: "On examining the section, it will appear that it really establishes a complete despotism." Mr. Sloan: "Can anything be more repugnant to the principles of just government? Can anything be more despotic?—Annals of Congress, 1803-'4.

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which is a federal compact among the States, establishing a limited government, with powers delegated by the people of distinct and independent communities, who reserved to their state governments, and to themselves, the powers they did not grant. This claim to impose a restriction upon the people of Missouri involved a denial of the constitutional relations between the people of the States and Congress, and affirmed a concurrent right for the latter, with their people to constitute the social and political system of the new States. A successful maintenance of this claim would have altered the basis of the Constitution. The new States would have become members of a Union defined in part by the Constitution and in part by Congress. They would not have been admitted to "this Union." Their sovereignty would have been restricted by Congress as well as the Constitution. The demand was unconstitutional and subversive, but was prosecuted with an energy, and aroused such animosities among the people, that patriots, whose confidence had not failed during the Revolution, began to despair for the Constitution.[1] Amid the utmost violence of this extraordinary contest, the expedient contained in the 8th section of this Act was proposed, to moderate it, and to avert the catastrophe it menaced. It was not seriously debated, nor were its constitutional aspects severely scrutinized by Congress. For the first time, in the history of the country, has its operation been embodied in a case at law, and been presented to this court for their judgment. The inquiry is, whether there are conditions in the constitutions of the Territories which subject the capacity and status of persons within their limits to the direct action of Congress. Can Congress determine the condition and status of persons who inhabit the Territories?

The Constitution permits Congress to dispose of and to make all needful rules and regulations respecting the territory of other property belonging to the United States. This power applies as well to territory belonging to the United States within the States, as beyond them. It comprehends all the public domain, wherever it may be. The argument is, that 510*] *the power to make "all needful rules and regulations" "is a power of legislation," "a full legislative power;" "that it includes all subjects of legislation in the territory," and is without any limitations, except the positive prohibitions which affect all the powers of Congress. Congress may then regulate or prohibit slavery upon the public domain within the new States, and such a prohibition would permanently affect the capacity of a slave, whose master might carry him to it. And why not? Because no power has been conferred on Congress. This is a conclusion universally admitted. But the power to "make rules and regulations respecting the territory" is not restrained by State lines, nor are there any constitutional prohibitions upon its exercise in the domain of the United States within the States; and whatever rules and regulations respecting territory Congress may constitutionally make, are supreme and are not dependent on the situs of "the territory."

The author of the Farmer's Letters, so famous in the ante-revolutionary history, thus states the argument made by the American loyalists in favor of the claim of the British Parliament to legislate in all cases whatever over the Colonies: "It has been urged with great vehemence against us," he says, "and it seems to be thought their fort, by our adversaries, that a power of regulation is a power of legislation; and a power of legislation, if constitutional, must be universal and supreme, in the utmost sense of the word. It is, therefore, concluded that the Colonies, by acknowledging the power of regulation, acknowledged every other power."

This sophism imposed upon a portion of the patriots of that day. Chief Justice Marshall, in his Life of Washington, says "that many of the best informed men in Massachusetts had, perhaps, adopted the opinion of the parliamentary right of internal government over the Colonies;" "that the English statute book furnishes many instances of its exercise:" "that in no case recollected, was their authority openly controverted;" and "that the General Court of Massachusetts, on a late occasion, openly recognized the principle."

Marsh. Wash. Vol. II. pp. 75, 76.

But the more eminent men of Massachusetts rejected it; and another patriot of the time employs the instance to warn us of "the stealth with which oppression approaches," and "the enormities towards which precedents travel." And the people of the United States, as we have seen, appealed to the last argument, rather than acquiesce in their authority. Could it have been the purpose of Washington and his illustrious associates, by the use of ambiguous, equivocal, and expansive *words, [*511 such as "rules," "regulations," "territory," to re-establish in the Constitution of their country that fort which had been prostrated amid the toils and with the sufferings and sacrifices of seven years of war? Are these words to be understood as the Norths, the Grenvilles, Hillsboroughs, Hutchinsons, and Dunmores—in a word, as George III. would have understood them—or are we to look for their interpretation to Patrick Henry or Samuel Adams, to Jefferson, and Jay, and Dickinson; to the sage Franklin, or to Hamilton, who from his early manhood was engaged in combating British constructions of such words? We know that the resolution of Congress of 1780 contemplated that the new States to be formed under their recommendation were to have the same rights of sovereignty, freedom and independence, as the old. That every resolution, cession, compact and ordinance, of the States, observed the same liberal principle. That the Union of the Constitution is a Union formed of equal States; and that new States, when admitted, were to enter "this Union." Had another Union been proposed in "any pointed manner," it would have encountered not only "strong" but successful opposition. The disunion between Great Britain and her colonies originated in the antipathy of the latter to "rules and regulations" made by a remote power respecting their internal policy. In forming the

1.—Mr. Jefferson wrote: "The Missouri question is the most portentous one that ever threatened our Union. In the gloomiest moments of the Revolutionary War, I never had any apprehension equal to that I feel from this source."

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Constitution, this fact was ever present in the minds of its authors. The people were assured by their most trusted statesmen "that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic," and "that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere." Still, this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the 9th and 10th amendments to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument, and to bind the authorities, state and federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore, that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution? 512*] When *the questions that came to the surface upon the acquisition of Louisiana were presented to the mind of Jefferson, he wrote: "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the Federal Government, and gives the powers necessary to carry them into execution." The publication of the journals of the Federal Convention in 1819, of the debates reported by Mr. Madison in 1840, and the mass of private correspondence of the early statesmen before and since, enable us to approach the discussion of the aims of those who made the Constitution, with some insight and confidence.

I have endeavored, with the assistance of these, to find a solution for the grave and difficult question involved in this inquiry. My opinion is, that the claim for Congress of supreme power in the Territories, under the grant to "dispose of and make all needful rules and regulations respecting territory," is not supported by the historical evidence drawn from the Revolution, the Confederation, or the deliberations which preceded the ratifications of the Federal Constitution. The Ordinance of 1787 depended upon the action of the Congress of the Confederation, the assent of the State of Virginia, and the acquiescence of the people who recognized the validity of that plea of necessity, which supported so many of the Acts of the governments of that time; and the Federal Government accepted the Ordinance as a recognized and valid engagement of the Confederation.

In referring to the precedents of 1798 and 1800, I find the Constitution was plainly violated by the invasion of the rights of a sovereign State, both of soil and jurisdiction; and in reference to that of 1804, the wisest statesmen protested against it, and the President more than doubted its policy and the power of the government.

Mr. John Quincy Adams, at a later period, says of the last Act, "that the President found Congress mounted to the pitch of passing those acts, without inquiring where they acquired the authority, and he conquered his own scruples as they had done theirs." But this court cannot undertake for themselves the same conquest. They acknowledge that our peculiar *security is in the possession of a writ- [*513 ten Constitution, and they cannot make it blank paper by construction.

They look to its delineation of the operations of the Federal Government, and they must not exceed the limits it marks out, in their administration. The court have said "that Congress cannot exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, beyond what has been delegated." We are then to find the authority for supreme power in the Territories in the Constitution. What are the limits upon the operations of a government invested with legislative, executive and judiciary powers, and charged with the power to dispose of and to make all needful rules and regulations respecting a vast public domain? The feudal system would have recognized the claim made on behalf of the Federal Government for supreme power over persons and things in the Territories, as an incident to this title—that is, the title to dispose of and make rules and regulations respecting it.

The Norman lawyers of William the Conqueror would have yielded an implicit assent to the doctrine, that a supreme sovereignty is an inseparable incident to a grant, to dispose of and to make all needful rules and regulations respecting the public domain. But an American patriot, in contrasting the European and American systems, may affirm, "that European sovereigns give lands to their colonists, but reserve to themselves a power to control their property, liberty and privileges; but the American Government sells the lands belonging to the people of the several States (i. e., United States) to their citizens, who are already in the possession of personal and political rights, which the government did not give, and cannot take away." And the advocates for government sovereignty in the Territories have been compelled to abate a portion of the pretensions originally made in its behalf, and to admit that the constitutional prohibitions upon Congress operate in the Territories. But a constitutional prohibition is not requisite to ascertain a limitation upon the authority of the several departments of the Federal Government. Nor are the States or people restrained by any enumeration or definition of their rights or liberties.

To impair or diminish either, the Department must produce an authority from the peo-

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ple themselves, in their Constitution; and as we have seen, a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and things upon it. But as this is "thought their fort" by our adversaries, I propose a more definite examination of it. We have seen, Con-
514*] gress does not *dispose of or make rules and regulations respecting domain belonging to themselves, but belonging to the United States.

These conferred on their mandatory, Congress, authority to dispose of the territory which belonged to them in common; and to accomplish that object beneficially and effectually, they gave an authority to make suitable rules and regulations respecting it. When the power of disposition is fulfilled, the authority to make rules and regulations terminates, for it attaches only upon territory "belonging to the United States."

Consequently, the power to make rules and regulations, from the nature of the subject, is restricted to such administrative and conservatory Acts as are needful for the preservation of the public domain, and its preparation for sale or disposition. The system of land surveys; the reservations for schools, internal improvements, military sites, and public buildings; the pre-emption claims of settlers; the establishment of land offices and boards of inquiry, to determine the validity of land titles; the modes of entry and sale, and of conferring titles; the protection of the lands from trespass and waste; the partition of the public domain into municipal subdivisions, having reference to the erection of territorial governments and States; and perhaps the selection, under their authority, of suitable laws for the protection of the settlers, until there may be a sufficient number of them to form a self-sustaining municipal government—these important rules and regulations will sufficiently illustrate the scope and operation of the 3d section of the 4th article of the Constitution. But this clause in the Constitution does not exhaust the powers of Congress within the territorial subdivisions, or over the persons who inhabit them. Congress may exercise there all the powers of government which belong to them as the Legislature of the United States, of which these Territories make a part. Loughborough v. Blake, 5 Wheat. 317. Thus the laws of taxation, for the regulation of foreign, federal and Indian commerce, and so for the abolition of the slave trade, for the protection of copyrights and inventions, for the establishment of postal communication and courts of justice, and for the punishment of crimes, are as operative there as within the States. I admit that to mark the bounds for the jurisdiction of the Government of the United States within the Territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and, in a great measure is beyond the cognizance of the Judiciary Department of that government. How much municipal power may be exercised by the people of the Territory, before their admission to the Union, the courts of justice
515*] cannot decide. This must depend, for *the most part, on political considerations, which cannot enter into the determination of a case of law or equity. I do not feel called upon to define the jurisdiction of Congress. It is sufficient for the decision of this case to ascertain whether the residuary sovereignty of the States or people has been invaded by the 8th section of the Act of 6th March, 1820, I have cited, in so far as it concerns the capacity and status of persons in the condition and circumstances of the plaintiff and his family.

These States, at the adoption of the Federal Constitution, were organized communities, having distinct systems of municipal law, which, though derived from a common source, and recognizing in the main similar principles, yet in some respects had become unlike, and on a particular subject promised to be antagonistic.

Their systems provided protection for life, liberty and property, among their citizens, and for the determination of the condition and capacity of the persons domiciled within their limits. These institutions, for the most part, were placed beyond the control of the Federal Government. The Constitution allows Congress to coin money, and regulate its value; to regulate foreign and federal commerce; to secure, for a limited period, to authors and inventors, a property in their writings and discoveries; and to make rules concerning captures in war; and within the limits of these powers, it has exercised, rightly, to a greater or less extent, the power to determine what shall and what shall not be property.

But the great powers of war and negotiation, finance, postal communication and commerce, in general, when employed in respect to the property of a citizen, refer to, and depend upon, the municipal laws of the States, to ascertain and determine what is property, and the rights of the owner, and the tenure by which it is held.

Whatever these Constitutions and laws validly determine to be property, it is the duty of the Federal Government, through the domain of jurisdiction merely federal, to recognize to be property.

And this principle follows from the structure of the respective governments, state and federal, and their reciprocal relations. They are different agents and trustees of the people of the several States, appointed with different powers and with distinct purposes, but whose Acts, within the scope of their respective jurisdictions, are mutually obligatory. They are respectively the depositories of such powers of legislation as the people were willing to surrender, and their duty is to co-operate within their several jurisdictions to maintain the rights of the same citizens under both governments, unimpaired. *A proscription, [*516 therefore, of the constitution and laws of one or more States, determining property, on the part of the Federal Government, by which the stability of its social system may be endangered, is plainly repugnant to the conditions on which the Federal Constitution was adopted, or which that government was designed to accomplish. Each of the States surrendered its powers of war and negotiation, to raise armies and to support a navy, and all these powers are sometimes required to preserve a State from disaster and ruin. The Federal Government was constituted to exercise these powers for the preservation of the States, respectively, and to secure to all their citizens the enjoyment of the

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rights which were not surrendered to the Federal Government. The provident care of the statesmen who projected the Constitution was signalized by such a distribution of the powers of government as to exclude many of the motives and opportunities for promoting provocations and spreading discord among the States, and for guarding against those partial combinations, so destructive of the community of interest, sentiment and feeling, which are so essential to the support of the Union. The distinguishing features of their system consist in the exclusion of the Federal Government from the local and internal concerns of, and in the establishment of an independent internal government within, the States. And it is a significant fact in the history of the United States, that those controversies which have been productive of the greatest animosity, and have occasioned most peril to the peace of the Union, have had their origin in the well-sustained opinion of a minority among the people, that the Federal Government had overstepped its constitutional limits to grant some exclusive privilege, or to disturb the legitimate distribution of property or power among the States or individuals. Nor can a more signal instance of this be found than is furnished by the Act before us. No candid or rational man can hesitate to believe, that if the subject of the 8th section of the Act of March, 1820, had never been introduced into Congress and made the basis of legislation, no interest common to the Union would have been seriously affected. And certainly the creation, within this Union, of large confederacies of unfriendly and frowning States, which has been the tendency, and, to an alarming extent, the result, produced by the agitation arising from it, does not commend it to the patriot or statesman. This court have determined that intermigration of slaves was not committed to the jurisdiction or control of Congress. Wherever a master is entitled to go within the United States, his slave may accompany him, without any impediment from, or 517*] fear of, Congressional *legislation or interference. The question then arises, whether Congress, which can exercise no jurisdiction over the relations of master and slave within the limits of the Union, and is bound to recognize and respect the rights and relations that validity exist under the constitutions and laws of the States, can deny the exercise of those rights, and prohibit the continuance of those relations within the Territories.

And the citation of state statutes prohibiting the immigration of slaves, and of the decisions of state courts enforcing the forfeiture of the master's title in accordance with their rule, only darkens the discussion. For the question is, have Congress the municipal sovereignty in the territories which the State Legislatures have derived from the authority of the people, and exercise in the States.

And this depends upon the construction of the article in the Constitution before referred to.

And, in my opinion, that clause confers no power upon Congress to dissolve the relations of the master and slave on the domain of the United States, either within or without any of the States.

The 8th section of the Act of Congress of the 6th of March, 1820, did not, in my opinion, operate to determine the domestic condition and status of the plaintiff and his family during their sojourn in Minnesota Territory, or after their return to Missouri.

The question occurs as to the judgment to be given in this case. It appeared upon the trial that the plaintiff, in 1834, was in a state of slavery in Missouri, and he had been in Missouri for near fifteen years in that condition, when this suit was brought. Nor does it appear that he at any time possessed another state or condition, de facto. His claim to freedom depends upon his temporary elocation, from the domicil of his origin, in company with his master, to communities where the law of slavery did not prevail. My examination is confined to the case, as it was submitted upon uncontested evidence, upon appropriate issues to the jury, and upon the instructions given and refused by the court upon that evidence. My opinion is, that the opinion of the Circuit Court was correct upon all the claims involved in those issues, and that the verdict of the jury was justified by the evidence and instructions.

The jury have returned that the plaintiff and his family are slaves.

Upon this record, it is apparent that this is not a controversy between citizens of different States; and that the plaintiff, at no period of the life which has been submitted to the view of the court, has had capacity to maintain a suit in the courts *of the United States. [*518 And in so far as the argument of the Chief Justice upon the plea in abatement has a reference to the plaintiff or his family, in any of the conditions or circumstances of their lives as presented in the evidence, I concur in that portion of his opinion. I concur in the judgment which expresses the conclusion that the Circuit Court should not have rendered a general judgment.

The capacity of the plaintiff to sue is involved in the pleas in bar, and the verdict of the jury discloses an incapacity under the Constitution. Under the Constitution of the United States, his is an incapacity to sue in their courts, while, by the laws of Missouri, the operation of the verdict would be more extensive. I think it a safe conclusion to enforce the lesser disability imposed by the Constitution of the United States, and leave to the plaintiff all his rights in Missouri. I think the judgment should be affirmed on the ground that the Circuit Court had no jurisdiction, or that the case should be reversed and remanded that the suit may be dismissed.

Mr. Justice Catron:

The defendant pleaded to the jurisdiction of the Circuit Court, that the plaintiff was a negro of African blood; the descendant of Africans, who had been imported and sold in this country as slaves, and thus had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea, and a trial was had upon the pleas, of the general issue, and also that the plaintiff and his family were slaves, belonging to the defendant. In this trial a verdict was given for the defendant.

The judgment of the Circuit Court upon the plea in abatement is not open, in my opinion, to examination in this court upon the plaintiff's writ.

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The judgment was given for him conformably to the prayer of his demurrer. He cannot assign an error in such a judgment.

Tidd's Pr. 1163; 2 Williams' Saund. 46a; 2 Iredell, N. C. 87; 2 W. & S. 391.

Nor does the fact that the judgment was given on a plea to the jurisdiction, avoid the application of this rule.

Capron v. Van Noorden, 2 Cranch, 126; 6 Wend. 465; 7 Met. 598; 5 Pike, 1005.

The declaration discloses a case within the jurisdiction of the court—a controversy between citizens of different States. The plea in abatement, impugning these jurisdictional averments, was waived when the defendant answered to the declaration by pleas to the merits. The proceedings on that plea remain a part of the technical record, to show the history of the case, but are not open to the review of this court by 519*] a writ *of error. The authorities are very conclusive on this point.

Shepherd v. Graves, 14 How. 505; Bailey v. Dozier, 6 How. 23; 1 Stewart (Ala.), 46; 10 Ben. Monroe (Ky.) 555; 2 Stew. (Ala.) 370, 443; 2 Scam. (Ill.) 78.

Nor can the court assume, as admitted facts, the averments of the plea from the confession of the demurrer. That confession was for a single object, and cannot be used for any other purpose than to test the validity of the plea.

Tompkins v. Ashby, 1 Moo. & Mal. 32; 33 Me. 96, 100.

There being nothing in controversy here but the merits, I will proceed to discuss them.

The plaintiff claims to have acquired property in himself, and became free, by being kept in Illinois during two years.

The Constitution, laws, and policy, of Illinois, are somewhat peculiar respecting slavery. Unless the master becomes an inhabitant of that State, the slaves he takes there do not acquire their freedom; and if they return with their master to the slave State of his domicil, they cannot assert their freedom after their return. For the reasons and authorities on this point, I refer to the opinion of my brother Nelson, with which I not only concur, but think his opinion is the most conclusive argument on the subject within my knowledge.

It is next insisted for the plaintiff, that his freedom (and that of his wife and eldest child) was obtained by force of the Act of Congress of 1820, usually known as the Missouri Compromise Act, which declares: "That in all that territory ceded by France to the United States, which lies north of thirty-six degrees thirty minutes north latitude, slavery and involuntary servitude shall be, and are hereby forever prohibited."

From this prohibition, the Territory now constituting the State of Missouri was excepted; which exception to the stipulation gave it the designation of a compromise.

The first question presented on this Act is, whether Congress has power to make such compromise. For, if power was wanting, then no freedom could be acquired by the defendant under the Act.

That Congress has no authority to pass laws and bind men's rights beyond the powers conferred by the Constitution, is not open to controversy. But it is insisted that, by the Constitution, Congress has power to legislate for and govern the Territories of the United States, and that, by force of the power to govern, laws could be enacted, prohibiting slavery in any portion of the Louisiana Territory: and, of course, to abolish slavery in all parts of it, whilst it was, or is, governed as a Territory.

My opinion is, that Congress is vested with power to govern *the Territories of the [*520 United States by force of the 3d section of the 4th article of the Constitution. And I will state my reasons for this opinion.

Almost every provision in that instrument has a history that must be understood, before the brief and sententious language employed can be comprehended in the relations its authors intended. We must bring before us the state of things presented to the Convention, and in regard to which it acted, when the compound provision was made, declaring: 1st. That "new States may be admitted by the Congress into this Union." 2d. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular State."

Having ascertained the historical facts giving rise to these provisions, the difficulty of arriving at the true meaning of the language employed will be greatly lessened.

The history of these facts is substantially as follows:

The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the Treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection, and dominion, for the use of the Indians."

This country was conquered from the Crown of Great Britain, and surrendered to the United States by the Treaty of Peace of 1783. The colonial charters of Virginia, North Carolina and Georgia, included it. Other States set up pretentions of claim to some portions of the territory north of the Ohio, but they were of no value, as I suppose. 5 Wheat. 375.

As this vacant country had been won by the blood and treasure of all the States, those whose charters did not reach it, insisted that the country belonged to the States united, and that the lands should be disposed of for the benefit of the whole; and to which end, the Western Territory should be ceded to the States united. The contest was stringent and angry, long before the Convention convened, and deeply agitated that body. As a matter of justice, and to quiet the controversy, Virginia consented to cede the country north of the Ohio as early as 1783; and in 1784 the deed of cession was executed, by her delegates in the Congress of the Confederation, conveying to the United States, in Congress assembled, for the benefit of said States, "all right, title and claim, as well of soil as of jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia *charter, situate, lying, and being to the [*521 northwest of the River Ohio." In 1787 (July 13), the Ordinance was passed by the old Congress to govern the Territory.

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Massachusetts had ceded her pretension of claim to western territory in 1785, Connecticut hers in 1786, and New York had ceded hers. In August, 1787, South Carolina ceded to the Confederation her pretension of claim to territory west of that State. And North Carolina was expected to cede hers, which she did do, in April, 1790. And so Georgia was confidently expected to cede her large domain, now constituting the territory of the States of Alabama and Mississippi.

At the time the Constitution was under consideration, there had been ceded to the United States, or was shortly expected to be ceded, all the western country, from the British Canada line to Florida, and from the head of the Mississippi almost to its mouth, except that portion which now constitutes the State of Kentucky.

Although Virginia had conferred on the Congress of the Confederation power to govern the territory north of the Ohio, still, it cannot be denied, as I think, that power was wanting to admit a new State under the Articles of Confederation.

With these facts prominently before the Convention, they proposed to accomplish these ends:

1st. To give power to admit new States.

2d. To dispose of the public lands in the Territories, and such as might remain undisposed of in the new States after they were admitted.

And third, to give power to govern the different Territories as incipient States, not of the Union, and fit them for admission. No one in the Convention seems to have doubted that these powers were necessary. As early as the third day of its session (May 29th), Edmund Randolph brought forward a set of resolutions containing nearly all the germs of the Constitution, the 10th of which is as follows:

"Resolved, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

August 18th, Mr. Madison submitted, in order to be referred to the committee of detail, the following powers as proper to be added to those of the General Legislature:

"To dispose of the unappropriated lands of the United States." "To institute temporary governments for new States arising therein." 3 Madison Papers, 1353.

522*] *These, with the resolution, that a district for the location of the seat of government should be provided, and some others, were referred, without a dissent, to the committee of detail, to arrange and put them into satisfactory language.

Gouverneur Morris constructed the clauses, and combined the views of a majority on the two provisions, to admit new States; and second, to dispose of the public lands, and to govern the Territories, in the mean time, between the cessions of the States and the admission into the Union of new States arising in the ceded territory.

3 Madison Papers, 1456 to 1466.

It was hardly possible to separate the power "to make all needful rules and regulations" respecting the government of the territory and the disposition of the public lands.

North of the Ohio, Virginia conveyed the lands, and vested the jurisdiction in the thirteen original States, before the Constitution was formed. She had the sole title and sole sovereignty, and the same power to cede, on any terms she saw proper, that the King of England had to grant the Virginia Colonial Charter of 1609, or to grant the Charter of Pennsylvania to William Penn. The thirteen States, through their representatives and deputed ministers in the old Congress, had the same right to govern that Virginia had before the cession. Baldwin's Constitutional Views, 90. And the 6th article of the Constitution adopted all engagements entered into by the Congress of the Confederation, as valid against the United States; and that the laws, made in pursuance of the new Constitution, to carry out this engagement, should be the supreme law of the land, and the judges bound thereby. To give the compact, and the Ordinance, which was part of it, full effect under the new government, the Act of August 7th, 1789, was passed, which declares, "Whereas, in order that the Ordinance of the United States in Congress assembled, for the government of the territory northwest of the River Ohio, may have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution of the United States." It is then provided that the Governor and other officers should be appointed by the President, with the consent of the Senate; and be subject to removal, etc., in like manner that they were by the old Congress, whose functions had ceased.

By the powers to govern, given by the Constitution, those amendments to the Ordinance could be made, but Congress guardedly abstained from touching the compact of Virginia, further than to adapt it to the new Constitution.

It is due to myself to say, that it is asking much of a judge, *who has for nearly [*523 twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper.

More than sixty years have passed away since Congress has exercised power to govern the Territories, by its legislation directly, or by territorial charters, subject to repeal at all times, and it is now too late to call that power into question, if this court could disregard its own decisions; which it cannot do, as I think. It was held in the case of Cross v. Harrison, 16 How. 193, 194, that the sovereignty of California was in the United States, in virtue of the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power to admit new States into the Union. That decision followed preceding ones, there cited. The question was then presented, how it was possible for the judicial mind to conceive that the United States Government, created solely by the Constitution, could, by a lawful treaty, acquire territory over which the acquiring power had no jurisdiction

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to hold and govern it, by force of the instrument under whose authority the country was acquired; and the foregoing was the conclusion of this court on the proposition. What was there announced, was most deliberately done, and with a purpose. The only question here is, as I think, how far the power of Congress is limited.

As to the Northwest Territory, Virginia had the right to abolish slavery there; and she did so agree in 1787, with the other States in the Congress of the Confederation, by assenting to and adopting the Ordinance of 1787, for the government of the Northwest Territory. She did this also by an Act of her Legislature, passed afterwards, which was a treaty in fact.

Before the new Constitution was adopted, she had as much right to treat and agree as any European government had. And, having excluded slavery, the new government was bound by that engagement by Article six of the new Constitution. This only meant that slavery should not exist whilst the United States exercised the power of government, in the territorial form; for, when a State came in, it might do so, with or without slavery.

My opinion is, that Congress had no power, in face of the compact between Virginia and the twelve other States to force slavery into the Northwest Territory, because there, it was bound to that "engagement," and could not break it.

524*] *In 1790, North Carolina ceded her western territory, now the State of Tennessee, and stipulated that the inhabitants thereof should enjoy all the privileges and advantages of the Ordinance for governing the territory north of the Ohio River, and that Congress should assume the government, and accept the cession, under the express conditions contained in the Ordinance: Provided, "That no regulation made, or to be made, by Congress, shall tend to emancipate slaves."

In 1802, Georgia ceded her western territory to the United States, with the provision that the Ordinance of 1787 should in all its parts extend to the territory ceded, "that article only excepted which forbids slavery." Congress had no more power to legislate slavery out from the North Carolina and Georgia cessions, than it had power to legislate slavery in, north of the Ohio. No power existed in Congress to legislate at all, affecting slavery, in either case. The inhabitants, as respected this description of property, stood protected, whilst they were governed by Congress, in like manner that they were protected before the cession was made and when they were respectively, parts of North Carolina and Georgia.

And how does the power of Congress stand west of the Mississippi River? The country there was acquired from France, by Treaty, in 1803. It declares, that the First Consul, in the name of the French Republic, doth hereby cede to the United States, in full sovereignty, the Colony or Province of Louisiana, with all the rights and appurtenances of the said Territory. And, by article 3d, that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities, of citizens of the United States; and, in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

Louisiana was a Province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property. The Province was ceded as a unit, with an equal right pertaining to its inhabitants, in every part thereof, to own slaves. It was, to a great extent, a vacant country, having in it few civilized inhabitants. No one portion of the Colony, of a proper size for a State of the Union, had a sufficient number of inhabitants to claim admission into the Union. To enable the United States to fulfill the Treaty, additional population was indispensable, and obviously desired with anxiety by both sides, so that the whole country should, as soon as possible, become States of the Union. And for this *contemplated future population, the [*525 Treaty as expressly provided as it did for the inhabitants residing in the Province when the Treaty was made. All these were to be protected "in the mean time;" that is to say, at all times, between the date of the Treaty and the time when the portion of the Territory where the inhabitants resided was admitted into the Union as a State.

At the date of the Treaty, each inhabitant had the right to the free enjoyment of his property, alike with his liberty and his religion, in every part of Louisiana; the Province then being one country, he might go everywhere in it, and carry his liberty, property, and religion, with him, and in which he was to be maintained and protected, until he became a citizen of a State of the Union of the United States. This cannot be denied to the original inhabitants and their descendants. And, if it be true that immigrants were equally protected, it must follow that they can also stand on the Treaty.

The settled doctrine in the State courts of Louisiana is, that a French subject coming to the Orleans Territory, after the Treaty of 1803 was made, and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that Act; that he was one of the inhabitants contemplated by the 3d article of the Treaty, which referred to all the inhabitants embraced within the new State on its admission.

That this is the true construction, I have no doubt.

If power existed to draw a line at thirty-six degrees thirty minutes north, so Congress had equal power to draw the line on the thirtieth degree—that is, due west from the City of New Orleans—and to declare that north of that line slavery should never exist. Suppose this had been done before 1812, when Louisiana came into the Union, and the question of infraction of the Treaty had then been presented on the present assumption of power to prohibit slavery, who doubts what the decision of this court would have been on such an Act of Congress; yet, the difference between the supposed line, and that on thirty-six degrees thirty minutes north, is only in the degree of grossness presented by the lower line.

The Missouri compromise line of 1820 was very aggressive; it declared that slavery was

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abolished forever throughout a country reaching from the Mississippi River to the Pacific Ocean, stretching over thirty-two degrees of longitude, and twelve and a half degrees of latitude on its eastern side, sweeping over four fifths, to say no more, of the original Province of Louisiana.

That the United States Government stipulat- 526*] ed in favor of *the inhabitants to the extent here contended for has not been seriously denied, as far as I know; but the argument is, that Congress had authority to repeal the 3d article of the Treaty of 1803, in so far as it secured the right to hold slave property, in a portion of the ceded territory, leaving the right to exist in other parts. In other words, that Congress could repeal the 3d article entirely, at its pleasure. This I deny.

The compacts with North Carolina and Georgia were Treaties also, and stood on the same footing of the Louisiana Treaty; on the assumption of power to repeal the one, it must have extended to all, and Congress could have excluded the slaveholder of North Carolina from the enjoyment of his lands in the Territory, now the State, of Tennessee, where the citizens of the mother State were the principal proprietors.

And so in the case of Georgia. Her citizens could have been refused the right to emigrate to the Mississippi or Alabama Territory, unless they left their most valuable and cherished property behind them.

The Constitution was framed in reference to facts then existing or likely to arise: the intrument looked to no theories of government. In the vigorous debates in the Convention, as reported by Mr. Madison and others, surrounding facts, and the condition and necessities of the country, gave rise to almost every provision; and among those facts, it was prominently true, that Congress dare not be intrusted with power to provide that, if North Carolina or Georgia ceded her western territory, the citizens of the State (in either case) could be prohibited, at the pleasure of Congress, from removing to their lands, then granted to a large extent, in the country likely to be ceded, unless they left their slaves behind. That such an attempt, in the face of a population fresh from the war of the Revolution, and then engaged in war with the great confederacy of Indians, extending from the mouth of the Ohio to the Gulf of Mexico, would end in open revolt, all intelligent men knew.

In view of these facts, let us inquire how the question stands by the terms of the Constitution, aside from the Treaty. How it stood in public opinion when the Georgia cession was made, in 1802, is apparent from the fact that no guaranty was required by Georgia of the United States for the protection of slave property. The Federal Constitution was relied on, to secure the rights of Georgia and her citizens during the territorial condition of the country. She relied on the indisputable truths, that the States were by the Constitution made equals in political rights, and equals in the right to participate in the common property of all the States 527*] united, and held in trust for *them. The Constitution having provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," the right to enjoy the territory as equals was reserved to the States, and to the citizens of the States, respectively. The cited clause is not that citizens of the United States shall have equal privileges in the Territories, but the citizen of each State shall come there in right of his State, and enjoy the common property. He secures his equality through the equality of his State, by virtue of that great fundamental condition of the Union—the equality of the States.

Congress cannot do indirectly what the Constitution prohibits directly. If the slaveholder is prohibited from going to the Territory with his slaves, who are parts of his family in name and in fact, it will follow that men owning lawful property in their own States, carrying with them the equality of their State to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousands of millions, might be almost as effectually excluded from removing into the Territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that owners of slaves, as a class, should be excluded, even if their slaves were left behind.

Just as well might Congress have said to those of the North, you shall not introduce into the territory south of said line your cattle or horses, as the country is already overstocked; nor can you introduce your tools of trade, or machines as the policy of Congress is to encourage the culture of sugar and cotton, south of the line, and so to provide that the Northern people shall manufacture for those of the South, and barter for the staple articles slave labor produces. And thus the Northern farmer and mechanic would be held out, as the slaveholder was for thirty years, by the Missouri restriction.

If Congress could prohibit one species of property, lawful throughout Louisiana when it was acquired, and lawful in the State from whence it was brought, so Congress might exclude any or all property.

The case before us will illustrate the construction contended for. Dr. Emerson was a citizen of Missouri; he had an equal right to go to the Territory with every citizen of other States. This is undeniable, as I suppose. Scott was Dr. Emerson's lawful property in Missouri; he carried his Missouri title with him; and the precise question here is, whether Congress had the power to annul that title. It is idle to say, that if Congress could not defeat the title directly, that it might be done *in- [*528 directly, by drawing a narrow circle around the slave population of Upper Louisiana, and declaring that if the slave went beyond it he should be free. Such assumption is mere evasion, and entitled to no consideration. And it is equally idle, to contend that because Congress has express power to regulate commerce among the Indian tribes, and to prohibit intercourse with the Indians, that therefore Dr. Emerson's title might be defeated within the country ceded by the Indians to the United States as early as 1805, and which embraces Fort Snelling. Am. State Papers, Vol. I. p. 734. We must meet the question whether Congress had the power to declare that a citizen

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of a State, carrying with him his equal rights, secured to him through his State, could be stripped of his goods and slaves, and be deprived of any participation in the common property. If this be the true meaning of the Constitution, equality of rights to enjoy a common country (equal to a thousand miles square) may be cut off by a geographical line, and a great portion of our citizens excluded from it.

Ingenious, indirect evasions of the Constitution have been attempted and defeated heretofore. In the Passenger Cases, 7 How. 283, the attempt was made to impose a tax on the masters, crews and passengers of vessels, the Constitution having prohibited a tax on the vessel itself; but this court held the attempt to be a mere evasion, and pronounced the tax illegal.

I admit that Virginia could, and lawfully did, prohibit slavery northwest of the Ohio, by her charter of cession, and that the Territory was taken by the United States with this condition imposed. I also admit that France could, by the Treaty of 1803, have prohibited slavery in any part of the ceded Territory, and imposed it on the United States as a fundamental condition of the cession, in the mean time, till new States were admitted into the Union.

I concur with Judge Baldwin, that federal power is exercised over all the territory within the United States, pursuant to the Constitution; and the conditions of the cession, whether it was a part of the original territory of a State of the Union, or of a foreign state, ceded by deed or treaty; the right of the United States in or over it depends on the contract of cession, which operates to incorporate as well the territory as its inhabitants into the Union.

Baldwin's Constitutional Views, 84.

My opinion is, that the 3d article of the Treaty of 1803, ceding Louisiana to the United States, stands protected by the Constitution, and cannot be repealed by Congress.

And, secondly, that the Act of 1820, known 529*] as the Missouri *Compromise, violates the most leading feature of the Constitution—a feature on which the Union depends, and which secures to the respective States and their citizens an entire equality of rights, privileges and immunities.

On these grounds, I hold the Compromise Act to have been void; and consequently, that the plaintiff, Scott, can claim no benefit under it.

For the reasons above stated, I concur with my brother judges that the plaintiff, Scott, is a slave, and was so when this suit was brought.

Mr. Justice McLean, dissenting:

This case is before us on a writ of error from the Circuit Court for the District of Missouri.

An action of trespass was brought, which charges the defendant with an assault and imprisonment of the plaintiff, and also of Harriet Scott, his wife, Eliza and Lizzie, his two children, on the ground that they were his slaves, which was without right on his part, and against law.

The defendant filed a plea in abatement, "that said causes of action, and each and every of them, if any such accrued to the said Dred Scott accrued out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to wit: said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent, his ancestors were of pure African blood; and were brought into this country and sold as negro slaves; and this the said Sandford is ready to verify; wherefore he prays judgment whether the court can or will take further cognizance of the action aforesaid."

To this a demurrer was filed, which, on argument, was sustained by the court, the plea in abatement being held insufficient; the defendant was ruled to plead over. Under this rule he pleaded: 1. Not guilty; 2. That Dred Scott was a negro slave, the property of the defendant; and 3. That Harriet, the wife, and Eliza and Lizzie, the daughters of the plaintiff, were the lawful slaves of the defendant.

Issue was joined on the first plea, and replications of de injuria were filed to the other pleas.

The parties agreed to the following facts: in the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the Army of the United States. In that year, Dr. Emerson took the plaintiff from the State of Missouri to *the post of Rock Island, [*530 in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, Dr. Emerson removed the plaintiff from Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of latitude thirty-six degrees thirty minutes north, and north of the State of Missouri. Dr. Emerson held the plaintiff in slavery, at Fort Snelling, from the last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the Army of the United States. In that year, Major Taliaferro took Harriet to Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at Fort Snelling, unto Dr. Emerson, who held her in slavery, at that place, until the year 1838.

In the year 1836, the plaintiff and Harriet were married at Fort Snelling, with the consent of Dr. Emerson, who claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the River Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, Dr. Emerson removed the plaintiff and said Harriet and their daughter Eliza from Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of the suit, Dr. Emerson sold and conveyed the plaintiff, Harriet, Eliza and Lizzie, to the defendant, as

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slaves, and he has ever since claimed to hold them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be the owner, laid his hands upon said plaintiff, Harriet, Eliza and Lizzie, and imprisoned them; doing in this respect, however, no more than he might lawfully do, if they were of right his slaves at such times.

In the first place, the plea to the jurisdiction is not before us, on this writ of error. A demurrer to the plea was sustained, which ruled the plea bad, and the defendant, on leave, pleaded over.

The decision on the demurrer was in favor of the plaintiff; and as the plaintiff prosecutes this writ of error, he does not complain of the decision on the demurrer. The defendant 531*] *might have complained of this decision, as against him, and have prosecuted a writ of error, to reverse it. But as the case, under the instruction of the court to the jury, was decided in his favor, of course he had no ground of complaint.

But it is said, if the court, on looking at the record, shall clearly perceive that the Circuit Court had no jurisdiction, it is a ground for the dismissal of the case. This may be characterized as rather a sharp practice, and one which seldom, if ever, occurs. No case was cited in the argument as authority, and not a single case precisely in point is recollected in our reports. The pleadings do not show a want of jurisdiction. This want of jurisdiction can only be ascertained by a judgment on the demurrer to the special plea. No such case, it is believed, can be cited. But if this rule of practice is to be applied in this case, and the plaintiff in error is required to answer and maintain as well the points ruled in his favor, as to show the error of those ruled against him, he has more than an ordinary duty to perform. Under such circumstances, the want of jurisdiction in the Circuit Court must be so clear as not to admit of doubt. Now, the plea which raises the question of jurisdiction, in my judgment, is radically defective. The gravamen of the plea is this: "That the plaintiff is a negro of African descent, his ancestors being of pure African blood, and were brought into this country, and sold as negro slaves."

There is no averment in this plea which shows or conduces to show an inability in the plaintiff to sue in the Circuit Court. It does not allege that the plaintiff had his domicil in any other State, nor that he is not a free man in Missouri. He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the Act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the Act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term "citizen" is "a freeman." Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the Act of Congress, and the courts of the Union are open to him.

It has often been held, that the jurisdiction, as regards parties, can only be exercised between citizens of different States, *and that [*532 a mere residence is not sufficient; but this has been said to distinguish a temporary from a permanent residence.

To constitute a good plea to the jurisdiction, it must negative those qualities and rights which enable an individual to sue in the Federal courts. This has not been done; and on this ground the plea was defective, and the demurrer was properly sustained. No implication can aid a plea in abatement or in bar; it must be complete in itself; the facts stated, if true, must abate or bar the right of the plaintiff to sue. This is not the character of the above plea. The facts stated, if admitted, are not inconsistent with other facts, which may be presumed, and which bring the plaintiff within the Act of Congress.

The pleader has not the boldness to allege that the plaintiff is a slave, as that would assume against him the matter in controversy, and embrace the entire merits of the case in a plea to the jurisdiction. But beyond the facts set out in the plea, the court, to sustain it, must assume the plaintiff to be a slave, which is decisive on the merits. This is a short and an effectual mode of deciding the cause; but I am yet to learn that it is sanctioned by any known rule of pleading.

The defendant's counsel complain, that if the court take jurisdiction on the ground that the plaintiff is free, the assumption is against the right of the master. This argument is easily answered. In the first place, the plea does not show him to be a slave; it does not follow that a man is not free whose ancestors were slaves. The reports of the Supreme Court of Missouri show that this assumption has many exceptions; and there is no averment in the plea that the plaintiff is not within them.

By all the rules of pleading, this is a fatal defect in the plea. If there be doubt, what rule of construction has been established in the slave States? In Jacob v. Sharp, Meigs' Tenn. 114, the court held, when there was doubt as to the construction of a will which emancipated a slave, "it must be construed to be subordinate to the higher and more important right of freedom."

No injustice can result to the master, from an exercise of jurisdiction in this cause. Such a decision does not in any degree affect the merits of the case; it only enables the plaintiff to assert his claims to freedom before this tribunal. If the jurisdiction be ruled against him, on the ground that he is a slave, it is decisive of his fate.

It has been argued that, if a colored person be made a citizen of a State, he cannot sue in the Federal court. The Constitution declares that federal jurisdiction "may be exercised between citizens of different States," and the same is provided *in the Act of 1789. The [*533 above argument is properly met, by saying that the Constitution was intended to be a practical instrument; and where its language is too plain to be misunderstood, the argument ends."

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In Chirac v. Chirac, 2 Wheat. 261, 15 U. S., this court says: "That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted." No person can legally be made a citizen of a State, and consequently a citizen of the United States, of foreign birth, unless he be naturalized under the Acts of Congress. Congress has power "to establish a uniform rule of naturalization."

It is a power which belongs exclusively to Congress, as intimately connected with our federal relations. A State may authorize foreigners to hold real estate within its jurisdiction, but it has no power to naturalize foreigners, and give them the rights of citizens. Such a right is opposed to the Acts of Congress on the subject of naturalization, and subversive of the federal powers. I regret that any countenance should be given from this bench to a practice like this in some of the States, which has no warrant in the Constitution.

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognized them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late Treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these Territories did not become citizens under the Treaty. They have exercised all the rights of citizens, without being naturalized under the Acts of Congress.

There are several important principles involved in this case, which have been argued, and which may be considered under the following heads:

1. The locality of slavery, as settled by this court and the courts of the States.

2. The relation which the Federal Government bears to slavery in the States.

3. The power of Congress to establish territorial governments, and to prohibit the introduction of slavery therein.

4. The effect of taking slaves into a new State or Territory, and so holding them, where slavery is prohibited.

5. Whether the return of a slave under the 534*] control of his *master, after being entitled to his freedom, reduces him to his former condition.

6. Are the decisions of the Supreme Court of Missouri, on the questions before us, binding on this court, within the rule adopted?

In the course of my judicial duties, I have had occasion to consider and decide several of the above points.

1. As to the locality of slavery. The civil law throughout the Continent of Europe, it is believed, without an exception, is, that slavery can exist only within the territory where it is established; and that, if a slave escapes, or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulations.

Grotius, lib. 2, chap. 15, 5, 1; lib. 10. chap. 10, 2, 1; Wicqueposts Ambassador, lib. 1, p. 418; 4 Martin, 385; case of The Creole in the House of Lords, 1842; 1 Phillimore on International Law, 316, 335.

There is no nation in Europe which considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master. The Roman law did not allow freedom to be sold. An ambassador or any other public functionary could not take a slave to France, Spain, or any other country of Europe, without emancipating him. A number of slaves escaped from a Florida plantation, and were received on board of ship by Admiral Cochrane. By the King's Bench, they were held to be free. 2 B. & C. 440.

In the great and leading case of Prigg v. The State of Pennsylvania, 16 Pet. 594, 41 U. S., this court say that, by the general law of nations, no nation is bound to recognize the state of slavery, as found within its territorial dominions, where it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is organized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in Somersett's case, Lafft's Rep. 1, 20 Howell's State Trials, 79, which was decided before the American Revolution.

There was some contrariety of opinion among the judges on certain points ruled in Prigg's case, but there was none in regard to the great principle, that slavery is limited to the range of the laws under which it is sanctioned.

No case in England appears to have been more thoroughly examined than that of Somersett. The judgment pronounced *by [*535 Lord Mansfield was the judgment of the Court of King's Bench. The cause was argued at great length, and with great ability, by Hargrave and others, who stood among the most eminent counsel in England. It was held under advisement from term to term, and a due sense of its importance was felt and expressed by the Bench.

In giving the opinion of the court, Lord Mansfield said:

"The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law."

He referred to the contrary opinion of Lord Hardwicke, in October, 1749, as Chancellor: "That he and Lord Talbot, when Attorney and Solicitor-General, were of opinion that no such claim, as here presented, for freedom, was valid."

The weight of this decision is sought to be impaired, from the terms in which it was described by the exuberant imagination of Curran. The words of Lord Mansfield, in giving the opinion of the court, were such as were fit to be used by a great judge, in a most important case. It is a sufficient answer to all objections to that judgment, that it was pronounced

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before the Revolution, and that it was considered by this court as the highest authority. For near a century, the decision in Somersett's case has remained the law of England. The case of The Slave Grace, decided by Lord Stowell in 1827, does not, as has been supposed, overrule the judgment of Lord Mansfield. Lord Stowell held that, during the residence of the slave in England, "No dominion, authority, or coercion, can be exercised over him." Under another head, I shall have occasion to examine the opinion in the case of Grace.

To the position, that slavery can only exist except under the authority of law, it is objected, that in few if in any instances has it been established by statutory enactment. This is no answer to the doctrine laid down by the court. Almost all the principles of the common law had their foundation in usage. Slavery was introduced into the Colonies of this country by Great Britain at an early period of their history, and it was protected and cherished, until it became incorporated into the colonial policy. It is immaterial whether a system of slavery was introduced by express law, or otherwise, if it have the authority of law. There is no slave state where the institution is not recognized and protected by statutory enactments and judicial decisions. Slaves are made property by the laws of the slave States, and as such are liable to the claims of cred-
536*] itors; *they descend to heirs, are taxed, and in the South they are a subject of commerce.

In the case of Rankin v. Lydia, 2 A. K. Marsh, 467, Judge Mills, speaking for the Court of Appeals of Kentucky, says: "In deciding the question (of slavery), we disclaim the influence of the general principles of liberty, which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this State, and the right to hold slaves under our municipay regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law."

I will now consider the relation which the Federal Government bears to slavery in the States:

Slavery is emphatically a state institution. In the 9th section of the 1st article of the Constitution, it is provided "that the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

In the Convention, it was proposed by a committee of eleven to limit the importation of slaves to the year 1800, when Mr. Pinckney moved to extend the time to the year 1808. This motion was carried—New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina and Georgia voting in the affirmative; and New Jersey, Pennsylvania and Virginia, in the negative. In opposition to the motion, Mr. Madison said: "Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves; so long a term will be more dishonorable to the American character than to say nothing about it in the Constitution." Madison Papers.

The provision in regard to the slave trade shows clearly that Congress considered slavery a state institution, to be continued and regulated by its individual sovereignty; and to conciliate that interest, the slave trade was continued twenty years, not as a general measure, but for the "benefit of such States as shall think proper to encourage it."

In the case of Groves v. Slaughter, 15 Pet. 449, 40 U. S. Messrs. Clay and Webster contended that, under the commercial power, Congress had a right to regulate the slave trade among the several States, but the court held that Congress had no power to interfere with slavery as it exists in the States, or to regulate what is called the slave trade among
*them. If this trade were subject to [*537
the commercial power, it would follow that Congress could abolish or establish slavery in every State of the Union.

The only connection which the Federal Government holds with slaves in a State, arises from that provision of the Constitution which declares that "No person held to service in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

This being a fundamental law of the Federal Government, it rests mainly for its execution, as has been held, on the judicial power of the Union; and so far as the rendition of fugitives from labor has become a subject of judicial action, the federal obligation has been faithfully discharged.

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government, to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial Colonies and States were chiefly engaged in the traffic. But we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom; and while I admit the government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised the

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rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the 538*] Constitution, or *shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and states, the South were influenced by what they considered to be their own interests.

But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles white men were made slaves. All slavery has its origin in power, and is against right.

The power of Congress to establish territorial governments, and to prohibit the introduction of slavery therein, is the next point to be considered.

After the cession of western territory by Virginia and other States, to the United States, the public attention was directed to the best mode of disposing of it for the general benefit.

While in attendance on the Federal Convention, Mr. Madison, in a letter to Edmund Randolph, dated the 22d April, 1787, says: "Congress are deliberating on the plan most eligible for disposing of the western territory not yet surveyed. Some alteration will probably be made in the ordinance on that subject." And in the same letter he says: "The inhabitants of the Illinois complain of the land jobbers, etc., who are purchasing titles among them. Those of St. Vincent's complain of the defective criminal and civil justice among them, as well as of military protection." And on the next day he writes to Mr. Jefferson: "The government of the settlements on the Illinois and Wabash is a subject very perplexing in itself, and rendered more so by our ignorance of the many circumstances on which a right judgment depends. The inhabitants at those places claim protection against the savages, and some provision for both civil and criminal justice."

In May, 1787, Mr. Edmund Randolph submitted to the Federal Convention certain propositions, as the basis of a Federal Government, among which was the following:

"Resolved, that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

Afterward, Mr. Madison submitted to the Convention, in order to be referred to the committee of detail, the following powers, as proper to be added to those of general legislation: 539*] *"To dispose of the unappropriated lands of the United States. To institute temporary governments for new States arising therein. To regulate affairs with the Indians, as well within as without the limits of the United States."

Other propositions were made in reference to the same subjects, which it would be tedious to enumerate. Mr. Gouverneur Morris proposed the following:

"The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims either of the United States or of any particular State."

This was adopted as a part of the Constitution, with two verbal alterations—Congress was substituted for Legislature, and the word "either" was stricken out.

In the organization of the new government, but little revenue for a series of years was expected from commerce. The public lands were considered as the principal resource of the country for the payment of the Revolutionary debt. Direct taxation was the means relied on to pay the current expenses of the government. The short period that occurred between the cession of western lands to the Federal Government by Virginia and other States, and the adoption of the Constitution, was sufficient to show the necessity of a proper land system and a temporary government. This was clearly seen by propositions and remarks in the Federal Convention, some of which are above cited, by the passage of the Ordinance of 1787, and the adoption of that instrument by Congress, under the Constitution, which gave to it validity.

It will be recollected that the deed of cession of western territory was made to the United States by Virginia in 1784, and that it required the territory ceded to be laid out into States, that the land should be disposed of for the common benefit of the States, and that all right, title, and claim, as well of soil as of jurisdiction, were ceded; and this was the form of cession from other States.

On the 13th of July, the Ordinance of 1787 was passed, "for the government of the United States territory northwest of the River Ohio," with but one dissenting vote. This instrument provided there should be organized in the territory not less than three, nor more than five, States, designating their boundaries. It was passed while the Federal Convention was in session, about two months before the Constitution was adopted by the Convention. The members of the Convention must, therefore, have been well acquainted with the provisions of the *Ordinance. It provided for a [*540 temporary government, as initiatory to the formation of state governments. Slavery was prohibited in the territory.

Can anyone suppose that the eminent men of the Federal Convention could have overlooked or neglected a matter so vitally important to the country, in the organization of temporary governments for the vast territory northwest of the River Ohio? In the 3d section of the 4th article of the Constitution, they did make provision for the admission of new States, the sale of the public lands, and the temporary government of the territory. Without a temporary government, new States could not have been formed, nor could the public lands have been sold.

If the 3d section were before us now for consideration for the first time, under the facts

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stated, I could not hesitate to say there was adequate legislative power given in it. The power to make all needful rules and regulations is a power to legislate. This no one will controvert, as Congress cannot make "rules and regulations," except by legislation. But it is argued that the word "territory" is used as synonymous with the word "land"; and that the rules and regulations of Congress are limited to the disposition of lands and other property belonging to the United States. That this is not the true construction of the section, appears from the fact that in the first line of the section "the power to dispose of the public lands" is given expressly, and, in addition, to make all needful rules and regulations. The power to dispose of it is complete in itself, and requires nothing more. It authorizes Congress to use the proper means within its discretion, and any further provision for this purpose would be a useless verbiage. As a composition, the Constitution is remarkably free from such a charge.

In the discussion of the power of Congress to govern a territory, in the case of The Atlantic Insurance Company v. Canter, 1 Pet. 511; 7 Curt. 685, Chief Justice Marshall, speaking for the court, said, in regard to the people of Florida, "they do not, however, participate in political power; they do not share in the government till Florida shall become a state; in the mean time, Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

And he adds, "perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result 541*] *necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory; whichever may be the source whence the power is derived, the possession of it is unquestioned." And in the close of the opinion, the court say, "in legislating for them [the territories], Congress exercises the combined powers of the general and state governments."

Some consider the opinion to be loose and inconclusive: others that it is obiter dicta; and the last sentence is objected to as recognizing absolute power in Congress over Territories. The learned and eloquent Wirt, who, in the argument of a cause before the court, had occasion to cite a few sentences from an opinion of the Chief Justice, observed, "no one can mistake the style, the words so completely match the thought."

I can see no want of precision in the language of the Chief Justice; his meaning cannot be mistaken. He states, first, the 3d section as giving power to Congress to govern the territories, and two other grounds from which the power may also be implied. The objection seems to be, that the Chief Justice did not say which of the grounds stated he considered the source of the power. He did not specifically state this, but he did say, "whichever may be the source whence the power is derived, the possession of it is unquestioned." No opinion of the court could have been expressed with a stronger emphasis; the power in Congress is unquestioned. But those who have undertaken to criticise the opinion, consider it without authority, because the Chief Justice did not designate specially the power. This is a singular objection. If the power be unquestioned, it can be a matter of no importance on which ground it is exercised.

The opinion clearly was not obiter dicta. The turning point in the case was, whether Congress had power to authorize the Territorial Legislature of Florida to pass the law under which the Territorial Court was established, whose decree was brought before this court for revision. The power of Congress, therefore, was the point in issue.

The word "territory," according to Worcester means "land, country, a district of country, under a temporary government." The words "territory or other property," as used, do imply, from the use of the pronoun other, that territory was used as descriptive of land; but does it follow that it was not used also as descriptive of a district of country? In both of these senses it belonged to the United States —as land, for the purpose of sale; as territory, for the purpose of government.

*But, if it be admitted that the word [*542 "territory" as used means land, and nothing but land, the power of Congress to organize a temporary government is clear. It has power to make all needful regulations respecting the public lands, and the extent of those "needful regulations" depends upon the direction of Congress, where the means are appropriate to the end, and do not conflict with any of the prohibitions of the Constitution. If a temporary government be deemed needful, necessary, requisite, or is wanted, Congress has power to establish it. This court says, in McCulloch v. The State of Maryland, 4 Wheat. 316, "If a certain means to carry into effect any of the powers expressly given by the Constitution to the government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance."

The power to establish postoffices and postroads gives power to Congress to make contracts for the transportation of the mail, and to punish all who commit depredations upon it in its transit, or at its places of distribution. Congress has power to regulate commerce, and, in the exercisee of its discretion, to lay an embargo, which suspends commerce; so under the same power, harbors, lighthouses, breakwaters, etc., are constructed.

Did Chief Justice Marshall, in saying that Congress governed a Territory, by exercising the combined powers of the federal and state governments, refer to unlimited discretion? A government which can make white men slaves? Surely, such a remark in the argument must have been inadvertently uttered. On the contrary, there is no power in the Constitution by which Congress can make either white or black men slaves. In organizing the government of a territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which

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are contrary to its spirit; so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of state governments, and no more power can be claimed or exercised, than is necessary to the attainment of the end. This is the limitation of all the federal powers.

But Congress has no power to regulate the internal concerns of a State, as of a Territory; consequently, in providing for the government of a Territory, to some extent, the combined powers of the federal and state governments are necessarily exercised.

543*] *If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it. This can be sustained on the ground of a sound national policy, which is so clearly shown in our history by practical results, that it would seem no considerate individual can question it. And, as regards any unfairness of such a policy to our Southern brethren, as urged in the argument, it is only necessary to say that, with one fourth of the federal population of the Union, they have in the slave States a larger extent of fertile territory than is included in the free States; and it is submitted, if masters of slaves be restricted from bringing them into free territory, that the restriction on the free citizens of non-slaveholding States, by bringing slaves into free territory, is four times greater than that complained of by the South. But, not only so; some three or four hundred thousand holders of slaves, by bringing them into free territory, impose a restriction on twenty millions of the free States. The repugnancy to slavery would probably prevent fifty or a hundred freemen from settling in a slave Territory, where one slaveholder would be prevented from settling in a free Territory.

This remark is made in answer to the argument urged, that a prohibition of slavery in the free Territories is inconsistent with the continuance of the Union. Where a territorial government is established in a slave Territory, it has uniformly remained in that condition until the people form a State constitution; the same course where the Territory is free, both parties acting in good faith, would be attended with satisfactory results.

The sovereignty of the Federal Government extends to the entire limits of our territory. Should any foreign power invade our jurisdiction, it would be repelled. There is a law of Congress to punish our citizens for crimes committed in districts of country where there is no organized government. Criminals are brought to certain Territories or States, designated in the law, for punishment. Death has been inflicted in Arkansas and in Missouri, on individuals, for murders committed beyond the limit of any organized Territory or State; and no one doubts that such a jurisdiction was rightfully exercised. If there be a right to acquire territory, there necessarily must be an implied power to govern it. When the military force of the Union shall conquer a country, may not Congress provide for the government of such country? This would be an implied power essential to the acquisition of new territory. *This power has been exercised, [*544 without doubt of its constitutionality on territory acquired by conquest and purchase.

And when there is a large district of country within the United States, and not within any state government, if it be necessary to establish a temporary government to carry out a power expressly vested in Congress—as the disposition of the public lands—may not such government be instituted by Congress? How do we read the Constitution? Is it not a practical instrument?

In such cases, no implication of a power can arise which is inhibited by the Constitution, or which may be against the theory of its construction. As my opinion rests on the 3d section, these remarks are made as an intimation that the power to establish a temporary government may arise, also, on the other two grounds stated in the opinion of the court in the insurance case, without weakening the 3d section.

I would here simply remark, that the Constitution was formed for our whole country. An expansion or contraction of our territory required no change in the fundamental law. When we consider the men who laid the foundation of our government and carried it into operation, the men who occupied the Bench, who filled the halls of legislation and the Chief Magistracy, it would seem, if any question could be settled clear of all doubt, it was the power of Congress to establish territorial governments. Slavery was prohibited in the entire Northwestern Territory, with the approbation of leading men, South and North; but this prohibition was not retained when this Ordinance was adopted for the government of southern Territories, where slavery existed. In a late republication of a letter of Mr. Madison, dated November 27, 1819, speaking of this power of Congress to prohibit slavery in a Territory, he infers there is no such power, from the fact that it has not been exercised. This is not a very satisfactory argument against any power, as there are but few, if any, subjects on which the constitutional powers of Congress are exhausted. It is true, as Mr. Madison states, that Congress, in the Act to establish a government in the Mississippi Territory, prohibited the importation of slaves into it from foreign parts; but it is equally true, that in the Act erecting Louisiana into two Territories, Congress declared, "it shall not be lawful for any person to bring into Orleans Territory, from any port or place within the limits of the United States, any slave which shall have been imported since 1798, or which may hereafter be imported, except by a citizen of the United States who settles in the Territory, under the penalty of the freedom of such slave." The inference of Mr. Madison, therefore, against the power of *Congress, is of no force, as it was [*545 founded on a fact supposed, which did not exist.

It is refreshing to turn to the early incidents of our history, and learn wisdom from the acts of the great men who have gone to their account. I refer to a report in the House of Representatives, by John Randolph, of Roanoke, as chairman of a committee, in March, 1803—fifty-four years ago. From the Convention

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held at Vincennes, in Indiana, by their president, and from the people of the Territory, a petition was presented to Congress, praying the suspension of the provision which prohibited slavery in that Territory. The report stated "that the rapid population of the State of Ohio sufficiently evinces, in the opinion of your committee, that the labor of slaves is not necessary to promote the growth and settlement of colonies in that region. That this labor, demonstrably the dearest of any, can only be employed to advantage in the cultivation of products more valuable than any known to that quarter of the United States; that the committee deem it highly dangerous and inexpedient to impair a provision wisely calculated to promote the happiness and prosperity of the Northwestern country, and to give strength and security to that extensive frontier. In the salutary operation of this sagacious and benevolent restraint, it is believed that the inhabitants will, at no very distant day, find ample remuneration for a temporary privation of labor and of emigration.

1 vol. State Papers, Public Lands, 160.

The judicial mind of this country, State and Federal, has agreed on no subject, within its legitimate action, with equal unanimity, as on the power of Congress to establish territorial governments. No court, State or Federal, no judge or statesman, is known to have had any doubts on this question for nearly sixty years after the power was exercised. Such governments have been established from the sources of the Ohio to the Gulf of Mexico, extending to the Lakes on the north and the Pacific Ocean on the west, and from the lines of Georgia to Texas.

Great interests have grown up under the territorial laws over a country more than five times greater in extent than the original thirteen States; and these interests, corporate or otherwise, have been cherished and consolidated by a benign policy, without anyone supposing the law-making power had united with the judiciary, under the universal sanction of the whole country, to usurp a jurisdiction which did not belong to them. Such a discovery at this late date is more extraordinary than anything which has occurred in the judicial history of this or any other country. Texas, under a previous or- [*547
546*] ganization, *was admitted as a State; but no State can be admitted into the Union which has not been organized under some form of government. Without temporary governments, our public lands could not have been sold, nor our wilderness reduced to cultivation, and the population protected; nor could our flourishing States, west and south, have been formed.

What do the lessons of wisdom and experience teach, under such circumstances, if the new light, which has so suddenly and unexpectedly burst upon us, be true? Acquiescence; acquiescence under a settled construction of the Constitution for sixty years, though it may be erroneous; which has secured to the country an advancement and prosperity beyond the power of computation.

An act of James Madison, when President, forcibly illustrates this policy. He had made up his opinion that Congress had no power under the Constitution to establish a National Bank. In 1815, Congress passed a bill to establish a bank. He vetoed the bill, on objections other than constitutional. In his message, he speaks as a wise statesman and Chief Magistrate, as follows:

"Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank, as being precluded, in my judgment, by the repeated recognitions under varied circumstances of the validity of such an institution, in acts of the Legislature, Executive, and Judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."

Has this impressive lesson of practical wisdom become lost to the present generation?

If the great and fundamental principles of our Government are never to be settled, there can be no lasting prosperity. The Constitution will become a floating waif on the billows of popular excitement.

The prohibition of slavery north of thirty-six degrees thirty minutes, and of the State of Missouri, contained in the Act admitting that State into the Union, was passed by a vote of 134, in the House of Representatives, to 42. Before Mr. Monroe signed the Act, it was submitted by him to his Cabinet, and they held the restriction of slavery in a Territory to be within the constitutional powers of Congress. It would be singular, if in 1804 Congress had power to prohibit the introduction of slaves in Orleans Territory from any other part of the Union, under the penalty of freedom to the slave, if the same power embodied in the Missouri Compromise, could not be exercised in 1820.

But this law of Congress, which prohibits slavery north of *Missouri and of thirty- [*547
six degrees thirty minutes, is declared to have been null and void by my brethren. And this opinion is founded mainly, as I understand, on the distinction drawn between the Ordinance of 1787 and the Missouri compromise line. In what does the distinction consist? The Ordinance, it is said, was a compact entered into by the confederated States before the adoption of the Constitution; and that in the cession of territory, authority was given to establish a territorial government.

It is clear that the Ordinance did not go into operation by virtue of the authority of the Confederation, but by reason of its modification and adoption by Congress under the Constitution. It seems to be supposed, in the opinion of the court, that the articles of cession placed it on a different footing from Territories subsequently acquired. I am unable to perceive the force of this distinction. That the Ordinance was intended for the government of the Northwestern Territory, and was limited to such Territory, is admitted. It was extended to southern Territories, with modifications, by Acts of Congress, and to some northern Territories. But the Ordinance was made valid by the Act of Congress, and without such Act could have been of no force. It rested for its validity on the Act of Congress, the same, in my opinion, as the Missouri compromise line.

If Congress may establish a territorial government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being the case, I do not see on what ground the Act is held to be void.

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It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery; in doing which, it followed the Ordinance of 1787.

I will now consider the fourth head, which is: "The effect of taking slaves into a State or Territory, and so holding them, where slavery is prohibited.

If the principle laid down in the case of Prigg v. The State of Pennsylvania is to be maintained, and it is certainly to be maintained until overruled, as the law of this court, there can be no difficulty on this point. In that case, the court says: "The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws." If this be so, slavery can exist nowhere except under the authority of law, founded on usage having the force of law, or by statutory recognition. And the court further says: "It is manifest, from this consideration, that if the Constitution had not contained the clause requiring the rendition of fugitives from labor, every non-slaveholding State in the Union would have been at liberty to have 548*] declared free all runaway slaves *coming within its limits, and to have given them entire immunity and protection against the claims of their masters."

Now, if a slave abscond, he may be reclaimed, but if he accompany his master into a State or Territory where slavery is prohibited, such slave cannot be said to have left the service of his master where his services were legalized. And if slavery be limited to the range of the territorial laws, how can the slave be coerced to serve in a State or Territory, not only without the authority of law, but against its express provisions? What gives the master the right to control the will of his slave? The local law, which exists in some form. But where there is no such law, can the master control the will of the slave by force? Where no slavery exists, the presumption, without regard to color, is in favor of freedom. Under such a jurisdiction, may the colored man be levied on as the property of his master by a creditor? On the decease of the master, does the slave descend to his heirs as property? Can the master sell him? Any one or all of these acts may be done to the slave, where he is legally held to service. But where the law does not confer this power, it cannot be exercised.

Lord Mansfield held that a slave brought into England was free. Lord Stowell agreed with Lord Mansfield in this respect, and that the slave could not be coerced in England; but on her voluntary return to Antigua, the place of her slave domicil, her former status attached. The law of England did not prohibit slavery, but did not authorize it. The jurisdiction which prohibits slavery is much stronger in behalf of the slave within it, than where it only does not authorize it.

By virtue of what law is it, that a master may take his slave into free territory, and exact from him the duties of a slave? The law of the territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress. Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer, that colored persons are made property by the law of the State, and no such power has been given to Congress. Does the master carry with him the law of the State from which he removes into the Territory? And does that enable him to coerce his slave in the Territory? Let us test this theory. If this may be done by a master from one slave State, it may be done by a master from every other slave State. This right is supposed to be connected with the person of the master, by virtue of the local law. Is it transferable? May it be negotiated, as a promissory note or bill of exchange? If it be assigned to a man from a free State, may he coerce the slave by virtue of it? What shall this thing be *denominated? Is it per- [*549 sonal or real property? Or is it an indefinable fragment of sovereignty, which every person carries with him from his late domicil? One thing is certain, that its origin has been very recent, and it is unknown to the laws of any civilized country.

A slave is brought to England from one of its islands, where slavery was introduced and maintained by the mother country. Although there is no law prohibiting slavery in England, yet there is no law authorizing it; and, for near a century, its courts have declared that the slave there is free from the coercion of the master. Lords Mansfield and Stowell agree upon this point, and there is no dissenting authority.

There is no other description of property which was not protected in England, brought from one of its slave islands. Does not this show that property in a human being does not arise from nature or from the common law, but, in the language of this court, "it is a mere municipal regulation, founded upon and limited to the range of the territorial laws?" This decision is not a mere argument, but it is the end of the law, in regard to the extent of slavery. Until it shall be overturned, it is not a point for argument; it is obligatory on myself and my brethren, and on all judicial tribunals over which this court exercises an appellate power.

It is said the Territories are common property of the States, and that every man has a right to go there with his property. This is not controverted. But the court say a slave is not property beyond the operation of the local law which makes him such. Never was a truth more authoritatively and justly uttered by man. Suppose a master of a slave in a British island owned a million of property in England; would that authorize him to take his slaves with him to England? The Constitution, in express terms, recognizes the status of slavery as founded on the municipal law. "No person held to service or labor in one State, under the laws thereof, escaping into another, shall," etc. Now, unless the fugitive escape from a place where, by the municipal law, he is held to labor, this provision affords no remedy to the master. What can be more conclusive than this? Suppose a slave escape from a Territory where slavery is not authorized by law, can he be reclaimed?

In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property. It is true, this was said by the court, as also many other things, which are of no authority. Noth-

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ing that has been said by them, which has not a direct bearing on the jurisdiction of the court, against which they decided, can be considered 550*] as *authority. I shall certainly not regard it as such. The question of jurisdiction, being before the court, was decided by them authoritatively, but nothing beyond that question. A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.

Under this head I shall chiefly rely on the decisions of the Supreme Courts of the Southern States, and especially of the State of Missouri.

In the 1st and 2d sections of the 6th article of the Constitution of Illinois, it is declared that neither slavery nor involuntary servitude shall hereafter be introduced into this State, otherwise than for the punishment of crimes whereof the party shall have been duly convicted; and in the 2d section it is declared that any violation of this article shall effect the emancipation of such person from his obligation to service. In Illinois, a right of transit through the State is given the master with his slaves. This is a matter which, as I suppose, belongs exclusively to the State.

The Supreme Court of Illinois, in the case of Jarrot v. Jarrot, 2 Gilman, 7, said:

"After the conquest of this Territory by Virginia, she ceded it to the United States, and stipulated that the titles and possessions, rights and liberties of the French settlers, should be guarantied to them. This, it has been contended, secured them in the possession of those negroes as slaves which they held before that time, and that neither Congress nor the Convention had power to deprive them of it; or, in other words, that the Ordinance and Constitution should not be so interpreted and understood as applying to such slaves, when it is therein declared that there shall be neither slavery nor involuntary servitude in the Northwest Territory, nor in the State of Illionis, otherwise than in the punishment of crimes. But it was held that those rights could not be thus protected, but must yield to the Ordinance and Constitution.

The first slave case decided by the Supreme Court of Missouri, contained in the reports, was Winny v. Whitesides, 1 Mo. 473, at October Term, 1824. It appeared that, more than twenty-five years before, the defendant, with her husband, had removed from Carolina to Illinois, and brought with them the plaintiff; that they continued to reside in Illinois three or four years, retaining the plaintiff as a slave; after which, they removed to Missouri, taking her with them.

The court held, that if a slave be detained in Illinois until he be entitled to freedom, the right of the owner does not revive when he finds the negro in a slave State.

551*] *That when a slave is taken to Illinois by his owner, who takes up his residence there, the slave is entitled to freedom.

In the case of Lagrange v. Chouteau, 2 Mo. 20, at May Term, 1828, it was decided that the Ordinance of 1787 was intended as a fundamental law for those who may choose to live under it, rather than as a penal statute.

That any sort of residence contrived or permitted by the legal owner of the slave, upon the faith of secret trusts or contracts, in order to defeat or evade the Ordinance, and thereby introduce slavery de facto, would entitle such slave to freedom.

In Julia v. McKinney, 3 Mo. 270, it was held, where a slave was settled in the State of Illinois, but with an intention on the part of the owner to be removed at some future day, that hiring said slave to a person to labor for one or two days, and receiving the pay for the hire, the slave is entitled to her freedom, under the 2d section of the 6th article of the Constitution of Illinois.

Rachel v. Walker, 4 Mo. 350, June Term, 1836, is a case involving, in every particular, the principles of the case before us. Rachel sued for her freedom; and it appeared that she had been bought as a slave in Missouri, by Stockton an officer of the army, taken to Fort Snelling, where he was stationed, and she was retained there as a slave a year; and then Stockton removed to Prairie du Chien, taking Rachel with him as a slave, where he continued to hold her three years, and then he took her to the State of Missouri, and sold her as a slave.

"Fort Snelling was admitted to be on the west side of the Mississippi River, and north of the State of Missouri, in the territory of the United States. That Prairie du Chien was in the Michigan Territory, on the east side of the Mississippi River. Walker, the defendant, held Rachel under Stockton."

The court said, in this case:

"The officer lived in Missouri Territory, at the time he bought the slave; he sent to a slaveholding country and procured her; this was his voluntary act, done without any other reason than that of his convenience; and he and those claiming under him must be holden to abide the consequences of introducing slavery both in Missouri Territory and Michigan, contrary to law; and on that ground Rachel was declared to be entitled to freedom."

In answer to the argument that, as an officer of the army, the master had a right to take his slave into free territory, the court said no authority of law or the government compelled him to keep the plaintiff there as a slave.

"Shall it be said, that because an officer of the army owns *slaves in Virginia, that [*552 when, as officer and soldier, he is required to take the command of a fort in the non-slaveholding States or Territories, he thereby has a right to take with him as many slaves as will suit his interests or convenience? It surely cannot be law. If this be true, the court say, then it is also true that the convenience or supposed convenience of the officer repeals, as to him and others who have the same character, the Ordinance and the Act of 1821, admitting Missouri into the Union, and also the prohibition of the several laws and constitutions of the nonslaveholding States.

In Wilson v. Melvin, 4 Mo. 592, it appeared the defendant left Tennessee with an intention of residing in Illinois, taking his negroes with him. After a month's stay in Illinois, he took his negroes to St. Louis, and hired them, then returned to Illinois. On these facts, the inferior court instructed the jury that the defendant was a sojourner in Illinois. This the Supreme Court held was error, and the judgment was reversed.

The case of Dred Scott v. Emerson, 15 Mo.

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576, March Term, 1852, will now be stated. This case involved the identical question before us, Emerson having, since the hearing, sold the plaintiff to Sandford, the defendant.

Two of the judges ruled the case, the Chief Justice dissenting. It cannot be improper to state the grounds of the opinion of the court, and of the dissent.

The court says: "Cases of this kind are not strangers in our court. Persons have been frequently here adjudged to be entitled to their freedom, on the ground that their masters held them in slavery in Territories or States in which that institution is prohibited. From the first case decided in our court, it might be inferred that this result was brought about by a presumed assent of the master, from the fact of having voluntarily taken his slave to a place where the relation of master and slave did not exist. But subsequent cases base the right to 'exact the forfeiture of emancipation,' as they term it, on the ground, it would seem, that it was the duty of the courts of this State to carry into effect the constitution and laws of other States and Territories, regardless of the rights, the policy, or the institutions, of the people of this State."

And the court say that the States of the Union, in their municipal concerns, are regarded as foreign to each other; that the courts of one State do not take notice of the laws of other States, unless proved as facts, and that every State has the right to determine how far its comity to other States shall extend; and it is laid down, that when there is no act of manumission decreed to the free State, the courts of 553*] the slave States *cannot be called to give effect to the law of the free State. Comity, it alleges, between States, depends upon the discretion of both, which may be varied by circumstances. And it is declared by the court, "that times are not as they were when the former decisions on this subject were made." Since then, not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances, it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others.

Chief Justice Gamble dissented from the other two judges. He says:

"In every slaveholding State in the Union, the subject of emancipation is regulated by statute; and the forms are prescribed in which it shall be effected. Whenever the forms required by the laws of the State in which the master and slave are resident are complied with, the emancipation is complete, and the slave is free. If the right of the person thus emancipated is subsequently drawn in question in another State, it will be ascertained and determined by the law of the State in which the slave and his former master resided; and when it appears that such law has been complied with, the right to freedom will be fully sustained in the courts of all the slaveholding States, although the act of emancipation may not be in the form required by law in which the court sits.

In all such cases, courts continually administer the law of the country where the right was acquired; and when that law becomes known to the court, it is just as much a matter of course to decide the rights of the parties according to its requirements, as it is to settle the title of real estate situated in our State by its own laws."

This appears to me a most satisfactory answer to the argument of the court. Chief Justice continues:

"The perfect equality of the different States lies at the foundation of the Union. As the institution of slavery in the States is one over which the Constitution of the United States gives no power to the general government, it is left to be adopted or rejected by the several States, as they think best; nor can any one State, or number of States, claim the right to interfere with any other State upon the question of admitting or excluding this institution.

"A citizen of Missouri, who removes with his slave to Illinois, *has no right to com- [*554 plain that the fundamental law of that State to which he removes, and in which he makes his residence, dissolves the relation between him and his slave. It is as much his own voluntary act, as if he had executed a deed of emancipation. No one can pretend ignorance of this constitutional provision, and," he says, "the decisions which have heretofore been made in this State, and in many other slaveholding States, give effect to this and other similar provisions, on the ground that the master, by making the free State the residence of his slave, has submitted his right to the operation of the law of such State; and this," he says, "is the same in law as a regular deed of emancipation."

He adds:

"I regard the question as conclusively settled by repeated adjudications of this court, and, if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them, than I would any other series of decisions by which the law of any other question was settled. There is with me," he says, "nothing in the law relating to slavery which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary public excitements which are gathered around it."

"In this State," he says, "it has been recognized from the beginning of the government as a correct position in law, that a master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave." These decisions, which come down to the year 1837, seemed to have so fully settled the question, that since that time there has been no case bringing it before the court for any reconsideration, until the present. In the case of Winny v. Whitesides, 1 Mo. 473, the question was made in the argument, "whether one nation would execute the penal laws of another," and the court replied in this language (Huberus, quoted in 4 Dallas), which says, "personal rights or disabilities obtained or communicated by the laws of any particular place are of a nature which accompany the person wherever he goes;" and the Chief Justice observed, in the case of Rachel v. Walker, 4 Mo. 350, the Act of Congress called the Missouri

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Compromise was held as operative as the Ordinance of 1787.

When Dred Scott, his wife and children, were removed from Fort Snelling to Missouri, in 1838, they were free as the law was then settled, and continued for fourteen years afterwards, up to 1852, when the above decision was made. Prior to this, for nearly thirty years, as Chief Justice Gamble declares, the residence of a master with his slave in the State of Illinois, or the Territory north of Missouri, 555*] where slavery was prohibited *by the Act called the Missouri Compromise, would manumit the slave as effectually as if he had executed a deed of emancipation; and that an officer of the army who takes his slave into that State or Territory, and holds him there as a slave, liberates him the same as any other citizen—and down to the above time it was settled by numerous and uniform decisions; and that on the return of the slave to Missouri, his former condition of slavery did not attach. Such was the settled law of Missouri until the decision of Scott v. Emerson.

In the case of Sylvia v. Kirby, 17 Mo. 434, the court followed the above decision, observing that it was similar in all respects to the case of Scott v. Emerson.

This court follows the established construction of the statutes of a State by its Supreme Court. Such a construction is considered as a part of the Statute, and we follow it to avoid two rules of property in the same State. But we do not follow the decisions of the Supreme Court of a State beyond a statutory construction as a rule of decision for this court. State decisions are always viewed with respect and treated as authority; but we follow the settled construction of the statutes, not because it is of binding authority, but in pursuance of a rule of judicial policy.

But there is no pretense that the case of Dred Scott v. Emerson turned upon the construction of a Missouri Statute; nor was there any established rule of property which could have rightfully influenced in the decision. On the contrary, the decision overruled the settled law for nearly thirty years.

This is said by my brethren to be a Missouri question; but there is nothing which gives it this character, except that it involves the right to persons claimed as slaves who reside in Missouri, and the decision was made by the Supreme Court of that State. It involves a right claimed under an Act of Congress and the Constitution of Illinois, and which cannot be decided without the consideration and construction of those laws. But the Supreme Court of Missouri held, in this case, that it will not regard either of those laws, without which there was no case before it; and Dred Scott, having been a slave, remains a slave. In this respect it is admitted this is a Missouri question—a case which has but one side, if the Act of Congress and the Constitution of Illinois are not recognized.

And does such a case constitute a rule of decision for this court—a case to be followed by this court? The course of decision so long and so uniformly maintained established a comity or law between Missouri and the free States and Territories where slavery was prohibited, which must be somewhat regarded in this case. Rights sanctioned for twenty-eight years *ought not and cannot be repudia- [*556 ated, with any semblance of justice, by one or two decisions, influenced, as declared, by a determination to counteract the excitement against slavery in the free States.

The courts of Louisiana having held, for a series of years, that where a master took his slave to France, or any free state, he was entitled to freedom, and that on bringing him back the status of slavery did not attach, the Legislature of Louisiana declared by an Act that the slave should not be made free under such circumstances. This regulated the rights of the master from the time the Act took effect. But the decision of the Missouri court, reversing a former decision, affects all previous decisions, technically, made on the same principles, unless such decisions are protected by the lapse of time or the Statute of Limitations. Dred Scott and his family, beyond all controversy, were free under the decisions made for twenty-eight years, before the case of Scott v. Emerson. This was the undoubted law of Missouri for fourteen years after Scott and his family were brought back to that State. And the grave question arises, whether this law may be so disregarded as to enslave free persons. I am strongly inclined to think that a rule of decision so well settled as not to be questioned, cannot be annulled by a single decision of the court. Such rights may be inoperatives under the decision in future; but I cannot well perceive how it can have the same effect in prior cases.

It is admitted, that when a former decision is reversed, the technical effect of the judgment is to make all previous adjudications on the same question erroneous. But the case before us was not that the law had been erroneously construed, but that, under the circumstances which then existed, that law would not be recognized; and the reason for this is declared to be the excitement against the institution of slavery in the free States. While I lament this excitement as much as anyone, I cannot assent that it shall be made a basis for judicial action.

In 1816, the common law, by statute, was made a part of the law of Missouri; and that includes the great principles of international law. These principles cannot be abrogated by judicial decisions. It will require the same exercise of power to abolish the common law, as to introduce it. International law is founded in the opinions generally received and acted on by civilized nations, and enforced by moral sanctions. It becomes a more authoritative system when it results from special compacts, founded on modified rules, adapted to the exigencies of human society; it is in fact an international morality, adapted to the best interests of nations. And in regard to the States *of this Union, on the subject [*557 of slavery, it is eminently fitted for a rule of action, subject to the Federal Constitution. "The laws of nations are but the natural rights of man applied to nations." Vattel.

If the common law have the force of a statutory enactment in Missouri, it is clear, as it seems to me, that a slave who, by a residence in Illinois in the service of his master, becomes entitled to his freedom, cannot again be reduced to slavery by returning to his former domicil in a slave State. It is unnecessary to say what

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legislative power might do by a general Act in such a case, but it would be singular if a freeman could be made a slave by the exercise of a judicial discretion. And it would be still more extraordinary if this could be done, not only in the absence of special legislation, but in a State where the common law is in force.

It is supposed by some that the 3d article in the Treaty of Cession of Louisiana to this country, by France, in 1803, may have some bearing on this question. The article referred to provides "that the inhabitants of the ceded Territory shall be incorporated into the Union, and enjoy all the advantages of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess."

As slavery existed in Louisiana at the time of the cession, it is supposed this is a guaranty that there should be no change in its condition.

The answer to this is, in the first place, that such a subject does not belong to the treaty-making power; and any such arrangement would have been nugatory. And, in the second place, by no admissible construction can the guaranty be carried further than the protection of property in slaves at that time in the ceded Territory. And this has been complied with. The organization of the slave States of Louisiana, Missouri and Arkansas, embraced every slave in Louisiana at the time of the cession. This removes every ground of objection under the Treaty. There is, therefore, no pretense, growing out of the Treaty, that any part of the Territory of Louisiana, as ceded, beyond the organized States, is slave territory.

Under the fifth head, we were to consider whether the status of slavery attached to the plaintiff and wife on their return to Missouri.

This doctrine is not asserted in the late opinion of the Supreme Court of Missouri, and up to 1852 the contrary doctrine was uniformly maintained by that court.

In its late decision, the court say that it will not give effect in Missouri to the laws of Illi-
558*] nois, or the law of Congress *called the Missouri Compromise. This was the effect of the decision, though its terms were, that the court would not take notice, judicially, of those laws.

In 1851, the Court of Appeals of South Carolina recognized the principle, that a slave, being taken to a free State, became free. Commonwealth v. Pleasant, 10 Leigh, 697. In Betty v. Horton, the Court of Appeals held that the freedom of the slave was acquired by the action of the laws of Massachusetts, by the said slave being taken there. 5 Leigh, 615.

The slave States have generally adopted the rule, that where the master, by a residence with his slave in a State or Territory where slavery is prohibited, the slave was entitled to his freedom everywhere. This was the settled doctrine of the Supreme Court of Missouri. It has been so held in Mississippi, in Virginia, in Louisiana, formerly in Kentucky, Maryland, and in other States.

The law, where a contract is made and is to be executed, governs it. This does not depend upon comity, but upon the law of the contract. And if, in the language of the Supreme Court of Missouri, the master, by taking his slave to Illinois, and employing him there as a slave, emancipates him as effectually as by a deed of emancipation, is it possible that such an act is not matter for adjudication in any slave State where the master may take him? Does not the master assent to the law when he places himself under it in a free State?

The States of Missouri and Illinois are bounded by a common line. The one prohibits slavery, the other admits it. This has been done by the exercise of that sovereign power which appertains to each. We are bound to respect the institutions of each, as emanating from the voluntary action of the people. Have the people of either any right to disturb the relations of the other? Each State rests upon the basis of its own sovereignty, protected by the Constitution. Our Union has been the foundation of our prosperity and national glory. Shall we not cherish and maintain it? This can only be done by respecting the legal rights of each State.

If a citizen of a free State shall entice or enable a slave to escape from the service of his master, the law holds him responsible, not only for the loss of the slave, but he is liable to be indicted and fined for the misdemeanor. And I am bound here to say that I have never found a jury in the four States which constitute my circuit, which have not sustained this law, where the evidence required them to sustain it. And it is proper that I should also say that more cases have arisen in my circuit by reason of its extent and locality, than in all *other parts of the Union. This has [*559 been done to vindicate the sovereign rights of the Southern States, and protect the legal interests of our brethren of the South.

Let these facts be contrasted with the case now before the court. Illinois has declared in the most solemn and impressive form that there shall be neither slavery nor involuntary servitude in that State, and that any slave brought into it, with a view of becoming a resident, shall be emancipated. And effect has been given to this provision of the Constitution by the decision of the Supreme Court of that State. With a full knowledge of these facts, a slave is brought from Missouri to Rock Island, in the State of Illinois, and is retained there as a slave for two years, and then taken to Fort Snelling, where slavery is prohibited by the Missouri Compromise Act, and there he is detained two years longer in a state of slavery. Harriet, his wife, was also kept at the same place four years as a slave, having been purchased in Missouri. They were then removed to the State of Missouri, and sold as slaves, and in the action before us they are not only claimed as slaves, but a majority of my brethren have held that on their being returned to Missouri the status of slavery attached to them

I am not able to reconcile this result with the respect due to the State of Illinois. Having the same rights of sovereignty as the State of Missouri in adopting a constitution, I can perceive no reason why the institutions of Illinois should not receive the same consideration as those of Missouri. Allowing to my brethren the same right of judgment that I exercise myself, I must be permitted to say that it seems to me the principle laid down will enable the people

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of a slave State to introduce slavery into a free State, for a longer or shorter time, as may suit their convenience; and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State. There is no evidence before us that Dred Scott and his family returned to Missouri voluntarily. The contrary is inferable from the agreed case: "In the year 1838, Dr. Emerson removed the plaintiff and said Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided." This is the agreed case; and can it be inferred from this that Scott and family returned to Missouri voluntarily? He was removed; which shows that he was passive, as a slave, having exercised no volition on the subject. He did not resist the master by absconding or force. But that was not sufficient to bring him within Lord Stowell's decision; he must have acted 560*] voluntarily. It would be a *mockery of law and an outrage on his rights to coerce his return, and then claim that it was voluntary, and on that ground that his former status of slavery attached.

If the decision be placed on this ground, it is a fact for a jury to decide, whether the return was voluntary, or else the fact should be distinctly admitted. A presumption against the plaintiff in this respect, I say with confidence, is not authorized from the facts admitted.

In coming to the conclusion that a voluntary return by Grace to her former domicil, slavery attached, Lord Stowell took great pains to show that England forced slavery upon her Colonies, and that it was maintained by numerous Acts of Parliament and public policy, and, in short, that the system of slavery was not only established by Great Britain in her West Indian colonies, but that it was popular and profitable to many of the wealthy and influential people of England, who were engaged in trade, or owned and cultivated plantations in the Colonies. No one can read his elaborate views and not be struck with the great difference between England and her Colonies, and the free and slave States of this Union. While slavery in the Colonies of England is subject to the power of the mother country, our States, especially in regard to slavery, are independent, resting upon their own sovereignties, and subject only to international laws, which apply to independent States.

In the case of Williams, who was a slave in Granada, having run away, came to England, Lord Stowell said: "The four judges all concur in this—that he was a slave in Granada, though a free man in England, and he would have continued a free man in all other parts of the world except Granada."

Strader v. Graham, 10 How. 82, and 18 Curt. 305, has been cited as having a direct bearing in the case before us. In that case the court say: "It was exclusively in the power of Kentucky to determine, for itself, whether the employment of slaves in another State should or should not make them free on their return." No question was before the court in that case, except that of jurisdiction. And any opinion given on any other point is obiter dictum, and of no authority. In the conclusion of his opinion, the Chief Justice said: "In every view of the subject, therefore, this court has no jurisdiction of the case, and the writ of error must on that ground be dismissed."

In the case of Spencer v. Negro Dennis, 8 Gill, 321, the court say: "Once free, and always free, is the maxim of Maryland law upon the subject. Freedom having once vested, by no compact between the master and the liberated slave, *nor by any condition subsequent, at- [*561 tached by the master to the gift of freedom, can a state of slavery be reproduced."

In Hunter v Fulcher, 1 Leigh, 172.

"By a Statute of Maryland of 1796, all slaves brought into that State to reside are declared free; a Virginian-born slave is carried by his master to Maryland; the master settled there, and keeps the slave there in bondage for twelve years, the statute in force all the time; then he brings him as a slave to Virginia, and sells him there. Adjudged, in an action brought by the man against the purchaser, that he is free."

Judge Kerr, in the case, says:

"Agreeing, as I do, with the general view taken in this case by my brother Green, I would not add a word, but to mark the exact extent to which I mean to go. The law of Maryland having enacted that slaves carried into that State for sale or to reside shall be free, and the owner of the slave here having carried him to Maryland, and voluntarily submitting himself and the slave to that law, it governs the case."

In every decision of a slave case prior to that of Dred Scott v. Emerson, the Supreme Court of Missouri considered it as turning upon the Constitution of Illinois, the Ordinance of 1787, or the Missouri Compromise Act of 1820. The court treated these Acts as in force, and held itself bound to execute them, by declaring the slave to be free who had acquired a domicil under them with the consent of his matser.

The late decision reversed this whole line of adjudication, and held that neither the Constitution and laws of the States, nor Acts of Congress in relation to Territories, could be judicially noticed by the Supreme Court of Missouri. This is believed to be in conflict with the decisions of all the courts in the Southern States. with some exceptions of recent cases.

In Marie Louise v. Marot et al. 9 La. 475, it was held, where a slave having been taken to the kingdom of France or other country by the owner, where slavery is not tolerated, operates on the condition of the slave, and produces immediate emancipation; and that, where a slave thus becomes free, the master cannot reduce him again to slavery.

Josephine v. Poultney, 1 La. Ann. 329. "where the owner removes with a slave into a State in which slavery is prohibited, with the intention of residing there, the slave will be thereby emancipated, and their subsequent return to the State of Louisiana cannot restore the relation of master and slave." To the same import are the cases of Smith v. Smith, 13 La. 441; Thomas v. Generis, 16 La. 483; Harry et al. v. Decker and Hopkins, Walk. (Miss.) 36. It was held that "slaves within the jurisdiction *of [*562 the Northwestern Territory became freemen by virtue of the Ordinance of 1787, and can assert their claim to freedom in the courts of Mississippi." Griffith v. Fanny, 1 Virginia, 143. It

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was decided that a negro held in servitude in Ohio, under a deed executed in Virginia is entitled to freedom by the Constitution of Ohio.

The case of Rhodes v. Bell, 2 How. 397, involved the main principle in the case before us. A person residing in Washington City purchased a slave in Alexandria, and brought him to Washington. Washington continued under the law of Maryland, Alexandria under the law of Virginia. The Act of Maryland of November, 1796, 2 Maxcy's Laws, 351, declared anyone who shall bring any negro, mulatto, or other slave, into Maryland, such slave should be free. The above slave, by reason of his being brought into Washington City, was declared by this court to be free. This, it appears to me, is a much stronger case against the slave than the facts in the case of Scott.

In Bush v. White, 3 Monroe, 104, the court say:

"That the Ordinance was paramount to the territorial laws, and restrained the legislative power there as effectually as a Constitution in an organized State. It was a public Act of the Legislature of the Union, and a part of the supreme law of the land; and, as such, this court is as much bound to take notice of it as it can be of any other law."

In the case of Rankin v. Lydia, 2 A. K. Marsh. 467, before cited, Judge Mills, speaking for the Court of Appeals of Kentucky, says:

"If, by the positive provision in our code, we can and must hold our slaves in the one case, and statutory provisions equally positive decide against that right in the other, and liberate the slave, he must, by an authority equally imperious, be declared free. Every argument which supports the right of the master on one side, based upon the force of written law, must be equally conclusive in favor of the slave, when he can point out in the statute the clause which secures his freedom."

And he further said:

"Free people of color in all the States are, it is believed, quasi citizens, or, at least, denizens. Although none of the States may allow them the privilege of office and suffrage, yet all other civil and conventional rights are secured to them; at least, such rights were evidently secured to them by the Ordinance in question for the government of Indiana. If these rights are vested in that or any other portion of the United States, can it be compatible with the spirit of our confederated government to deny their existence in any other part? Is there less comity existing between State and State, or 563*] State *and Territory, than exists between the despotic governments of Europe."

These are the words of a learned and great judge, born and educated in a slave State.

I now come to inquire, under the sixth and last head, "whether the decisions of the Supreme Court of Missouri, on the question before us, are binding on this court."

While we respect the learning and high intelligence of the state courts, and consider their decisions, with others, as authority, we follow them only where they give a construction to the state statutes. On this head, I consider myself fortunate in being able to turn to the decision of this court, given by Mr. Justice Grier, in Pease v. Peck, a case from the State of Michigan, 18 How. 595, decided in December Term, 1855. Speaking for the court, Judge Grier said:

"We entertain the highest respect for that learned court (the Supreme Court of Michigan), and in any question affecting the construction of their own laws, where we entertain any doubt, would be glad to be relieved from doubt and responsibility by reposing on their decision. There are, it is true, many dicta to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the state courts on the construction of their own laws. But although this may be correct, yet a rather strong expression of a general rule, it cannot be received as the annunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a State, by its highest judicature established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it, without criticism or further inquiry. When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions; and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent."

These words, it appears to me, have a stronger application to the case before us than they had to the cause in which they were spoken as the opinion of this court; and I regret that they do not seem to be as fresh in the recollection of some of my brethren as in my own. For twenty-eight years, the decisions of the Supreme Court of Missouri were consistent on all the points made in this case. But this consistent course was suddenly terminated, whether by some new light suddenly springing up, or an excited public opinion, or both, it is not *necessary to say. In the case of Scott [*564 v. Emerson, in 1852, they were overturned and repudiated.

This, then, is the very case in which seven of my brethren declared that they would not follow the last decision. On this authority I may well repose. I can desire no other or better basis.

But there is another ground which I deem conclusive, and which I will restate.

The Supreme Court of Missouri refused to notice the Act of Congress or the Constitution of Illinois, under which Dred Scott, his wife and children, claimed that they are entitled to freedom.

This being rejected by the Missouri court, there was no case before it, or at least it was a case with only one side. And this is the case which, in the opinion of this court, we are bound to follow. The Missouri court disregards the express provisions of an Act of Congress and the constitution of a sovereign State, both of which laws for twenty-eight years it had not only regarded, but carried into effect.

If a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford? So far from this being a Missouri question, it is a question, as it would seem, within the 25th sec. of the Judiciary Act, where a right to freedom being

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set up under the Act of Congress, and the decision being against such right, it may be brought for revision before this court, from the Supreme Court of Missouri.

I think the judgment of the court below should be reversed.

Mr. Justice Curtis, dissenting:

I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. The plaintiff alleged in his declaration, that he was a citizen of the State of Missouri, and that the defendant was a citizen of the State of New York. It is not doubted that it was necessary to make each of these allegations, to sustain the jurisdiction of the Circuit Court. The defendant denied, by a plea to the jurisdiction, either sufficient or insufficient, that the plaintiff was a citizen of the State of Missouri. The plaintiff demurred to that plea. The Circuit Court adjudged the plea insufficient, and the first question for our consideration is, whether the sufficiency of that plea is before this court for judgment, upon this writ of error. The part of the judicial power of the United States, conferred by Congress on the circuit courts, being limited to certain described cases and controversies, the 565*] question whether a particular *case is within the cognizance of a circuit court, may be raised by a plea to the jurisdiction of such court. When that question has been raised, the Circuit Court must, in the first instance, pass upon and determine it. Whether its determination be final, or subject to review by this appellate court, must depend upon the will of Congress; upon which body the Constitution has conferred the power, with certain restrictions, to establish inferior courts to determine their jurisdiction, and to regulate the appellate power of this court. The 22d section of the Judiciary Act of 1789, which allows a writ of error from final judgments of circuit courts, provides that there shall be no reversal in this court, on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court. Accordingly it has been held, from the origin of the court to the present day, that circuit courts have not been made by Congress the final judges of their own jurisdiction in civil cases. And that when a record comes here upon a writ of error or appeal, and, on its inspection, it appears to this court that the Circuit Court had not jurisdiction, its judgment must be reversed, and the cause remanded, to be dismissed for want of jurisdiction.

It is alleged by the defendant in error, in this case, that the plea to the jurisdiction was a sufficient plea; that it shows, on inspection of its allegations, confessed by the demurrer, that the plaintiff was not a citizen of the State of Missouri; that upon this record, it must appear to this court that the case was not within the judicial power of the United States, as defined and granted by the Constitution, because it was not a suit by a citizen of one State against a citizen of another State.

To this it is answered, first, that the defendant, by pleading over, after the plea to the jurisdiction was adjudged insufficient, finally waived all benefit of that plea.

When that plea was adjudged insufficient, the defendant was obliged to answer over. He held no alternative. He could not stop the further progress of the case in the Circuit Court by a writ of error, on which the sufficiency of his plea to the jurisdiction could be tried in this court, because the judgment on that plea was not final, and no writ of error would lie. He was forced to plead to the merits. It cannot be true, then, that he waived the benefit of his plea to the jurisdiction by answering over. Waiver includes consent. Here, there was no consent. And if the benefit of the plea was finally lost, it must be, not by any waiver, but because the laws of the United States have not provided any mode of reviewing the decision of the Circuit Court on such a plea, when that decision is against the defendant. This is not the *law. Whether [*566 the decision of the Circuit Court on a plea to the jurisdiction be against the plaintiff, or against the defendant, the losing party may have any alleged error in law, in ruling such a plea examined in this court on a writ of error, when the matter in controversy exceeds the sum or value of $2,000. If the decision be against the plaintiff, and his suit dismissed for want of jurisdiction, the judgment is technically final, and he may at once sue out his writ of error.

Mollan v. Torrance, 9 Wheat. 537.

If the decision be against the defendant, though he must answer over, and wait for a final judgment in the cause, he may then have have his writ of error, and upon it obtain the judment of this court on any question of law apparent on the record, touching the jurisdiction. The fact that he pleaded over to the merits, under compulsion, can have no effect on his right to object to the jurisdiction. If this were not so, the condition of the two parties would be grossly unequal. For if a plea to the jurisdiction were ruled against the plaintiff, he could at once take his writ of error and have the ruling reviewed here; while, if the same plea were ruled against the defendant, he must not only wait for a final judgment, but could in no event have the ruling of the Circuit Court upon the plea reviewed by this court. I know of no ground for saying that the laws of the United States have thus discriminated between the parties to a suit in its courts.

It is further objected, that as the judgment of the Circuit Court was in favor of the defendant, and the writ of error in this cause was sued out by the plaintiff, the defendant is not in a condition to assign any error in the record, and therefore this court is precluded from considering the question whether the Circuit Court had jurisdiction.

The practice of this court does not require a technical assignment of errors. See the rule. Upon a writ of error, the whole record is open for inspection; and if any error be found in it, the judgment is reversed.

Bank of U. S. v. Smith, 11 Wheat. 171.

It is true, as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for

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error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac. Abr. Error, H. 4. And this court followed this practice in Capron 567*] v. Van Noorden, 2 *Cranch, 126, where the plaintiff below procured the reversal of a judgment for the defendant, on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction.

But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the court is, where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even where it does not appear, affirmatively, that it does exist. Piquignot v. The Pennsylvania R. R. Co. 16 How. 104. It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. Cutler v. Rae, 7 How. 729. I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is, sua sponte, if not moved to it by either party, to examine the sufficiency of that plea; and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power.

I proceed, therefore, to examine the plea to the jurisdiction.

I do not perceive any sound reason why it is not to be judged by the rules of the common law applicable to such pleas. It is true, where the jurisdiction of the Circuit Court depends on the citizenship of the parties, it is incumbent on the plaintiff to allege on the record the necessary citizenship; but when he has done so, the defendant must interpose a plea in abatement, the allegations whereof show that the court has not jurisdiction; and it is incumbent on him to prove the truth of his plea.

In Sheppard v. Graves, 14 How. 505, the rules on this subject are thus stated in the opinion of the court: "That although, in the courts of the United States, it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken prima facie, as existing; and 568*] it is incumbent *on him who would impeach that jurisdiction for causes dehors the pleading, to allege and prove such causes; that the necessity for the allegation, and the burden of sustaining it by proof, both rest upon the party taking the exception." These positions are sustained by the authorities there cited, as well as by Wickliffe v. Owings, 17 How. 47.

When, therefore, as in this case, the necessary averments as to citizenship are made on the record, and jurisdiction is assumed to exist, and the defendant comes by a plea to the jurisdiction to displace that presumption, he occupies, in my judgment, precisely the position described in Bacon Abr. Abatement: "Abatement, in the general acceptation of the word, signifies a plea, put in by the defendant, in which he shows cause to the court why he should not be impleaded; or, if at all, not in the manner and form he now is."

This being, then, a plea in abatement, to the jurisdiction of the court, I must judge of its sufficiency by those rules of the common law applicable to such pleas.

The plea was as follows: "And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them (if any such have accrued to the said Dred Scott), accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri; for that, to wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves; and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid."

The plaintiff demurred, and the judgment of the Circuit Court was, that the plea was insufficient.

I cannot treat this plea as a general traverse of the citizenship alleged by the plaintiff. Indeed, if it were so treated, the plea was clearly bad, for it concludes with a verification, and not to the country, as a general traverse should. And though this defect in a plea in bar must be pointed out by a special demurrer, it is never necessary to demur specially to a plea in abatement; all matters, though of form only, may be taken advantage of upon a general demurrer to such a plea.

Chitty on Pl. 465.

The truth is, that though not drawn with the utmost technical accuracy, it is a special traverse of the plaintiff's allegation *of citi- [*569 zenship, and was a suitable and proper mode of traverse under the circumstances. By reference to Mr. Stephen's description of the uses of such a traverse, contained in his excellent analysis of pleadings (Steph. on Pl. 176), it will be seen how precisely this plea meets one of his descriptions. No doubt the defendant might have traversed, by a common or general traverse, the plaintiff's allegation that he was a citizen of the State of Missouri, concluding to the country. The issue thus presented being joined, would have involved matter of law, on which the jury must have passed, under the direction of the court. But by traversing the plaintiff's citizenship specially—that is, averring those facts on which the defendant relied to show that in point of law the plaintiff was not a citizen, and basing the traverse on those facts as a deduction therefrom—opportunity was given to do what was done; that is, to

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present directly to the court, by a demurrer, the sufficiency of those facts to negative, in point of law, the plaintiff's allegation of citizenship. This, then, being a special, and not a general or common traverse, the rule is settled, that the facts thus set out in the plea, as the reason or ground of the traverse, must of themselves constitute, in point of law, a negative of the allegation thus traversed. Steph. on Pl. 183; Ch. on Pl. 620. And upon a demurrer to this plea, the question which arises is, whether the facts, that the plaintiff is a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves, may all be true, and yet the plaintiff be a citizen of the State of Missouri, within the meaning of the Constitution and laws of the United States, which confer on citizens of one State the right to sue citizens of another State in the circuit courts. Undoubtedly, if these facts, taken together, amount to an allegation that, at the time of action brought, the plaintiff was himself a slave, the plea is sufficient. It has been suggested that the plea, in legal effect, does so aver, because, if his ancestors were sold as slaves, the presumption is they continued slaves; and if so, the presumption is, the plaintiff was born a slave; and if so, the presumption is, he continued to be a slave to the time of action brought.

I cannot think such presumptions can be resorted to, to help out defective averments in pleading; especially, in pleading in abatement, where the utmost certainty and precision are required. Chit. Pl. 457. That the plaintiff himself was a slave at the time of action brought, is a substantive fact, having no necessary connection with the fact that his parents were sold as slaves. For they might have been sold after he was born; or the plaintiff him-570*] self, if once a slave, might have *become a freeman before action was brought. To aver that his ancestors were sold as slaves, is not equivalent, in point of law to an averment that he was a slave. If it were, he could not even confess and avoid the averment of the slavery of his ancestors, which would be monstrous; and if it be not equivalent in point of law, it cannot be treated as amounting thereto when demurred to; for a demurrer confesses only those substantive facts which are well pleaded, and not other distinct substantive facts which might be inferred therefrom by a jury. To treat an averment that the plaintiff's ancestors were Africans, brought to this country and sold as slaves as amounting to an averment on the record that he was a slave, because it may lay some foundation for presuming so, is to hold that the facts actually alleged may be treated as intended as evidence of another distinct fact not alleged. But, it is a cardinal rule of pleading, laid down in Dowman's case, 9 Rep. b. and in even earlier authorities therein referred to, "that evidence shall never be pleaded, for it only tends to prove matter of fact; and therefore the matter of fact shall be pleaded." Or, as the rule is sometimes stated, pleadings must not be argumentative. Steph. Pl. 384, and authorities cited by him. In Com. Dig. Pleader, E. 3, and Bac. Abr. Pleas I. 5, and Steph. Pl., many decisions under this rule are collected. In trover, for an indenture whereby A granted a manor, it is no plea that A did not grant the manor, for it does not answer the declaration except by argument. Yelv. 223.

So in trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. The court said, "this is an infallible argument that the defendant is not guilty, but it is no plea." Dyer, a 43.

In ejectment, the defendant pleaded a surrender of a copyhold by the hand of Fosset, the steward. The plaintiff replied that Fosset was not steward. The court held this no issue, for it traversed the surrender only argumentatively. Cro. Eliz. 260.

In these cases, and many others reported in the books, the inferences from the facts stated were irresistible. But the court held they did not, when demurred to, amount to such inferable facts. In the case at bar, the inference that the defendant was a slave at the time of action brought, even if it can be made at all, from the fact that his parents were slaves, is certainly not a necessary inference. This case, therefore, is like that of Digby v. Alexander, 8 Bing. 416. In that case, the defendant pleaded many facts strongly tending to show that he was once Earl of Stirling; but as there was no positive allegation *that he was so at the time [*571 of action brought, and as every fact averred might be true, and yet the defendant not have been Earl of Stirling at the time of action brought, the plea was held to be insufficient.

A lawful seisin of land is presumed to continue. But if, in an action of trespass quare clausum, the defendant were to plead that he was lawfully seised of the locus in quo, one month before the time of the alleged trespass, I should have no doubt it would be a bad plea. See Mollan v. Torrance, 9 Wheat. 537. So if a plea to the jurisdiction, instead of alleging that the plaintiff was a citizen of the same State as the defendant, were to allege that the plaintiff's ancestors were citizens of that State, I think the plea could not be supported. My judgment would be, as it is in this case, that if the defendant meant to aver a particular substantive fact, as existing at the time of action brought, he must do it directly and explicitly, and not by way of inference from certain other averments, which are quite consistent with the contrary hypothesis. I cannot, therefore, treat this plea as containing an averment that the plaintiff himself was a slave at the time of action brought; and the inquiry recurs, whether the facts, that he is of African descent, and that his parents were once slaves, are necessarily inconsistent with his own citizenship in the State of Missouri, within the meaning of the Constitution and laws of the United States.

In Gassies v. Ballon, 6 Pet. 761, the defendant was described on the record as a naturalized citizen of the United States, residing in Louisiana. The court held this equivalent to an averment that the defendant was a citizen of Louisiana; because a citizen of the United States, residing in any State of the Union, is, for purposes of jurisdiction, a citizen of that State. Now, the plea to the jurisdiction in this case does not controvert the fact that the plaintiff resided in Missouri at the date of the writ. If he did then reside there, and was also a citizen of the United States, no provisions

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contained in the Constitution or laws of Missouri can deprive the plaintiff of his right to sue citizens of States other than Missouri, in the courts of the United States.

So that, under the allegations contained in this plea, and admitted by the demurrer, the question is, whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States. If any such person can be a citizen, this plaintiff has the right to the judgment of the court that he is so; for no cause is shown by the plea, why he is not so, except his descent and the slavery of his ancestors.

The 1st section of the 2d Article of the 572*] Constitution *uses the language, "a citizen of the United States at the time of the adoption of the Constitution." One mode of approaching this question is, to inquire who were citizens of the United States at the time of the adoption of the Constitution.

Citizens of the United States at the time of the adoption of the Constitution can have been no other than the citizens of the United States under the Confederation. By the Articles of Confederation, a government was organized, the style whereof was, "The United States of America." This government was in existence when the Constitution was framed and proposed for adoption, and was to be superseded by the new Government of the United States of America, organized under the Constitution. When, therefore, the Constitution speaks of citizenship of the United States, existing at the time of the adoption of the Constitution, it must necessarily refer to citizenship under the government which existed prior to and at the time of such adoption.

Without going into any question concerning the powers of the Confederation to govern the territory of the United States out of the limits of the States, and consequently to sustain the relation of Government and citizen in respect to the inhabitants of such territory, it may safely be said that the citizens of the several States were citizens of the United States under the Confederation.

That government was simply a confederacy of the several States, possessing a few defined powers over subjects of general concern, each State retaining every power, jurisdiction, and right, not expressly delegated to the United States in Congress assembled. And no power was thus delegated to the government of the Confederation, to act on any question of citizenship, or to make any rules in respect thereto. The whole matter was left to stand upon the action of the several States, and to the natural consequence of such action, that the citizens of each State should be citizens of that Confederacy into which that State had entered, the style whereof was, "The United States of America."

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New *York, New Jersey and North Carolina, [*573 though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors on equal terms with other citizens.

The Supreme Court of North Carolina, in the case of The State v. Manuel, 4 Dev. & Bat. 20, has declared the law of that State on this subject, in terms which I believe to be as sound law in the other States I have enumerated, as it was in North Carolina.

"According to the laws of this State," says Judge Gaston, in delivering the opinion of the court, "all human beings within it, who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman laws between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects—those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the British Colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity, the disqualification of slavery, was removed, they became persons, and were then either British subjects, or not British subjects, according as they were or were not born within the allegiance of the British King. Upon the Revolution, no other change took place in the laws of North Carolina than was consequent on the transition from a Colony dependent on a European King, to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, remained aliens. Slaves, manumitted here, became freemen, and therefore, if born within North Carolina, are citizens of North Carolina, and all free persons born within the State are born citizens of the State. The Constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one, and paid a public tax; and it is a matter of universal notoriety, that, under it, free persons, without regard to color, claimed and exercised the franchise, until it was taken from free men of color a few years since by our amended Constitution."

In The State v. Newcomb, 5 Ired. 253, decided in 1844, the same court referred to this case of The State v. Manuel, and said: "That case underwent a very laborious investigation, both by the Bar and the Bench. The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling *influence and authority on all [*574 questions of a similar character."

An argument from speculative premises, however well chosen, that the then state of opinion in the Commonwealth of Massachusetts was not consistent with the natural rights of people of color who were born on that soil, and that they were not, by the Constitution of 1780 of that State, admitted to the condition of

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citizens, would be received with surprise by the people of that State, who know their own political history. It is true, beyond all controversy, that persons of color, descended from African slaves, were by that Constitution made citizens of the State; and such of them as have had the necessary qualifications, have held and exercised the elective franchise, as citizens, from that time to the present. See Com. v. Aves, 18 Pick. 210.

The Constitution of New Hampshire conferred the elective franchise upon "every inhabitant of the State having the necessary qualifications," of which color or descent was not one.

The Constitution of New York gave the right to vote to "every male inhabitant, who shall have resided," etc.; making no discrimination between the colored persons and others. See Con. of N. Y. Art. 2, Rev. Stats. of N. Y. Vol. I. p. 126.

That of New Jersey, to "all inhabitants of this Colony, of full age, who are worth £50 proclamation money, clear estate."

New York, by its Constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present Constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry, except to show, that before they were made, no such restrictions existed; and colored, in common with white persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts. I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted, in the Declaration of Independence, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, 575*] would not leave *these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place to vindicate their memory. As I conceive, we should deal here, not with such disputes, if there can be a dispute concerning this subject, but with those substantial facts evinced by the written constitutions of States, and by the notorious practice under them. And they show, in a manner which no argument can obscure, that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States.

The 4th of the fundamental articles of the Confederation was as follows: "The free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States."

The fact that free persons of color were citizens of some of the several States, and the consequence, that this 4th Article of the Confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive, that the 4th Article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

On the 25th of June, 1778, the Articles of Confederation being under consideration by the Congress, the delegates from South Carolina moved to amend this 4th Article, by inserting after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of general citizenship would be secured only to white persons. Two States voted for the amendment, eight States against it, and the vote of one State was divided. The language of the article stood unchanged, and both its terms of inclusion, "free inhabitants," and the strong implication from its terms of exclusion, "paupers, vagabonds and fugitives from justice," who alone were excepted, it is clear, that under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and, by reason of their citizenship in certain States, were, entitled to the *privileges and immunities of gen- [*576 eral citizenship of the United States.

Did the Constitution of the United States deprive them or their descendants of citizenship?

That Constitution was ordained and established by the people of the United States through the action, in each State, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States by whom the Constitution was ordained and established," but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which, proprio vigore, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its constitution and laws. And my opinion is, that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that

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State by force of its Constitution or laws, is also a citizen of the United States.

I will proceed to state the grounds of that opinion.

The 1st Section of the 2d Article of the Constitution uses the language, "a natural-born citizen." It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. At the Declaration of Independence, and ever since, the received general doctrine has been, in conformity with the common law, that free persons born within either of the colonies were subjects of the King; that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be subjects, and became citizens of the several States, except so far as some of them were disfranchised by the legislative power of the States, or availed themselves, seasonably, of the right to adhere to the British Crown in the 577*] civil contest, *and thus to continue British subjects. McIlvaine v. Coxe's Lessee, 4 Cranch, 209; Inglis v. Sailors' Snug Harbor, 3 Pet. p. 99; Shanks v. Dupont, Ibid. p. 242.

The Constitution having recognized the rule that persons born within the several States are citizens of the United States, one of four things must be true:

First. That the Constitution itself has described what native-born persons shall or shall not be citizens of the United States; or,

Second. That it has empowered Congress to do so; or,

Third. That all free persons, born within the several States, are citizens of the United States; or,

Fourth. That it is left to each State to determine what free persons, born within its limits, shall be citizens of such State, and thereby be citizens of the United States.

If there be such a thing as citizenship of the United States acquired by birth within the States, which the Constitution expressly recognizes, and no one denies, then these four alternatives embrace the entire subject, and it only remains to select that one which is true.

That the Constitution itself has defined citizenship of the United States by declaring what persons, born within the several States, shall or shall not be citizens of the United States, will not be pretended. It contains no such declaration. We may dismiss the first alternative, as without doubt unfounded.

Has it empowered Congress to enact what free persons, born within the several States, shall or shall not be citizens of the United States?

Before examining the various provisions of the Constitution which may relate to this question, it is important to consider for a moment the substantial nature of this inquiry. It is, in effect, whether the Constitution has empowered Congress to create privileged classes within the States, who alone can be entitled to the franchises and powers of citizenship of the United States. If it be admitted that the Constitution has enabled Congress to declare what free persons, born within the several States, shall be citizens of the United States, it must, at the same time, be admitted that it is an unlimited power. If this subject is within the control of Congress, it must depend wholly on its discretion. For, certainly, no limits of that discretion can be found in the Constitution, which is wholly silent concerning it; and the necessary consequence is, that the Federal Government may select classes of persons within the several States who alone can be entitled to the political privileges of citizenship of the United States. If this power exists, what persons born within the States may be President or Vice-President *of the United States, [*578 or members of either house of Congress, or hold any office or enjoy any privilege whereof citizenship of the United States is a necessary qualification, must depend solely on the will of Congress. By virtue of it, though Congress can grant no title of nobility, they may create an oligarchy, in whose hands would be concentrated the entire power of the Federal Government.

It is a substantive power, distinct in its nature from all others; capable of affecting not only the relations of the States to the General Government, but of controlling the political condition of the people of the United States. Certainly we ought to find this power granted by the Constitution, at least by some necessary inference, before we can say it does not remain to the States or the people. I proceed, therefore, to examine all the provisions of the Constitution which may have some bearing on this subject.

Among the powers expressly granted to Congress is "the power to establish a uniform rule of naturalization." It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this, would do violence to the meaning of the term naturalization, fixed in the common law (Co. Litt. 8 a, 129 a; 2 Ves. Sr. 286; 2 Bl. Com. 293), and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen, that it was employed in the Declaration of Independence. It was in this sense it was expounded in the Federalist (No. 42), has been understood by Congress, by the Judiciary (8 Wheat. 259, 269; 3 Wash. 313, 322; 12 Wheat. 277), and by commentators on the Constitution. 3 Story's Com. on Const. 1–3; 1 Rawle on Const. 84–88; 1 Tucker's Bl. Com. App. 225-259.

It appears, then, that the only power expressly granted to Congress to legislate concerning citizenship, is confined to the removal of the disabilities of foreign birth.

Whether there be anything in the Constitution from which a broader power may be implied, will best be seen when we come to examine the two other alternatives, which are, whether all free persons, born on the soil of the several States, or only such of them as may be citizens of each State, respectively, are thereby citizens of the United States. The last of these alternatives, in my judgment, contains the truth.

Undoubtedly, as has already been said, it is a principle of public law, recognized by the Con-

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sitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remem-
579*] bered, that though *the Constitution was to form a government, and under it the United States of America were to be one united sovereign nation, to which loyalty and obedience on the one side, and from which protection and privileges on the other, would be due, yet the several sovereign States, whose people were then citizens, were not only to continue in existence, but with powers unimpaired, except so far as they were granted by the people to the National Government.

Among the powers unquestionably possessed by the several States, was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts: First. The power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. Second. Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several States. Third. What native born persons should be citizens of the United States.

The first named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization, must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue, and conferred on the General Government, there arises a strong presumption that this is all which is granted, and that the residue is left to the States and to the people. And this presumption is, in my opinion, converted into a certainty by an examination of all such other clauses of the Constitution as touch this subject.

I will examine each which can have any possible bearing on this question.

The 1st clause of the 2d Section of the 3d Article of the Constitution is: "The judicial power shall extend to controversies between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between States, or the citizens thereof, and foreign states,
580*] *citizens or subjects." I do not think this clause has any considerable bearing upon the particular inquiry now under consideration. Its purpose was, to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States, or a particular State and a foreign nation. At the same time, I would remark, in passing, that it has never been held—I do not know that it has ever been supposed—that any citizen of a State could bring himself under this clause and the 11th and 12th sections of the Judiciary Act of 1789, passed in pursuance of it, who was not a citizen of the United States. But I have referred to the clause, only because it is one of the places where citizenship is mentioned by the Constitution. Whether it is entitled to any weight in this inquiry or not, it refers only to citizenship of the several States; it recognizes that; but it does not recognize citizenship of the United States as something distinct therefrom.

As has been said, the purpose of this clause did not necessarily connect it with citizenship of the United States, even if that were something distinct from citizenship of the several States, in the contemplation of the Constitution. This cannot be said of other clauses of the Constitution, which I now proceed to refer to.

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." Nowhere else in the Constitution is there anything concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship—how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and, as such, the privileges and immunities of general citizenship, derived from and guarantied by the Constitution, are to be enjoyed by them. It would seem that if it had been intended to constitute a class of native born persons within the States, who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States.

*And if it was intended to secure these [*581 rights only to citizens of the United States, how has the Constitution here described such persons? Simply as citizens of each State.

But, further: though, as I shall presently more fully state, I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American Constitutions; and the just and constitutional possession of this right is decisive evidence of citizenship. The provisions made by a constitution on this subject must therefore be looked to as bearing directly on the question what persons are citizens under that constitution; and as being decisive, to this extent, that all such persons as are allowed by the Constitution to exercise the elective franchise, and thus to participate in the Government of the United States, must be deemed citizens of the United States.

Here, again, the consideration presses itself upon us, that if there was designed to be a par-

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ticular class of native-born persons within the States, deriving their citizenship from the Constitution and laws of the United States, they should at least have been referred to as those by whom the President and House of Representatives were to be elected, and to whom they should be responsible.

Instead of that, we again find this subject referred to the laws of the several States. The electors of President are to be appointed in such manner as the Legislature of each State may direct, and the qualifications of electors of members of the House of Representatives shall be the same as for electors of the most numerous branch of the State Legislature.

Laying aside, then, the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that the Constitution has recognized the general principle of public law, that allegiance and citizenship depend on the place of birth; that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that when we turn to the Constitution for an answer to the question, what free persons, born within the several States, are citizens of the United States, the only answer we can receive from any of its express provisions is, the citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. Add to this, that the Constitution was ordained by the citizens of the several States; that they were "the people of the United States," for whom 582*] *and whose posterity the government was declared in the preamble of the Constitution to be made; that each of them was "a citizen of the United States at the time of the adoption of the Constitution," within the meaning of those words in that instrument; that by them the government was to be and was in fact organized; and that no power is conferred on the Government of the Union to discriminate between them, or to disfranchise any of them—the necessary conclusion is, that those persons born within the several States, who, by force of their respective constitutions and laws, are citizens of the State, are thereby citizens of the United States.

It may be proper here to notice some supposed objections to this view of the subject.

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.

Again; it has been objected, that if the Constitution has left to the several States the rightful power to determine who of their inhabitants shall be citizens of the United States, the States may make aliens citizens.

The answer is obvious. The Constitution has left to the States the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.

It has been further objected, that if free colored persons, born within a particular State, and made citizens of that State by its constitution and laws, are thereby made citizens of the United States, then, under the 2d section of the 4th article of the Constitution, such persons would be entitled to all the privileges and immunities of citizens in the several States; and if so, then colored persons could vote, and be *eligible to not only federal offices, but [*583 offices even in those States whose Constitutions and laws disqualify colored persons from voting or being elected to office.

But this position rests upon an assumption which I deem untenable. Its basis is, that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen. See 1 Lit. Ky. 326. That this is not true, under the Constitution of the United States, seems to me clear.

A naturalized citizen cannot be President of the United States, nor a Senator till after the lapse of nine years, nor a Representative till after the lapse of seven years, from his naturalization. Yet, as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia, or of either of the Territories, eligible to the office of Senator or Representative in Congress, though they may be citizens of the United States. So, in all the States, numerous persons, though citizens, cannot vote, or cannot hold office, either on account of their age or sex, or the want of the necessary legal qualifications. The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed

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to do so, I apprehend no one will deny that they are citizens of the United States. Besides, this clause of the Constitution does not confer on the citizens of one State, in all other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a State, by reason of the operation of causes other than mere citizenship, are not conferred. Thus, if the laws of a State require, 584*] in addition to *citizenship of the State, some qualification for office, or the exercise of the elective franchise, citizens of all other States, coming thither to reside, and not possessing those qualifications, cannot enjoy those privileges, not because they are not to be deemed entitled to the privileges of citizens of the State in which they reside, but because they, in common with the native-born citizens of that State, must have the qualifications prescribed by law for the enjoyment of such privileges under its constitution and laws. It rests with the States themselves so to frame their constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity, if it confer it on all of them by reason of mere naked citizenship, then it may be claimed by every citizen of each State by force of the Constitution; and it must be borne in mind, that the difficulties which attend the allowance of the claims of colored persons to be citizens of the United States are not avoided by saying that, though each State may make them its citizens, they are not thereby made citizens of the United States, because the privileges of general citizenship are secured to the citizens of each State. The language of the Constitution is: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." If each State may make such persons its citizens, they become, as such, entitled to the benefits of this article, if there be a native-born citizenship of the United States distinct from a native-born citizenship of the several States.

There is one view of this article entitled to consideration in this connection. It is manifestly copied from the 4th of the Articles of Confederation, with only slight changes of phraseology, which render its meaning more precise, and dropping the clause which excluded paupers, vagabonds and fugitives from justice, probably because these cases could be dealt with under the police powers of the States, and a special provision therefor was not necessary. It has been suggested, that in adopting it into the Constitution, the words "free inhabitants" were changed for the word "citizens." An examination of the forms of expression commonly used in the state papers of that day, and an attention to the substance of this article of the Confederation, will show that the words "free inhabitants," as then used, were synonymous with citizens. When the Articles of Confederation were adopted, we were in the midst of the War of the Revolution, and there were very few persons then embraced in the words "free inhabitants," who were not born on our soil. It was not a time when many, save the *children of the [*585 soil, were willing to embark their fortunes in our cause; and though there might be an inaccuracy in the uses of words to call free inhabitants citizens, it was then a technical rather than a substantial difference. If we look into the constitutions and state papers of that period, we find the inhabitants or people of these Colonies or the inhabitants of this State, or Commonwealth, employed to designate those whom we should now denominate "citizens." The substance and purpose of the article prove it was in this sense it used these words: It secures to the free inhabitants of each State the privileges and immunities of free citizens in every State. It is not conceivable that the States should have agreed to extend the privileges of citizenship to persons not entitled to enjoy the privileges of citizens in the States where they dwelt; that under this article there was a class of persons in some of the States, not citizens, to whom were secured all the privileges and immunities of citizens when they went into other States; and the just conclusion is, that though the Constitution cured an inaccuracy of language, it left the substance of this article in the National Constitution the same as it was in the Articles of Confederation.

The history of this 4th article, respecting the attempt to exclude free persons of color from its operation, has been already stated. It is reasonable to conclude that this history was known to those who framed and adopted the Constitution. That under this 4th article of the Confederation, free persons of color might be entitled to the privileges of general citizenship, if otherwise entitled thereto, is clear. When this article was, in substance, placed in and made part of the Constitution of the United States, with no change in its language calculated to exclude free colored persons from the benefit of its provisions, the presumption is, to say the least, strong, that the practical effect which it was designed to have, and did have, under the former government, it was designed to have, and should have, under the new government.

It may be further objected, that if free colored persons may be citizens of the United States, it depends only on the will of a master whether he will emancipate his slave and thereby make him a citizen. Not so. The master is subject to the will of the State. Whether he shall be allowed to emancipate his slave at all; if so, on what conditions; and what is to be the political status of the freed man, depend, not on the will of the master, but on the will of the State, upon which the political status of all its native-born inhabitants depends. Under the Constitution of the United States, each State has retained this power of determining the political status of its native-born *inhabitants, and no exception thereto [*586 can be found in the Constitution. And if a master in a slaveholding State should carry his slave into a free State, and there emancipate him, he would not thereby make him a native-born citizen of that State, and consequently no privileges could be claimed by such emancipated slave as a citizen of the United States. For, whatever powers the States may exercise to confer privileges of citizenship on persons

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not born on their soil, the Constitution of the United States does not recognize such citizens. As has already been said, it recognizes the great principle of public law, that allegiance and citizenship spring from the place of birth. It leaves to the States the application of that principle to individual cases. It secured to the citizens of each State the privileges and immunities of citizens in every other State. But it does not allow to the States the power to make aliens citizens, or permit one State to take persons born on the soil of another State, and, contrary to the laws and policy of the States where they were born, make them its citizens, and so citizens of the United States. No such deviation from the great rule of public law was contemplated by the Constitution; and when any such attempt shall be actually made, it is to be met by applying to it those rules of law and those principles of good faith which will be sufficient to decide it, and not, in my judgment, by denying that all the free native-born inhabitants of a State, who are its citizens under its constitution and laws, are also citizens of the United States.

It has sometimes been urged that colored persons are shown not to be citizens of the United States, by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen, cannot depend on laws which refer only to aliens, and do not affect the status of persons born in the United States. The utmost effect which can be attributed to them is, to show that Congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if thought fit, is clear. The Constitution has not excluded them. And since that has conferred the power on Congress to naturalize colored aliens, it certainly shows that color is not a necessary qualification for citizenship under the Constitution of the United States. It may be added, that the power to make colored persons citizens of the United States, under the Constitution, has been actually exercised in repeated and important instances. See the Treaties with the Choctaws, of Sept. 27, 1830, art. 14; with the Cherokees, of May 23, 1836, art. 12; Treaty of Guadaloupe Hidalgo, Feb. 2, 1848, art. 8.

I do not deem it necessary to review at length 587*] the legislation *of Congress having more or less bearing on the citizenship of colored persons. It does not seem to me to have any considerable tendency to prove that it has been considered by the Legislative Department of the government, that no such persons are citizens of the United States. Undoubtedly they have been debarred from the exercise of particular rights or privileges extended by white persons, but, I believe, always in terms which, by implication, admit they may be citizens. Thus the Act of May 17, 1792, for the organization of the militia, directs the enrollment of "every free, able-bodied, white male citizen." An assumption that none but white persons are citizens, would be as inconsistent with the just import of this language, as that all citizens are able-bodied, or males.

So the Act of February 28, 1803, 2 Stat. at L. 205, to prevent the importation of certain persons into States, when by the laws thereof their admission is prohibited, in its 1st section forbids all masters of vessels to import or bring "any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States," etc.

The Acts of March 3, 1813, sec. 1, 2 Stat. at L. 809, and March 1, 1817, sec. 3, 3 Stat. at L. 351, concerning seamen, certainly imply there may be persons of color, natives of the United States, who are not citizens of the United States. This implication is undoubtedly in accordance with the fact. For not only slaves, but free persons of color, born in some of the States, are not citizens. But there is nothing in these laws inconsistent with the citizenship of persons of color in others of the States, nor with their being citizens of the United States.

Whether much or little weight should be attached to the particular phraseology of these and other laws, which were not passed with any direct reference to this subject, I consider their tendency to be, as already indicated, to show that, in the apprehension of their framers, color was not a necessary qualification of citizenship. It would be strange, if laws were found on our statute book to that effect, when by solemn treaties, large bodies of Mexican and North American Indians, as well as free colored inhabitants of Louisiana, have been admitted to citizenship of the United States.

In the legislative debates which preceded the admission of the State of Missouri into the Union, this question was agitated. Its result is found in the resolution of Congress, of March 5, 1821, for the admission of that State into the Union. The Constitution of Missouri, under which that State applied for admission into the Union, provided, that it should be the duty *of the Legislature "to pass laws to pre- [*588 vent free negroes and mulattoes from coming to and settling in the State, under any pretext whatever." One ground of objection to the admission of the State under this Constitution was, that it would require the Legislature to exclude free persons of color, who would be entitled, under the 2d section of the 4th article of the Constitution, not only to come within the State, but to enjoy there the privileges and immunities of citizens. The resolutions of Congress admitting the State was upon the fundamental condition, "that the Constitution of Missouri shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States." It is true, that neither this legislative declaration, nor anything in the Consitution or laws of Missouri, could confer or take away any privilege or immunity granted by the Constitution. But it is also true, that it expresses the then conviction of the legislative power of the United States, that free negroes, as citizens of some of the States, might be entitled to the privileges and immunities of citizens in all the States.

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each State are citizens of the United States.

Second. That as free colored persons born within some of the States are citizens of those

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States, such persons are also citizens of the United States.

Third. That every such citizen, residing in any State, has the right to sue and is liable to be sued in the federal courts, as a citizen of that State in which he resides.

Fourth. That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States, and his residence in the State of Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it, was correct.

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the Act of Congress commonly called the Missouri Compro-[*589] mise *Act, and the grounds and conclusions announced in their opinion.

Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the Act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court, as described by its repeated decisions, and, as I understand, acknowledged in this opinion of the majority of the court.

In the course of that opinion, it became necessary to comment on the case of Legrand v. Darnall, reported in 2 Pet. 664. In that case, a bill was filed, by one alleged to be a citizen of Maryland, against one alleged to be a citizen of Pennsylvania. The bill stated that the defendant was the son of a white man by one of his slaves; and that the defendant's father devised to him certain lands, the title to which was put in controversy by the bill. These facts were admitted in the answer, and upon these and other facts the court made its decree, founded on the principle that a devise of land by a master to a slave was by implication also a bequest of his freedom. The facts that the defendant was of African descent, and was born a slave, were not only before the court, but entered into the entire substance of its inquiries. The opinion of the majority of my brethren in this case disposes of the case of Legrand v. Darnall, by saying, among other things, that as the fact that the defendant was born a slave only came before this court on the bill and answer, it was then too late to raise the question of the personal disability of the party, and therefore that decision is altogether inapplicable in this case.

In this I concur. Since the decision of this court in Livingston v. Story, 11 Pet. 351, the law has been settled, that when the declaration or bill contains the necessary averments of citizenship, this court cannot look at the record, to see whether those averments are true, except so far as they are put in issue by a plea to the jurisdiction. In that case, the defendant denied by his answer that Mr. Livingston was a citizen of New York, as he had alleged in the bill. Both parties went into proofs. The court refused to examine those proofs, with reference to the personal disability of the plaintiff. This is the *settled law of the court, af-[*590] firmed so lately as Sheppard v. Graves, 14 How. 505, and Wickliffe v. Owings, 17 How. 51; see, also, De Wolf v. Rabaud, 1 Pet. 476. But I do not understand this to be a rule which the court may depart from at its pleasure. If it be a rule, it is as binding on the court as on the suitors. If it removes from the latter the power to take any objection to the personal disability of a party alleged by the record to be competent, which is not shown by a plea to the jurisdiction, it is because the court are forbidden by law to consider and decide on objections so taken. I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court or any court, binding, when expressed on a question not legitimately before it. Carroll v. Carroll, 16 How. 275. The judgment of this court is, that the case is to be dismissed for want of jurisdiction, because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

But as, in my opinion, the Circuit Court had jurisdiction, I am obliged to consider the question whether its judgment on the merits of the case should stand or be reversed.

The residence of the plaintiff in the State of Illinois, and the residence of himself and his wife in the Territory acquired from France lying north of latitude thirty-six degrees thirty minutes, and north of the State of Missouri, are each relied on by the plaintiff in error. As the residence in the Territory affects the plaintiff's wife and children as well as himself, I must inquire what was its effect.

The general question may be stated to be, whether the plaintiff's status, as a slave, was so changed by his residence within that Territory, that he was not a slave in the State of Missouri, at the time this action was brought.

In such cases, two inquiries arise, which may be confounded, but should be kept distinct.

The first is, what was the law of the Territory into which the master and slave went, respecting the relation between them?

The second is, whether the State of Missouri recognizes and allows the effect of that law of the Territory, on the status of the slave, on his return within its jurisdiction.

As to the first of these questions, the will of States and nations, *by whose municipal [*591] law slavery is not recognized, has been manifested in three different ways.

One is, absolutely to dissolve the relation, and terminate the rights of the master existing

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under the law of the country whence the parties came. This is said by Lord Stowell, in the case of The Slave Grace, 2 Hagg. Ad. 94, and by the Supreme Court of Louisiana in the case of Maria Louise v. Marot, 9 La. 473, to be the law of France; and it has been the law of several States of this Union, in respect to slaves introduced under certain conditions.

Wilson v. Isabel, 5 Call, 430; Hunter v. Fulcher, 1 Leigh, 172; Stewart v. Oakes, 5 Harr. & J. 107.

The second is, where the municipal law of a country not recognizing slavery, it is the will of the State to refuse the master all aid to exercise any control over his slave; and if he attempt to do so, in a manner justifiable only by that relation, to prevent the exercise of that control. But no law exists, designed to operate directly on the relation of master and slave, and put an end to that relation. This is said by Lord Stowell, in the case above mentioned, to be the law of England, and by Mr. Chief Justice Shaw, in the case of The Commonwealth v. Aves, 18 Pick. 193, to be the law of Massachusetts.

The third is, to make a distinction between the case of a master and his slave only temporarily in the country, animo non manendi, and those who are there to reside for permanent or indefinite purposes. This is said by Mr. Wheaton to be the law of Prussia, and was formerly the statute law of several States of our Union. It is necessary in this case to keep in view this distinction between those countries whose laws are designed to act directly on the status of a slave, and make him a freeman, and those where the master can obtain no aid from the laws to enforce his rights.

It is to the last case only that the authorities, out of Missouri, relied on by defendant, apply, when the residence in the non-slaveholding Territory was permanent. In The Commonwealth v. Aves, 18 Pick. 218, Mr. Chief Justice Shaw said: "From the principle above stated, on which a slave brought here becomes free, to wit: that he becomes entitled to the protection of our laws, it would seem to follow, as a necessary conclusion, that if the slave waives the protection of those laws, and returns to the State where he is held as a slave, his condition is not changed." It was upon this ground, as is apparent from his whole reasoning, that Sir William Scott rests his opinion in the case of The Slave Grace. To use one of his expressions, the effect of the law of England was to put the liberty of the slave into a parenthe-
592*] sis. If there had been an *Act of Parliament declaring that a slave coming to England with his master should thereby be deemed no longer to be a slave, it is easy to see that the learned judge could not have arrived at the same conclusion. This distinction is very clearly stated and shown by President Tucker, in his opinion in the case of Betty v. Horton, 5 Leigh's Va. 615.

See, also, Hunter v. Fulcher, 1 Leigh's Va. 172; Maria Louise v. Marot, 9 La. 473; Smith v. Smith, 13 La. 441; Thomas v. Generis, 16 La. 483; Rankin v. Lydia, 2 A. K. Marsh. 467; Davis v. Tingle, 8 B. Mon. 539; Griffeth v. Fanny, Gilm. Va. 143; Lunsford v. Coquillon, 2 Mart. N. S. 405; Josephine v. Poultney, 1 La. Ann. 329.

But if the Acts of Congress on this subject are valid, the law of the Territory of Wisconsin, within whose limits the residence of the plaintiff and his wife, and their marriage and the birth of one or both of their children, took place, falls under the first category, and is a law operating directly on the status of the slave. By the 8th section of the Act of March 6, 1820, 3 Stat. at L. 548, it was enacted that, within this Territory, "slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby forever prohibited: Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or services, as aforesaid."

By the Act of April 20, 1836, 4 Stat. at L. 10, passed in the same month and year of the removal of the plaintiff to Fort Snelling, this part of the Territory ceded by France, where Fort Snelling is, together with so much of the territory of the United States east of the Mississippi as now constitutes the State of Wisconsin, was brought under a territorial government, under the name of the Territory of Wisconsin. By the 18th section of this Act, it was enacted, "That the inhabitants of this Territory shall be entitled to and enjoy all and singular the rights, privileges and advantages, granted and secured to the people of the Territory of the United States northwest of the River Ohio, by the articles of compact contained in the Ordinance for the government of said Territory, passed on the 13th day of July, 1787; and shall be subject to all the restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory." The 6th article of that compact is, "there shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in *the punishment of crimes, [*593 whereof the party shall have been duly convicted: Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid." By other provisions of this Act establishing the Territory of Wisconsin, the laws of the United States, and the then existing laws of the State of Michigan, are extended over the Territory; the latter being subject to alteration and repeal by the legislative power of the Territory created by the Act.

Fort Snelling was within the Territory of Wisconsin, and these laws were extended over it. The Indian title to that site for a military post had been acquired from the Sioux nation as early as September 23, 1805 (Am. State Papers, Indian Affairs, Vol. I. p. 744), and until the erection of the territorial government, the persons at that post were governed by the Rules and Articles of War, and such laws of the United States, including the 8th section of the Act of March 6, 1820, prohibiting slavery, as were applicable to their condition; but after the erection of the Territory, and the extension of the laws of the United States and the laws of Michigan over the whole of the Territory, including this military post, the persons resid-

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ing there were under the dominion of those laws in all particulars to which the Rules and Articles of War did not apply.

It thus appears that, by these Acts of Congress, not only was a general system of municipal law borrowed from the State of Michigan, which did not tolerate slavery, but it was positively enacted that slavery and involuntary servitude, with only one exception, specifically described, should not exist there. It is not simply that slavery is not recognized and cannot be aided by the municipal law. It is recognized for the purpose of being absolutely prohibited, and declared incapable of existing within the Territory, save in the instance of a fugitive slave.

It would not be easy for the Legislature to employ more explicit language to signify its will that the status of slavery should not exist within the Territory, than the words found in the Act of 1820, and in the Ordinance of 1787; and if any doubt could exist concerning their application to cases of masters coming into the Territory with their slaves to reside, that doubt must yield to the inference required by the words of exception. That exception is, of cases of fugitive slaves. An exception from a prohibition marks the extent of the prohibition; for it would be absurd, as well as useless, to except from a prohibition 594*] *a case not contained within it. 9 Wheat. 200. I must conclude, therefore, that it was the will of Congress that the state of involuntary servitude of a slave, coming into the Territory with his master, should cease to exist. The Supreme Court of Missouri so held in Rachel v. Walker, 4 Mo. 350, which was the case of a military officer going into the Territory with two slaves.

But it is a distinct question, whether the law of Missouri recognized and allowed effect to the change wrought in the status of the plaintiff, by force of the laws of the Territory of Wisconsin.

I say the law of Missouri, because a judicial tribunal, in one State or nation, can recognize personal rights acquired by force of the law of any other State or nation, only so far as it is the law of the former State that those rights should be recognized. But, in the absence of positive law to the contrary, the will of every civilized State must be presumed to be to allow such effect to foreign laws as is in accordance with the settled rules of international law. And legal tribunals are bound to act on this presumption. It may be assumed that the motive of the State in allowing such operation to foreign laws is what has been termed comity. But, as has justly been said (per Chief Justice Taney, 13 Pet. 589), it is the comity of the State, not of the court. The judges have nothing to do with the motive of the State. Their duty is simply to ascertain and give effect to its will. And when it is found by them that its will to depart from a rule of international law has not been manifested by the State, they are bound to assume that its will is to give effect to it. Undoubtedly, every sovereign State may refuse to recognize a change, wrought by the law of a foreign State, on the status of a person, while within such foreign State, even in cases where the rules of international law require that recognition. Its will to refuse such recognition may be manifested by what we term statute law, or by the customary law of the State. It is within the province of its judicial tribunals to inquire and adjudge whether it appears, from the statute or customary law of the State, to be the will of the State to refuse to recognize such changes of status by force of foreign law, as the rules of the law of nations require to be recognized. But, in my opinion, it is not within the province of any judicial tribunal to refuse such recognition from any political considerations, or any view it may take of the exterior political relations between the State and one or more foreign States, or any impressions it may have that a change of foreign opinion and action on the subject of slavery may afford a reason why the State should change its own action. To understand and give *just [*595 effect to such considerations, and to change the action of the State in consequence of them, are functions of diplomatists and legislators, not of judges.

The inquiry to be made on this part of the case is, therefore, whether the State of Missouri has, by its statute, or its customary law, manifested its will to displace any rule of international law, applicable to a change of the status of a slave, by foreign law.

I have not heard it suggested that there was any statute of the State of Missouri bearing on this question. The customary law of Missouri is the common law, introduced by statute in 1816. 1 Ter. Laws, 436. And the common law, as Blackstone says (4 Com. 67) adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land.

I know of no sufficient warrant for declaring that any rule of international law, concerning the recognition, in that State, of a change of status, wrought by an extraterritorial law, has been displaced or varied by the will of the State of Missouri.

I proceed, then, to inquire what the rules of international law prescribe concerning the change of status of the plaintiff wrought by the law of the Territory of Wisconsin.

It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that wherever any question may arise concerning the status of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that status. And further, that the laws of a country do not rightfully operate upon and fix the status of persons who are within its limits in itinere, or who are abiding there for definite temporary purposes, as for health, curiosity, or occasional business; that these laws, known to writers on public and private international law as personal statutes, operate only on the inhabitants of the country. Not that it is or can be denied that each independent nation may, if it thinks fit, apply them to all persons within their limits. But when this is done, not in conformity with the principles of international law, other States are not understood to be willing to recognize or allow effect to such applications of personal statutes.

It becomes necessary, therefore, to inquire whether the operation of the laws of the Territory of Wisconsin upon the status of the plaintiff was or was not such an operation as

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these principles of international law require other States to recognize and allow effect to.

And this renders it needful to attend to the particular facts and circumstances of this case. 596*] *It appears that this case came on for trial before the Circuit Court and a jury, upon an issue, in substance, whether the plaintiff, together with his wife and children, were the slaves of the defendant.

The court instructed the jury that, "upon the facts in this case, the law is with the defendant." This withdrew from the jury the consideration and decision of every matter of fact. The evidence in the case consisted of written admissions, signed by the counsel of the parties. If the case had been submitted to the judgment of the court, upon an agreed statement of facts, entered of record, in place of a special verdict, it would have been necessary for the court below, and for this court, to pronounce its judgment solely on those facts, thus agreed, without inferring any other facts therefrom. By the rules of the common law applicable to such a case, and by force of the 7th article of the Amendments of the Constitution, this court is precluded from finding any fact not agreed to by the parties on the record. No submission to the court on a statement of facts was made. It was a trial by jury, in which certain admissions, made by the parties, were the evidence. The jury were not only competent, but were bound to draw from that evidence every inference which, in their judgment, exercised according to the rules of law, it would warrant. The Circuit Court took from the jury the power to draw any inferences from the admissions made by the parties, and decided the case for the defendant. This course can be justified here, if at all, only by its appearing that upon the facts agreed, and all such inferences of fact favorable to the plaintiff's case, as the jury might have been warranted in drawing from those admissions, the law was with the defendant. Otherwise, the plaintiff would be deprived of the benefit of his trial by jury, by whom, for aught we can know, those inferences favorable to his case would have been drawn.

The material facts agreed, bearing on this part of the case, are, that Dr. Emerson, the plaintiff's master, resided about two years at the military post of Fort Snelling, being a surgeon in the Army of the United States, his domicil of origin being unknown; and what, if anything, he had done, to preserve or change his domicil prior to his residence at Rock Island, being also unknown.

Now, it is true, that under some circumstances the residence of a military officer at a particular place, in the discharge of his official duties does not amount to the acquisition of a technical domicil. But it cannot be affirmed, with correctness, that it never does. There being actual residence, and this being presumptive evidence of domicil, all the circumstances 597*] *of the case must be considered, before a legal conclusion can be reached, that his place of residence is not his domicil. If a military officer, stationed at a particular post, should entertain an exception that his residence there would be indefinitely protracted, and in consequence should remove his family to the place where his duties were to be discharged, form a permanent domestic establishment there, exercise there the civil rights and discharge the civil duties of an inhabitant, while he did no act and manifested no intent to have a domicil elsewhere, I think no one would say that the mere fact that he was himself liable to be called away by the orders of the Government would prevent his acquisition of a technical domicil at the place of the residence of himself and his family. In other words, I do not think a military officer incapable of acquiring a domicil. Bruce v. Bruce, 2 Bos. & P. 230; Monroe v. Douglas, 5 Madd. Ch. 379. This being so, this case stands thus: there was evidence before the jury that Emerson resided about two years at Fort Snelling, in the Territory of Wisconsin. This may or may not have been with such intent as to make it his technical domicil. The presumption is that it was. It is so laid down by this court in Ennis v. Smith, 14 How. 400, and the authorities in support of the position are there referred to. His intent was a question of fact for the jury. Fitchburg v. Winchendon, 4 Cush. 190.

The case was taken from the jury. If they had power to find that the presumption of the necessary intent had not been rebutted, we cannot say, on this record, that Emerson had not his technical domicil at Fort Snelling. But, for reasons which I shall now proceed to give, I do not deem it necessary in this case to determine the question of the technical domicil of Dr. Emerson.

It must be admitted that the inquiry whether the law of a particular country has rightfully fixed the status of a person, so that in accordance with the principles of international law that status should be recognized in other jurisdictions, ordinarily depends on the question whether the person was domiciled in the country whose laws are asserted to have fixed his status. But, in the United States, questions of this kind may arise, where an attempt to decide solely with reference to technical domicil, tested by the rules which are applicable to changes of places of abode from one country to another, would not be consistent with sound principles. And in my judgment, this is one of those cases.

The residence of the plaintiff, who was taken by his master, Dr. Emerson, as a slave, from Missouri, to the State of Illinois, and thence to the Territory of Wisconsin, must be deemed to *have been for the time being, and until [*598 he asserted his own separate intention, the same as the residence of his master; and the inquiry, whether the personal statutes of the Territory were rightfully extended over the plaintiff, and ought, in accordance with the rules of international law, to be allowed to fix his status, must depend upon the circumstances under which Dr. Emerson went into that Territory, and remained there; and upon the further question, whether anything was there rightfully done by the plaintiff to cause those personal statutes to operate on him.

Dr. Emerson was an officer in the Army of the United States. He went into the Territory to discharge his duty to the United States. The place was out of the jurisdiction of any particular State, and within the exclusive jurisdiction of the United States. It does not appear where the domicil of origin of Dr. Emerson was, nor whether or not he had lost it, and gained an-

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other domicil, nor of what particular State, if any, he was a citizen.

On what ground can it be denied that all valid laws of the United States, Constitutionally enacted by Congress for the government of the Territory, rightfully extended over an officer of the United States and his servant who went into the Territory to remain there for an indefinite length of time, to take part in its civil or military affairs? They were not foreigners, coming from abroad. Dr. Emerson was a citizen of the country which had exclusive jurisdiction over the Territory; and not only a citizen, but he went there in a public capacity, in the service of the same sovereignty which made the laws. Whatever those laws might be, whether of the kind denominated personal statutes, or not, so far as they were intended by the legislative will, constitutionally expressed, to operate on him and his servant, and on the relations between them, they had a rightful operation, and no other State or country can refuse to allow that those laws might rightfully operate on the plaintiff and his servant, because such a refusal would be a denial that the United States could, by laws constitutionally enacted, govern their own servants, residing on their own territory, over which the United States had the exclusive control, and in respect to which they are an independent sovereign power. Whether the laws now in question were constitutionally enacted, I repeat once more, is a separate question. But, assuming that they were, and that they operated directly on the status of the plaintiff, I consider that no other State or country could question the rightful power of the United States so to legislate, or, consistently with the settled rules of international law, could refuse 599*] to recognize the effects *of such legislation upon the status of their officers and servants, as valid everywhere.

This alone would, in my apprehension, be sufficient to decide this question.

But there are other facts stated on the record which should not be passed over. It is agreed that in the year 1836, the plaintiff, while residing in the Territory, was married, with the consent of Dr. Emerson, to Harriet, named in the declaration as his wife, and that Eliza and Lizzie were the children of that marriage, the first named having been born on the Mississippi River, north of the line of Missouri, and the other having been born after their return to Missouri. And the inquiry is, whether, after the marriage of the plaintiff in the Territory, with the consent of Dr. Emerson, any other State or country can, consistently with the settled rules of international law, refuse to recognize and treat him as a free man, when suing for the liberty of himself, his wife, and the children of that marriage. It is in reference to his status, as viewed in other States and countries, that the contract of marriage and the birth of children becomes strictly material. At the same time, it is proper to observe that the female to whom he was married having been taken to the same military post of Fort Snelling as a slave, and Dr. Emerson claiming also to be her master at the time of her marriage, her status, and that of the children of the marriage, are also affected by the same consideration.

If the laws of Congress governing the Territory of Wisconsin were constitutional and valid laws, there can be no doubt these parties were capable of contracting a lawful marriage, attended with all the usual civil rights and obligations of that condition. In that Territory they were absolutely free persons, having full capacity to enter into the civil contract of marriage.

It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere: and that no technical domicil at the place of the contract is necessary to make it so. See Bishop on Mar. and Div. 125–129, where the cases are collected.

If, in Missouri, the plaintiff were held to be a slave, the validity and operation of his contract of marriage must be denied. He can have no legal rights; of course, not those of a husband and father. And the same is true of his wife and children. The denial of his rights is the denial of theirs. So that, though lawfully married in the Territory, when they came out of it, into the State of Missouri, they were no longer *husband and wife; and a [*600 child of that lawful marriage, though born under the same dominion where its parents contracted a lawful marriage, is not the fruit of that marriage, nor the child of its father, but subject to the maxim, partus sequitur ventrem.

It must be borne in mind that in this case there is no ground for the inquiry, whether it be the will of the State of Missouri not to recognize the validity of the marriage of a fugitive slave, who escapes into a State or country where slavery is not allowed, and there contracts a marriage; or the validity of such a marriage, where the master, being a citizen of the State of Missouri, voluntarily goes with his slave in itinere, into a State or country which does not permit slavery to exist, and the slave there contracts marriage without the consent of his master; for in this case, it is agreed, Dr. Emerson did consent; and no further question can arise concerning his rights, so far as their assertion is inconsistent with the validity of the marriage. Nor do I know of any ground for the assertion that this marriage was in fraud of any law of Missouri. It has been held by this court, that a bequest of property by a master to his slave, by necessary implication entitles the slave to his freedom; because, only as a freeman could he take and hold the bequest. Legrand v. Darnall, 2 Pet. 664. It has also been held, that when a master goes with his slave to reside for an indefinite period in a State where slavery is not tolerated, this operates as an act of manumission; because it is sufficiently expressive of the consent of the master that the slave should be free. 2 Marsh. Ky. 470; 14 Mart. La. 401.

What, then, shall we say of the consent of the master, that the slave may contract a lawful marriage attended with all the civil rights and duties which belong to that relation; that he may enter into a relation which none but a free man can assume—a relation which involves not only the rights and duties of the slave, but those of the other party to the contract, and of their descendants to the remotest generation? In my judgment, there can be no more effectual abandonment of the legal rights

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of a master over his slave, than by the consent of the master that the slave should enter into a contract of marriage, in a free State, attended by all the civil rights and obligations which belong to that condition.

And any claim by Dr. Emerson, or anyone claiming under him, the effect of which is to deny the validity of this marriage, and the lawful paternity of the children born from it, wherever asserted, is, in my judgment, a claim inconsistent with good faith and sound reason, as well as with the rules of international law. And I go further: in my opinion, a law of the 601*] State *of Missouri, which should thus annul a marriage, lawfully contracted by these parties while resident in Wisconsin, not in fraud of any law of Missouri, or of any right of Dr. Emerson, who consented thereto, would be a law impairing the obligation of a contract, and within the prohibition of the Constitution of the United States. See 4 Wheat. 629, 695, 696.

To avoid misapprehension on this important and difficult subject, I will state, distinctly, the conclusions at which I have arrived. They are:

First. The rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the status of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.

Second. The laws of the United States, constitutionally enacted, which operated directly on and changed the status of a slave coming into the Territory of Wisconsin with his master, who went thither to reside for an indefinite length of time, in the performance of his duties as an officer of the United States, had a rightful operation on the status of the slave, and it is in conformity with the rules of international law that this change of status should be recognized everywhere.

Third. The laws of the United States, in operation in the Territory of Wisconsin at the time of the plaintiff's residence there, did act directly on the status of the plaintiff, and change his status to that of a free man.

Fourth. The plaintiff and his wife were capable of contracting, and, with the consent of Dr. Emerson, did contract a marriage in that Territory, valid under its laws; and the validity of this marriage cannot be questioned in Missouri, save by showing that it was in fraud of the laws of that State, or of some right derived from them; which cannot be shown in this case, because the master consented to it.

Fifth. That the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition, is an effectual act of emancipation. And the law does not enable Dr. Emerson, or anyone claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery.

But it is insisted that the Supreme Court of Missouri has settled this case by its decision in Scott v. Emerson, 15 Mo. 576; and that this de-
602*] cision is in conformity *with the weight of authority elsewhere, and with sound principles. If the Supreme Court of Missouri had placed its decision on the ground that it appeared Dr. Emerson never became domiciled in the Territory, and so its laws could not rightfully operate on him and his slave; and the facts that he went there to reside indefinitely, as an officer of the United States, and that the plaintiff was lawfully married there, with Dr. Emerson's consent, were left out of view, the decision would find support in other cases, and I might not be prepared to deny its correctness. But the decision is not rested on this ground. The domicil of Dr. Emerson in that Territory is not questioned in that decision: and it is placed on a broad denial, of the operation, in Missouri, of the law of any foreign State or country, upon the status of a slave, going with his master from Missouri into such foreign State or country, even though they went thither to become, and actually became, permanent inhabitants of such foreign State or country, the laws whereof acted directly on the status of the slave, and changed his status to that of a freeman.

To the correctness of such a decision I cannot assent. In my judgment, the opinion of the majority of the court in that case is in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding States, and with fundamental principles of private international law. Mr. Chief Justice Gamble in his dissenting opinion in that case, said:

"I regard the question as conclusively settled by repeated adjudications of this court; and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them, than I would any other series of decisions by which the law upon any other question had been settled. There is with me nothing in the law of slavery which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary excitements which have gathered around it. . . . But in the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend."

"In this State, it has been recognized from the beginning of the government as a correct position in law, that the master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave." Whinney v. Whitesides, 1 Mo. 473; Le Grange v. Chouteau, 2 Mo. 20; Milley v. Smith, 2 Mo. 36; Ralph v. Duncan, 3 Mo. 194; Julia v. McKinney, 3 Mo. 270; Nat v. Ruddle, 3 Mo. 400; Rachel v. Walker, 4 Mo. 350; Wilson v. Melvin, 4 Mo. 592.

*Chief Justice Gamble has also exam- [*603
ined the decisions of the courts of other States in which slavery is established, and finds them in accordance with these preceding decisions of the Supreme Court of Missouri to which he refers.

It would be a useless parade of learning for me to go over the ground which he has so fully and ably occupied.

But it is further insisted we are bound to follow this decision. I do not think so. In

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this case, it is to be determined what laws of the United States were in operation in the Territory of Wisconsin, and what was their effect on the status of the plaintiff. Could the plaintiff contract a lawful marriage there? Does any law of the State of Missouri impair the obligation of that contract of marriage, destroy his rights as a husband, bastardize the use of marriage, and reduce them to a state of slavery?

The questions which arise exclusively under the Constitution and laws of the United States, this court, under the Constitution and laws of the United States, has the rightful authority finally to decide. And if we look beyond these questions, we come to the consideration whether the rules of international law, which are part of the laws of Missouri until displaced by some statute not alleged to exist, do or do not require the status of the plaintiff, as fixed by the laws of the Territory of Wisconsin, to be recognized in Missouri. Upon such a question, not depending on any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of State Courts, however great respect might be felt for their learning, ability, and impartiality. See Swift v. Tyson, 16 Pet. 1; Carpenter v. The Providence Ins. Co. 16 Pet. 495; Foxcroft v. Mallet, 4 How. 353; Rowan v. Runnels, 5 How. 134.

Some reliance has been placed on the fact that the decision in the Supreme Court of Missouri was between these parties, and the suit there was abandoned to obtain another trial in the courts of the United States.

In Homer v. Brown, 16 How. 354, this court made a decision upon the construction of a devise of lands, in direct opposition to the unanimous opinion of the Supreme Court of Massachusetts, between the same parties, respecting the same subject matter—the claimant having become nonsuit in the State Court, in order to bring his action in the Circuit Court of the United States. I did not sit in that case, having been of counsel for one of the parties while at the bar; but, on examining the report of the argument of the counsel for the plaintiff in error, I find they made the point, that this court ought to give effect to the construction put 604*] upon by the will by the State *Court, to the end that rights respecting lands may be governed by one law, and that the law of the place where the lands are situated; that they referred to the state decision of the case, reported in 3 Cushing, 390, and to many decisions of this court. But this court does not seem to have considered the point of sufficient importance to notice it in their opinions. In Millar v. Austin, 13 How. 218, an action was brought by the indorsee of a written promise. The question was, whether it was negotiable under a statute of Ohio. The Supreme Court of that State having decided it was not negotiable, the plaintiff became nonsuit, and brought his action in the Circuit Court of the United States. The decision of the Supreme Court of the State, reported in 4 Ves. L. J. 527, was relied on. This court unanimously held the paper to be negotiable.

When the decisions of the highest court of a State are directly in conflict with each other, it has been repeatedly held, here, that the last decision is not necessarily to be taken as the rule. State Bank v. Knoop, 16 How. 369; Pease v. Peck, 18 How. 599.

To these considerations I desire to add, that it was not made known to the Supreme Court of Missouri, so far as appears, that the plaintiff was married in Wisconsin with the consent of Dr. Emerson, and it is not made known to us that Dr. Emerson was a citizen of Missouri, a fact to which that court seem to have attached much importance.

Sitting here to administer the law between these parties, I do not feel at liberty to surrender my own convictions of what the law requires, to the authority of the decision in 15 Missouri Reports.

I have thus far assumed, merely for the purpose of the argument, that the laws of the United States, respecting slavery in this Territory, were Constitutionally enacted by Congress. It remains to inquire whether they are constitutional and binding laws.

In the argument of this part of the case at bar, it was justly considered by all the counsel to be necessary to ascertain the source of the power of Congress over the Territory belonging to the United States. Until this is ascertained, it is not possible to determine the extent of that power. On the one side it was maintained that the Constitution contains no express grant of power to organize and govern what is known to the laws of the United States as a Territory. That whatever power of this kind exists, is derived by implication from the capacity of the United States to hold and acquire territory out of the limits of any State, and the necessity for its having some government.

*On the other side it was insisted that [*605 the Constitution has not failed to make an express provision for this end, and that it is found in the 3d Section of the 4th Article of the Constitution.

To determine which of these is the correct view, it is needful to advert to some facts respecting this subject, which existed when the Constitution was framed and adopted. It will be found that these facts not only shed much light on the question, whether the framers of the Constitution omitted to make a provision concerning the power of Congress to organize and govern Territories, but they will also aid in the construction of any provision which may have been made respecting this subject.

Under the Confederation, the unsettled territory within the limits of the United States had been a subject of deep interest. Some of the States insisted that these lands were within their chartered boundaries, and that they had succeeded to the title of the Crown to the soil. On the other hand, it was argued that the vacant lands had been acquired by the United States, by the war carried on by them under a common government and for the common interest.

This dispute was further complicated by unsettled questions of boundary among several States. It not only delayed the accession of Maryland to the Confederation, but at one time seriously threatened its existence. 5 Jour. of Cong. 208, 442. Under the pressure of these circumstances, Congress earnestly recommended to the several States a cession of their claims and rights to the United States. 5 Jour. of Cong. 442. And before the Constitution was framed, it had been begun. That by New

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York had been made on the 1st day of March, 1781; that of Virginia on the 1st day of March, 1784; that of Massachusetts on the 19th day of April, 1785, that of Connecticut on the 14th day of September, 1786; that of South Carolina on the 8th day of August, 1787, while the convention for framing the Constitution was in session.

It is very material to observe, in this connection, that each of these Acts cedes, in terms, to the United States, as well the jurisdiction as the soil.

It is also equally important to note that, when the Constitution was framed and adopted, this plan of vesting in the United States, for the common good, the great tracts of ungranted lands claimed by the several States, in which so deep an interest was felt, was yet incomplete. It remained for North Carolina and Georgia to cede their extensive and valuable claims. These were made, by North Carolina on the 25th day of February, 1790, and by 606*] Georgia on the 24th day of April, *1802. The terms of these last mentioned cessions will hereafter be noticed in another connection; but I observe here that each of them distinctly shows, upon its face, that they were not only in execution of the general plan proposed by the Congress of the Confederation, but of a formed purpose of each of these States, existing when the assent of their respective people was given to the Constitution of the United States.

It appears, then, that when the Federal Constitution was framed, and presented to the people of the several States for their consideration, the unsettled territory was viewed as justly applicable to the common benefit, so far as it then had or might attain thereafter a pecuniary value; and so far as it might become the seat of new States, to be admitted into the Union upon an equal footing with the original States. And also that the relations of the United States to that unsettled territory were of different kinds. The titles of the States of New York, Virginia, Massachusetts, Connecticut, and South Carolina, as well of soil as of jurisdiction, had been transferred to the United States. North Carolina and Georgia had not actually made transfers, but a confident expectation, founded on their appreciation of the justice of the general claim, and fully justified by the results, was entertained, that these cessions would be made. The Ordinance of 1787 had made provision for the temporary government of so much of the territory, actually ceded, as lay northwest of the River Ohio.

But it must have been apparent, both to the framers of the Constitution and the people of the several States who were to act upon it, that the government thus provided for could not continue, unless the Constitution should confer on the United States the necessary powers to continue it. That temporary government, under the Ordinance, was to consist of certain officers, to be appointed by and responsible to the Congress of the Confederation; their powers had been conferred and defined by the ordinance. So far as it provided for the temporary government of the Territory, it was an ordinary Act of legislation, deriving its force from the legislative power of Congress, and depending for its vitality upon the continuance of that legislative power. But the officers to be appointed for the Northwestern Territory, after the adoption of the Constitution, must necessarily be officers of the United States, and not of the Congress of the Confederation; appointed and commissioned by the President, and exercising powers derived from the United States under the Constitution.

Such was the relation between the United States and the Northwestern Territory, which all reflecting men must have foreseen would exist, when the government created by the *Constitution should supersede that of [*607 the Confederation. That if the new government should be without power to govern this Territory, it could not appoint and commission officers, and send them into the Territory, to exercise their legislative, judicial and executive power; and that this Territory, which was even then foreseen to be so important, both politically and financially, to all the existing States, must be left not only without the control of the General Government, in respect to its future political relations to the rest of the States, but absolutely without any government, save what its inhabitants, acting in their primary capacity, might from time to time create for themselves.

But this Northwestern Territory was not the only Territory, the soil and jurisdiction whereof were then understood to have been ceded to the United States. The cession by South Carolina, made in August, 1787, was of "all the territory included within the River Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary of North Carolina, and continuing along the said boundary line until it intersects the ridge or chain of mountains which divides the Eastern from the Western waters; then to be continued along the top of the said ridge of mountains, until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo River, to the said mountains; and thence to run a due west course to the River Mississippi."

It is true that by subsequent explorations it was ascertained that the source of the Tugaloo River, upon which the title of South Carolina depended, was so far to the northward, that the transfer conveyed only a narrow slip of land, about twelve miles wide, lying on the top of the ridge of mountains, and extending from the northern boundary of Georgia to the southern boundary of North Carolina. But this was a discovery made long after the cession, and there can be no doubt that the State of South Carolina, in making the cession, and the Congress in accepting it, viewed it as a transfer to the United States of the soil and jurisdiction of an extensive and important part of the unsettled territory ceded by the Crown of Great Britain by the Treaty of Peace, though its quantity or extent then remained to be ascertained.[1]

1.—Note by Mr. Justice Curtis. This statement that some territory did actually pass by this cession, is taken from the opinion of the court, delivered by *Mr. Justice* Wayne, in the case of Howard v. Ingersoll, reported in 13 How. 405. It is an obscure matter, and, on some examination of it, I have been led to doubt whether any territory actually passed by this cession. But as the fact is not important to the argument, I have not thought it necessary further to investigate it.

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It must be remembered also, as has been already stated, that not only was there a confident expectation entertained by the 608*] *other States, that North Carolina and Georgia would complete the plan already so far executed by New York, Virginia, Massachusetts, Connecticut, and South Carolina, but that the opinion was in no small degree prevalent, that the just title to this "back country," as it was termed, had vested in the United States by the Treaty of Peace, and could not rightfully be claimed by any individual State.

There is another consideration applicable to this part of the subject, and entitled, in my judgment, to great weight.

The Congress of the Confederation had assumed the power not only to dispose of the lands ceded, but to institute governments and make laws for their inhabitants. In other words, they had proceeded to act under the cession, which, as we have seen, was as well of the jurisdiction as of the soil. This Ordinance was passed on the 13th of July, 1787. The Convention for framing the Constitution was then in session at Philadelphia. The proof is direct and decisive, that it was known to the Convention.[1] It is equally clear that it was admitted and understood not to be within the legitimate powers of the Confederation to pass this Ordinance. Jefferson's Works, Vol. IX. pp. 251, 276; Federalist, Nos. 38, 43.

The importance of conferring on the new government regular powers commensurate with the objects to be attained, and thus avoiding the alternative of a failure to execute the trust assumed by the acceptance of the cessions made and expected, or its execution by usurpation, could scarcely fail to be perceived. That it was in fact perceived, is clearly shown by the Federalist (No. 38), where this very argument is made use of in commendation of the Constitution. Keeping these facts in view, it may confidently be asserted that there is very strong reason to believe, before we examine the Constitution itself, that the necessity for a competent grant of power to hold, dispose of, and govern territory, ceded and expected to be ceded, could not have escaped the attention of those who framed or adopted the Constitution; and that if it did not escape their attention, it could not fail to be adequately provided for.

Any other conclusion would involve the assumption that a subject of the gravest national concern, respecting which the small States felt so much jealousy that it had been almost an insurmountable obstacle to the formation of the Confederation, and as to which all the States had deep pecuniary and political interests, and which had been so recently and constantly 609*] agitated, *was nevertheless overlooked; or that such a subject was not overlooked, but designedly left unprovided for, though it was manifestly a subject of common concern, which belonged to the care of the General Government, and adequate provision for which could not fail to be deemed necessary and proper.

The admission of new States, to be framed out of the ceded territory, early attracted the attention of the Convention. Among the resolutions introduced by Mr. Randolph, on the 29th of May, was one on this subject (Res. No. 10, 5 Elliot, 128), which, having been affirmed in Committee of the Whole, on the 5th of June (5 Elliot, 156), and reported to the Convention on the 13th of June (5 Elliot, 190), was referred to the Committee of Detail, to prepare the Constitution, on the 26th of July (5 Elliot, 376). This committee reported an article for the admission of new States "lawfully constituted or established." Nothing was said concerning the power of Congress to prepare or form such States. This omission struck Mr. Madison, who, on the 18th of August (5 Elliot, 439), moved for the insertion of power to dispose of the unappropriated lands of the United States, and to institute temporary governments for new States arising therein.

On the 29th of August (5 Elliot, 492), the report of the committee was taken up, and after debate, which exhibited great diversity of views concerning the proper mode of providing for the subject, arising out of the supposed diversity of interests of the large and small States, and between those which had and those which had not unsettled territory, but no difference of opinion respecting the propriety and necessity of some adequate provision for the subject, Gouverneur Morris moved the clause as it stands in the Constitution. This met with general approbation, and was at once adopted. The whole section is as follows:

"New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of Congress.

The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State."

That Congress has some power to institute temporary governments over the Territory, I believe all agree; and, if it be admitted that the necessity of some power to govern the Territory *of the United States could not [*610 and did not escape the attention of the Convention and the people, and the necessity is so great that, in the absence of any express grant, it is strong enough to raise an implication of the existence of that power, it would seem to follow that it is also strong enough to afford material aid in construing an express grant of power respecting that Territory; and that they who maintain the existence of the power, without finding any words at all in which it is conveyed, should be willing to receive a reasonable interpretation of language of the Constitution, manifestly intended to relate to the Territory, and to convey to Congress some authority concerning it.

It would seem, also, that when we find the subject matter of the growth and formation and admission of new States, and the disposal of the Territory for these ends, were under consideration, and that some provision therefor was expressly made, it is improbable that it would be, in its terms, a grossly inadequate provision; and that an indispensably necessary

1.—It was published in a newspaper at Philadelphia, in May, and a copy of it was sent by R. H. Lee to Gen. Washington, on the 15th of July. See p. 261, Cor. of Am. Rev. Vol. IV., and Writings of Washington, Vol. IX. p. 174.

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power to institute temporary governments, and to legislate for the inhabitants of the Territory, was passed silently by, and left to be deduced from the necessity of the case.

In the argument at the bar, great attention has been paid to the meaning of the word "territory."

Ordinarily, when the territory of a sovereign power is spoken of, it refers to that tract of country which is under the political jurisdiction of that sovereign power. Thus Chief Justice Marshall, in United States v. Bevans, 3 Wheat. 386, says: "What, then, is the extent of jurisdiction which a State possesses? We answer, without hesitation, the jurisdiction of a State is co-extensive with its territory." Examples might easily be multiplied of this use of the word, but they are unnecessary, because it is familiar. But the word "territory" is not used in this broad and general sense in this clause of the Constitution.

At the time of the adoption of the Constitution, the United States held a great tract of country northwest of the Ohio; another tract, then of unknown extent, ceded by South Carolina; and a confident expectation was then entertained, and afterwards realized, that they then were or would become the owners of other great tracts, claimed by North Carolina and Georgia. These ceded tracts lay within the limits of the United States, and out of the limits of any particular State; and the cessions embraced the civil and political jurisdiction, and so much of the soil as had not previously been granted to individuals.

These words, "territory belonging to the 611*] United States," were *not used in the Constitution to describe an abstraction, but to identify and apply to these actual subjects, matter then existing and belonging to the United States, and other similar subjects which might afterwards be acquired; and this being so, all the essential qualities and incidents attending such actual subjects are embraced within the words "territory belonging to the United States," as fully as if each of those essential qualities and incidents had been specifically described.

I say, the essential qualities and incidents. But in determining what were the essential qualities and incidents of the subject with which they were dealing, we must take into consideration not only all the particular facts which were immediately before them, but the great consideration, ever present to the minds of those who framed and adopted the Constitution, that they were making a frame of government for the people of the United States and their posterity, under which they hoped the United States might be, what they have now become, a great and powerful nation, possessing the power to make war and to conclude treaties, and thus to acquire territory. See Sere v. Pitot, 6 Cranch, 336; Am. Ins. Co. v. Canter, 1 Pet. 542. With these in view, I turn to examine the clause of the article now in question.

It is said this provision has no application to any territory save that then belonging to the United States. I have already shown that, when the Constitution was framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great Territory which lay west of those States. No doubt has been suggested that the first clause of this same article, which enabled Congress to admit new States, refers to and includes new States to be formed out of this Territory, expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would exist for an authority to dispose of and make all needful regulations respecting this Territory, when ceded, as existed for a like authority respecting territory which had been ceded.

No reason has been suggested why any reluctance should have been felt, by the framers of the Constitution, to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of the cessions; a circumstance in no way material as respects the necessity for rules and regulations, or the propriety of conferring *on the Congress [*612 power to make them. And if we look at the course of the debates in the Convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance.

Again; in what an extraordinary position would the limitation of this clause to territory then belonging to the United States, place the Territory which lay within the chartered limits of North Carolina and Georgia. The title to that Territory was then claimed by those States, and by the United States; their respective claims are purposely left unsettled by the express words of this clause; and when cessions were made by those States, they were merely of their claims to this Territory, the United States neither admitting nor denying the validity of those claims; so that it was impossible then, and has ever since remained impossible, to know whether this Territory did or did not then belong to the United States: and, consequently, to know whether it was within or without the authority conferred by this clause, to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur.

There is not, in my judgment, anything in the language, the history, or the subject matter of this article, which restricts its operation to territory owned by the United States when the Constitution was adopted.

But it is also insisted that provisions of the Constitution respecting territory belonging to the United States do not apply to territory acquired by treaty from a foreign nation. This objection must rest upon the position that the Constitution did not authorize the Federal Government to acquire foreign territory, and consequently has made no provision for its government when acquired; or, that though the acquisition of foreign territory was contemplated by the Constitution, its provisions concerning the admission of new States, and the making of all needful rules and regulations respecting ter-

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ritory belonging to the United States, were not designed to be applicable to territory acquired from foreign nations.

It is undoubtedly true, that at the date of the Treaty of 1803, between the United States and France, for the cession of Louisiana, it was made a question, whether the Constitution had conferred on the Executive Department of the Government of the United States power to acquire foreign territory by a treaty.

613*] *There is evidence that very grave doubts were then entertained concerning the existence of this power. But that there was then a settled opinion in the executive and legislative branches of the government, that this power did not exist, cannot be admitted, without at the same time imputing to those who negotiated and ratified the Treaty, and passed the laws necessary to carry it into execution, a deliberate and known violation of their oaths to support the Constitution; and whatever doubts may then have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different administrations. Six States, formed on such territory, are now in the Union. Every branch of this government, during a period of more than fifty years, has participated in these transactions. To question their validity now, is vain. As was said by Mr. Chief Justice Marshall, in The American Insurance Company v. Canter, 1 Pet. 542, "the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or treaty." See Sere v. Pitot, 6 Cranch, 336. And I add, it also possesses the power of governing it, when acquired, not by resorting to suppositious powers, nowhere found described in the Constitution, but expressly granted in the authority to make all needful rules and regulations, respecting the Territory of the United States.

There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all Territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument, as it is with its language, and I can have no hesitation in rejecting it.

I construe this clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, 614*] as well of the jurisdiction as of the *soil, so far as the soil may be the property of the party making the cession, at the time of making it.

It has been urged that the words "rules and regulations" are not appropriate terms in which to convey authority to make laws for the government of the Territory.

But it must be remembered that this is a grant of power to the Congress—that it is, therefore, necessarily a grant of power to legislate—and certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a Legislature to make all needful rules and regulations respecting the Territory, is a power to pass all needful laws respecting it.

The word regulate, or regulation, is several times used in the Constitution. It is used in the 4th section of the 1st article to describe those laws of the States which prescribe the times, places, and manner, of choosing Senators and Representatives; in the 2d section of the 4th article, to designate the legislative action of a State on the subject of fugitives from service, having a very close relation to the matter of our present inquiry; in the 2d section of the 3d article, to empower Congress to fix the extent of the appellate jurisdiction of this court; and, finally, in the 8th section of the 1st article in the words, "Congress shall have power to regulate commerce."

It is unnecessary to describe the body of legislation which has been enacted under this grant of power; its variety and extent are well known. But it may be mentioned, in passing, that under this power to regulate commerce, Congress has enacted a great system of municipal laws, and extended it over the vessels and crews of the United States on the high seas and in foreign ports, and even over citizens of the United States resident in China; and has established judicatures, with power to inflict even capital punishment within that country.

If, then, this clause does contain a power to legislate respecting the Territory, what are the limits of that power?

To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, *not a judicial, ques- [*615 tion. Whatever Congress deems needful, is so, under the grant of power.

Nor am I aware that it has ever been questioned that laws providing for the temporary government of the settlers on the public lands are needful, not only to prepare them for admission to the Union as States, but even to enable the United States to dispose of the lands.

Without government and social order there can be no property; for without law, its ownership, its use and the power of disposing of it,

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cease to exist, in the sense in which those words are used and understood in all civilized States.

Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States, when in the judgment of Congress they should be fitted therefor, since these were the needs provided for, since it is confessed that Government is indispensable to provide for those needs, and the power is, to make all needful rules and regulations respecting the Territory, I cannot doubt that this is a power to govern the inhabitants of the Territory, by such laws as Congress deems needful, until they obtain admission as States.

Whether they should be thus governed solely by laws enacted by Congress, or partly by laws enacted by legislative power conferred by Congress, is one of those questions which depend on the judgment of Congress—a question which of these is needful.

But it is insisted, that whatever other powers Congress may have respecting the Territory of the United States, the subject of negro slavery forms an exception.

The Constitution declares that Congress shall have power to make "all needful rules and regulations" respecting the Territory belonging to the United States.

The assertion is, though the Constitution says all, it does not mean all—though it says all, without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument, to exhibit some solid and satisfactory reason, drawn from the subject matter or the purposes and objects of the clause, the context, or from other provisions of the Constitution, showing that the words employed in this clause are not to be understood, according to their clear, plain, and natural signification.

The subject matter is the Territory of the United States out of the limits of every State, and consequently under the exclusive power of the people of the United States. Their 616*] *will respecting it, manifested in the Constitution, can be subject to no restriction. The purposes and objects of the clause were the enactment of laws concerning the disposal of the public lands, and the temporary government of the settlers thereon, until new States should be formed. It will not be questioned that, when the Constitution of the United States was framed and adopted, the allowance and the prohibition of negro slavery were recognized subjects of municipal legislation; every State had in some measure acted thereon; and the only legislative Act concerning the Territory—the Ordinance of 1787, which had then so recently been passed— contained a prohibition of slavery. The purpose and object of the clause being to enable Congress to provide a body of municipal law for the government of the settlers, the allowance or the prohibition of slavery comes within the known and recognized scope of that purpose and object.

There is nothing in the context which qualifies the grant of power. The regulations must be "respecting the Territory." An enactment that slavery may or may not exist there, is a regulation respecting the Territory. Regulations must be needful; but it is necessarily left to the legislative discretion to determine whether a law be needful. No other clause of the Constitution has been referred to at the bar, or has been seen by me, which imposes any restriction or makes any exception concerning the power of Congress to allow or prohibit slavery in the territory belonging to the United States.

A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind, on a question of the interpretation of the Constitution. Stuart v. Laird, 1 Cranch, 299; Martin v. Hunter, 1 Wheat. 304; Cohens v. Virginia, 6 Wheat. 264; Prigg v. Pennsylvania, 16 Pet. 621; Cooley v. Port Wardens, 12 How. 315.

In this view, I proceed briefly to examine the practical construction placed on the clause now in question, so far as it respects the inclusion therein of power to permit or prohibit slavery in the Territories.

It has already been stated, that after the Government of the United States was organized under the Constitution, the temporary government of the Territory northwest of the River Ohio could no longer exist, save under the powers conferred on Congress by the Constitution. Whatever legislative, judicial, or executive authority should be exercised therein could be derived only from the people of the United States under the Constitution. And, accordingly, an Act was passed on the 7th *day[*617 of August, 1789, 1 Stat. at L. 50, which recites: "Whereas, in order that the Ordinance of the United States in Congress assembled, for the government of the Territory northwest of the River Ohio, may continue to have full effect, it is required that certain provisions should be made, so as to adapt the same to the present Constitution of the United States." It then provides for the appointment by the President of all officers, who, by force of the Ordinance, were to have been appointed by the Congress of the Confederation, and their commission in the manner required by the Constitution; and empowers the Secretary of the Territory to exercise the powers of the Governor in case of the death or necessary absence of the latter.

Here is an explicit declaration of the will of the first Congress, of which fourteen members, including Mr. Madison, had been members of the Convention which framed the Constitution, that the Ordinance, one article of which prohibited slavery, "should continue to have good effect." Gen. Washington, who signed this bill, as President, was the President of that Convention.

It does not appear to me to be important, in this connection, that that clause in the Ordinance which prohibited slavery was one of a series of articles of what is therein termed a compact. The Congress of the Confederation had no power to make such a compact, nor to act at all on the subject; and after what had been so recently said by Mr. Madison on this subject, in the thirty-eighth number of the Federalist, I cannot suppose that he, or any others who voted for this bill, attributed any intrinsic effect to what was denominated in the

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Ordinance a compact between "the original States and the people and States in the new territory;" there being no new States then in existence in the Territory, with whom a compact could be made, and the few scattered inhabitants, unorganized into a political body, not being capable of becoming a party to a treaty, even if the Congress of the Confederation had had power to make one touching the government of that Territory.

I consider the passage of this law to have been an assertion by the first Congress of the power of the United States to prohibit slavery within this part of the Territory of the United States; for it clearly shows that slavery was there after to be prohibited there, and it could be prohibited only by an exertion of the power of the United States, under the Constitution; no other power being capable of operating within that Territory after the Constitution took effect.

On the 2d of April, 1790, 1 Stat. at L. 106, the first Congress passed an Act accepting a 618*] deed of cession by North *Carolina of that Territory afterwards erected into the State of Tennessee. The fourth express condition contained in this deed of cession, after providing that the inhabitants of the Territory shall be temporarily governed in the same manner as those beyond the Ohio, is followed by these words: "Provided, always, that no regulations made or to be made by Congress shall tend to emancipate slaves."

This provision shows that it was then understood Congress might make a regulation prohibiting slavery, and that Congress might also allow it to continue to exist in the Territory; and accordingly, when a few days later, Congress passed the Act of May 20th, 1790, 1 Stat. at L. 123, for the government of the Territory south of the River Ohio, it provided, "and the government of the Territory south of the Ohio shall be similar to that now exercised in the Territory northwest of the Ohio, except so far as is otherwise provided in the conditions expressed in an Act of Congress of the present session, entitled 'An Act to accept a cession of the claims of the State of North Carolina to a certain district of western territory.'" Under the government thus established, slavery existed until the Territory became the State of Tennessee.

On the 7th of April, 1798, 1 Stat. at L. 649, an Act was passed to establish a government in the Mississippi Territory in all respects like that exercised in the Territory northwest of the Ohio, "excepting and excluding the last article of the Ordinance made for the government thereof by the late Congress on the 13th day of July, 1787." When the limits of this Territory had been amicably settled with Georgia, and the latter ceded all its claim thereto, it was one stipulation in the compact of cession, that the ordinance of July 13th, 1787, "shall in all its parts extend to the Territory contained in the present Act of Cession, that article only excepted which forbids slavery." The government of this Territory was subsequently established and organized under the Act of May 10th, 1800; but so much of the Ordinance as prohibited slavery was not put in operation there.

Without going minutely into the details of each case, I will now give reference to two classes of Acts, in one of which Congress has extended the Ordinance of 1787, including the article prohibiting slavery, over different Territories, and thus exerted its power to prohibit it; in the other, Congress has erected governments over Territories acquired from France and Spain, in which slavery already existed, but refused to apply to them that part of the government under the Ordinance which excluded slavery.

Of the first class are the Act of May 7th, 1800, 2 Stat. at *L. 58, for the govern- [*619 ment of the Indiana Territory; the Act of Jan. 11th, 1805, 2 Stat. at L. 309, for the government of Michigan Territory; the Act of May 3d, 1809, 2 Stat. at L. 514, for the government of the Illinois Territory; the Act of April 20, 1836, 5 Stat. at L. 10, for the government of the Territory of Wisconsin; the Act of June 12th, 1838, for the government of the Territory of Iowa; the Act of Aug. 14th, 1848, for the government of the Territory of Oregon. To these instances should be added the Act of March 6th, 1820, 3 Stat. at L. 548, prohibiting slavery in the Territory acquired from France, being northwest of Missouri, and north of thirty-six degrees thirty minutes north latitude.

Of the second class, in which Congress refused to interfere with slavery already existing under the municipal law of France or Spain, and established governments by which slavery was recognized and allowed, are: the Act of March 26th, 1804, 2 Stat. at L. 283, for the government of Louisiana; the Act of March 2d, 1805, 2 Stat. at L. 322, for the government of the Territory of Orleans; the Act of June 4th, 1812, 2 Stat. at L. 743, for the government of the Missouri Territory; the Act of March 30th, 1822, 3 Stat. at L. 654, for the government of the Territory of Florida. Here are eight distinct instances, beginning with the first Congress, and coming down to the year 1848, in which Congress has excluded slavery from the Territory of the United States; and six distinct instances in which Congress organized governments of Territories by which slavery was recognized and continued, beginning also with the first Congress, and coming down to the year 1822. These Acts were severally signed by seven Presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the Constitution was adopted.

If the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of Acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the Acts above adverted to.

It appears, however, from what has taken place at the bar, that notwithstanding the language of the Constitution, and the long line of legislative and executive precedents under it, three different and opposite views are taken of the power of Congress respecting slavery in the Territories.

*One is, that though Congress can [*620 make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing

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it; another is, that it can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery; while the third is, that the Constitution itself secures to every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory, and there hold them as property.

No particular clause of the Constitution has been referred to at the bar in support of either of these views. The first seems to be rested upon general considerations concerning the social and moral evils of slavery, its relations to republican governments, its inconsistency with the Declaration of Independence and with natural right.

The second is drawn from considerations equally general, concerning the right of self-government, and the nature of the political institutions which have been established by the people of the United States.

While the third is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some and exclude the property of other citizens; and inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates, practically, to make an unjust discrimination between citizens of different States, in respect to their use and enjoyment of the territory of the United States.

With the weight of either of these considerations, when presented to Congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical [*621] *interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

If it can be shown by anything in the Constitution itself that when it confers on Congress the power to make all needful rules and regulations respecting the Territory belonging to the United States, the exclusion or the allowance of slavery was excepted; or if anything in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Constitution to be introduced into it, I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said all needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.

There have been eminent instances in this court closely analogous to this one, in which such an attempt to introduce an exception, not found in the Constitution itself, has failed of success.

By the 8th section of the 1st article, Congress has the power of exclusive legislation in all cases whatsoever within this district.

In the case of Loughborough v. Blake, 5 Wheat. 324, the question arose, whether Congress has power to impose direct taxes on persons and property in this district. It was insisted, that though the grant of power was in its terms broad enough to include direct taxation, it must be limited by the principle, that taxation and representation are inseparable. It would not be easy to fix on any political truth, better established or more fully admitted in our country, than that taxation and representation must exist together. We went into the War of the Revolution to assert it, and it is incorporated as fundamental into all American Governments. But however true and important *this maxim may be, it is not necessar- [*622] ily of universal application. It was for the people of the United States, who ordained the Constitution, to decide whether it should or should not be permitted to operate within this district. Their decision was embodied in the words of the Constitution; and as that maintained no such exception as would permit the maxim to operate in this district, this court interpreting that language, held that the exceptition did not exist.

Again; the Constitution confers on Congress power to regulate commerce with foreign nations. Under this, Congress passed an Act on the 22d of December, 1807, unlimited in duration, laying an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States. No law of the United States ever pressed so severely upon particular States. Though the constitutionality of the law was contested with an earnestness and zeal proportioned to the ruinous effects which were felt from it, and though, as Mr. Chief Justice Marshall has said, 9 Wheat. 192, "a want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this" I am not aware that the fact that its prohibited the use of a particular species of property,

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belonging almost exclusively to citizens of a few States, and this indefinitely, was ever supposed to show that it was unconstitutional. Something much more stringent, as a ground of legal judgment, was relied on—that the power to regulate commerce did not include the power to annihilate commerce.

But the decision was, that under the power to regulate commerce, the power of Congress over the subject was restricted only by those exceptions and limitations contained in the Constitution; and as neither the clause in question, which was a general grant of power to regulate commerce, nor any other clause of the Constitution, imposed any restrictions as to the duration of an embargo, an unlimited prohibition of the use of the shipping of the country was within the power of Congress. On this subject, Mr. Justice Daniel, speaking for the court in the case of U. S. v. Marigold, 9 How. 560, says: "Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms 'to regulate commerce,' such as would embrace absolute prohibition, may have been questioned, yet, since the passage of the Embargo and Non-Intercourse Laws, and the repeated judicial sanctions these statutes have received, it can scarcely, at this day, be open to doubt, that 623*] every subject falling legitimately *within the sphere of commercial regulation may be partially or wholly excluded, when either measure shall be demanded by the safety or the important interests of the entire nation. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it."

If power to regulate commerce extends to an indefinite prohibition of the use of all vessels belonging to citizens of the several States, and may operate, without exception, upon every subject of commerce to which the legislative discretion may apply it, upon what grounds can I say that power to make all needful rules and regulations respecting the territory of the United States is subject to an exception of the allowance or prohibition of slavery therein?

While the regulation is one "respecting the Territory," while it is, in the judgment of Congress, "a needful regulation," and is thus completely within the words of the grant, while no other clause of the Constitution can be shown, which requires the insertion of an exception respecting slavery, and while the practical construction for a period of upwards of fifty years forbids such an exception, it would, in my opinion, violate every sound rule of interpretation to force that exception into the Constitution upon the strength of abstract political reasoning, which we are bound to believe the people of the United States thought insufficient to induce them to limit the power of Congress, because what they have said contains no such limitation.

Before I proceed further to notice some other grounds of supposed objection to this power of Congress, I desire to say, that if it were not for my anxiety to insist upon what I deem a correct exposition of the Constitution; if I looked only to the purposes of the argument, the source of the power of Congress asserted in the opinion of the majority of the court would answer those purposes equally well. For they admit that Congress has power to organize and govern the Territories until they arrive at a suitable condition for admission to the Union; they admit, also, that the kind of government which shall thus exist, should be regulated by the condition and wants of each Territory, and that it is necessarily committed to the discretion of Congress to enact such laws for that purpose as that discretion may dictate; and no limit to that discretion has been shown, or even suggested, save those positive prohibitions to legislate, which are found in the Constitution.

I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of Congress and the opinion of the majority of the court, save *that I consider it derivable from [*624 the express language of the Constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude?

The only one suggested is that clause in the 5th article of the Amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. I will now proceed to examine the question, whether this clause is entitled to the effect thus contributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

Slavery being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a status created by municipal law. In Prigg v. Pennsylvania, 16 Pet. 611, this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." In Rankin v. Lydia, 2 A. K. Marsh. 470, the Supreme Court of Appeals of Kentucky said: "Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law." I am not acquainted with any case or writer questioning the correctness of this doctrine. See, also, 1 Burge, Col., and For. Laws, 738-741, where the authorities are collected.

The status of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person when the master takes his life; while in others, the law may

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recognize a right of the slave to be protected from cruel treatment. In other words, the status of slavery embraces every condition, from that in which the slave is known to the law 625*] simply as a *chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the status of slavery, must depend on the municipal law which creates and upholds it.

And not only must the status of slavery be created and measured by municipal law, but the rights, powers and obligations which grow out of that status, must be defined, protected and enforced by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by the death of the master, suits for freedom, the capacity of the slave to be party to a suit, or to be a witness, with such police regulations as have existed in all civilized States where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the Territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the Territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to the laws of the Territory, I suppose this right is not to be restricted to the citizens of slave-holding States. A citizen of a State which does not tolerate slavery can hardly be denied the power of doing the same thing. And what law of slavery does either take with him to the Territory? If it be said to be those laws 626*] respecting *slavery which existed in the particular State from which each slave last came, what an anomaly is this? Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law, for holding persons in slavery? I say, not merely to introduce, but permanently to continue these anomalies. For the offspring of the female must be governed by the foreign municipal laws to which the mother was subject: and when any slave is sold or passes by succession on the death of the owner, there must pass with him, by a species of subrogation, and as a kind of unknown jus in re, the foreign municipal laws which constituted, regulated, and preserved, the status of the slave before his exportation. Whatever theoretical importance may be now supposed to belong to the maintenance of such a right, I feel a perfect conviction that it would, if ever tried, prove to be as impracticable in fact, as it is, in my judgment, monstrous in theory.

I consider the assumption which lies at the basis of this theory to be unsound; not in its just sense, and when properly understood, but in the sense which has been attached to it. That assumption is, that the Territory ceded by France was acquired for the equal benefit of all the citizens of the United States. I agree to the position. But it was acquired for their benefit in their collective, not their individual, capacities. It was acquired for their benefit, as an organized political society, subsisting as "the people of the United States," under the Constitution of the United States; to be administered justly and impartially, and as nearly as possible for the equal benefit of every individual citizen, according to the best judgment and discretion of the Congress; to whose power, as the Legislature of the nation which acquired it, the people of United States have committed its administration. Whatever individual claims may be founded on local circumstances, or sectional differences of condition, cannot, in my opinion, be recognized in this court, without arrogating to the judicial branch of the government powers not committed to it; and which, with all the unaffected respect I feel for it, when acting in its proper sphere, I do not think it fitted to wield.

Nor, in my judgment, will the position, that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law, bear examination.

It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from Magna Charta; was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of *the [*627 Great Charter. It existed in every political community in America in 1787, when the Ordinance prohibiting slavery north and west of the Ohio was passed.

And if a prohibition of slavery in a Territory in 1820 violated this principle of Magna Charta, the Ordinance of 1787 also violated it; and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, or the Legislature of any or all the States of the Confederacy, to consent to such a violation? The people of the States had conferred no such power. I think I may at least say, if the Congress did then violate Magna Charta by the Ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens

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of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia, that thereafter no slave should be imported into that Commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it; as may be seen in Wilson v. Isbel, 5 Call. 425. See, also, Hunter v. Hulsher, 1 Leigh, 172; and a similar law has been recognized as valid in Maryland, in Stewart v. Oakes, 5 Harr. & Johns, 107. I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of Magna Charta incorporated into the state constitutions. It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can a similar regulation respecting a Territory violate the 5th Amendment of the Constitution.

Some reliance was placed by the defendant's counsel upon the fact that the prohibition of slavery in this Territory was in the words, "that slavery, &c., shall be, and is hereby forever prohibited." But the insertion of the word "forever" can have no legal effect. Every enact-
628*] ment not expressly limited in its *duration continues in force until repealed or abrogated by some competent power, and the use of the word "forever" can give to the law no more durable operation. The argument is, that Congress cannot so legislate as to bind the future States formed out of the Territory, and that in this instance it has attempted to do so. Of the political reasons which may have induced the Congress to use these words, and which caused them to expect that subsequent Legislatures would conform their action to the then general opinion of the country that it ought to be permanent, this court can take no cognizance.

However fit such considerations are to control the action of Congress, and however reluctant a statesman may be disturb what has been settled, every law made by Congress may be repealed, and, saving private rights, and public rights gained by States, its repeal is subject to the absolute will of the same power which enacted it. If Congress had enacted that the crime of murder, committed in this Indian Territory, north of thirty-six degrees thirty minutes, by or on any white man, should forever be punishable with death, it would seem to me an insufficient objection to an indictment, found while it was a Territory, that at some future day States might exist there, and so the law was invalid, because, by its terms, it was to continue in force forever. Such an objection rests upon a misapprehension of the province and power of courts respecting the constitutionality of laws enacted by the Legislature.

If the Constitution prescribe one rule, and the law another and different rule, it is the duty of courts to declare that the Constitution, and not the law, governs the case before them for judgment. If the law include no case save those for which the Constitution has furnished a different rule, or no case which the Legislature has the power to govern, then the law can have no operation. If it includes cases which the Legislature has power to govern, and concerning which the Constitution does not prescribe a different rule, the law governs those cases, though it may, in its terms, attempt to include others, on which it cannot operate. In other words, this court cannot declare void an Act of Congress which constitutionally embraces some cases, though other cases, within its terms, are beyond the control of Congress, or beyond the reach of that particular law. If, therefore, Congress had power to make a law excluding slavery from this Territory while under the exclusive power of the United States, the use of the word "forever" does not invalidate the law, so long as Congress has the exclusive legislative power in the Territory.

*But it is further insisted that the [*629 Treaty of 1803, between the United States and France, by which this Territory was acquired, has so restrained the constitutional powers of Congress, that it cannot, by law, prohibit the introduction of slavery into that part of this Territory north and west of Missouri, and north of thirty-six degrees thirty minutes north latitude.

By a treaty with a foreign nation, the United States may rightfully stipulate that the Congress will or will not exercise its legislative power in some particular manner, on some particular subject. Such promises, when made, should be voluntarily kept, with the most scrupulous good faith. But that a treaty with a foreign nation can deprive the Congress of any part of the legislative power conferred by the people, so that it no longer can legislate as it was empowered by the Constitution to do, I more than doubt.

The powers of the government do and must remain unimpaired. The responsibility of the government to a foreign nation, for the exercise of those powers, is quite another matter. That responsibility is to be met, and justified to the foreign nation, according to the requirements of the rules of public law; but never upon the assumption that the United States had parted with or restricted any power of acting according to its own free will, governed solely by its own appreciation of its duty.

The 2d section of the 4th article is: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." This has made treaties part of our municipal law; but it has not assigned to them any particular degree of authority, nor declared that laws so enacted shall be irrepealable. No supremacy is assigned to treaties over Acts of Congress. That they are not perpetual, and must be in some way repealable, all will agree.

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If the President and the Senate alone possess the power to repeal or modify a law found in a treaty, inasmuch as they can change or abrogate one treaty only by making another inconsistent with the first, the Government of the United States could not act at all, to that effect, without the consent of some foreign government. I do not consider—I am not aware it has ever been considered—that the Constitution has placed our country in this helpless condition. The action of Congress in repealing the Treaties with France by the Act of July 7th, 1798, 1 Stat. at L. 578, was in conformity with these views. In the case of Taylor et al. 630]* v. Morton, 2 Curt. Cir. Ct. 454, *I had occasion to consider this subject, and I adhere to the views there expressed.

If, therefore, it were admitted that the Treaty between the United States and France did contain an express stipulation that the United States would not exclude slavery from so much of the ceded territory as is now in question, this court could not declare that an Act of Congress excluding it was void by force of the Treaty. Whether or no a case existed sufficient to justify a refusal to execute such a stipulation, would not be a judicial, but a political and legislative question, wholly beyond the authority of this court to try and determine. It would belong to diplomacy and legislation, and not to the administration of existing laws. Such a stipulation in a treaty, to legislate or not to legislate in a particular way, has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound, Foster v. Neilson, 2 Pet. 314; Garcia v. Lee, 12 Pet. 519.

But, in my judgment, this Treaty contains no stipulation in any manner affecting the action of the United States respecting the Territory in question. Before examining the language of the Treaty, it is material to bear in mind that the part of the ceded Territory lying north of thirty-six degrees thirty minutes, and west and north of the present State of Missouri, was then a wilderness, uninhabited save by savages, whose possessory title had not then been extinguished.

It is impossible for me to conceive on what ground France could have advanced a claim, or could have desired to advance a claim, to restrain the United States from making any rules and regulations respecting this Territory, which the United States might think fit to make; and still less can I conceive of any reason which would have induced the United States to yield to such a claim. It was to be expected that France would desire to make the change of sovereignty and jurisdiction as little burdensome as possible to the then inhabitants of Louisiana, and might well exhibit even an anxious solicitude to protect their property and persons, and to secure to them and their posterity their religious and political rights; and the United States, as a just government, might readily accede to all proper stipulations respecting those who were about to have their allegiance transferred. But what interest France could have in uninhabited Territory, which, in the language of the Treaty, was to be transferred "forever, and in full sovereignty," to the United States, or how the United States could consent to allow a foreign nation to interfere in its purely internal affairs, in which that foreign nation had no concern *whatever, is difficult for me to conjec- [*631 ture. In my judgment, this Treaty contains nothing of the kind.

The 3d article is supposed to have a bearing on the question. It is as follows: "The inhabitants of the ceded Territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States; and in the meantime they shall be maintained and protected in the enjoyment of their liberty, property, and the religion they profess."

There are two views of this Article, each of which, I think, decisively shows that it was not intended to restrain the Congress from excluding slavery from that part of the ceded Territory then uninhabited. The first is, that, manifestly, its sole object was to protect individual rights of the then inhabitants of the Territory. They are to be "maintained and protected in the free enjoyment of their liberty, property, and the religion they profess." But this Article does not secure to them the right to go upon the public domain ceded by the Treaty, either with or without their slaves. The right or power of doing this did not exist before or at the time the Treaty was made. The French and Spanish Governments, while they held the country, as well as the United States when they acquired it, always exercised the undoubted right of excluding inhabitants from the Indian country, and of determining when and on what conditions it should be opened to settlers. And a stipulation, that the then inhabitants of Louisiana should be protected in their property, can have no reference to their use of that property, where they had no right, under the Treaty, to go with it, save at the will of the United States. If one who was an inhabitant of Louisiana at the time of the Treaty had afterwards taken property then owned by him, consisting of fire-arms, ammunition, and spirits, and had gone into the Indian country north of thirty-six degrees thirty minutes, to sell them to the Indians, all must agree the 3d article of the Treaty would not have protected him from indictment under the Act of Congress of March 30, 1802, 2 Stat. at L. 139, adopted and extended to this Territory by the Act of March 26, 1804, 2 Stat. at L. 283.

Besides, whatever rights were secured were individual rights. If Congress should pass any law which violated such rights of any individual, and those rights were of such a character as not to be within the lawful control of Congress under the Constitution, that individual could complain, and the Act of Congress, as to such rights of his, would be inoperative; but it *would be valid and operative as to all [*632 other persons, whose individual rights did not come under the protection of the Treaty. And inasmuch as it does not appear that any inhabitant of Louisiana, whose rights were secured by Treaty, had been injured, it would be wholly inadmissible for this court to assume, first, that one or more such cases may have ex-

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isted; and second, that if any did exist, the entire law was void—not only as to those cases, if any, in which it could not rightfully operate, but as to all others, wholly unconnected with the Treaty, in which such law could rightfully operate.

But it is quite unnecessary, in my opinion, to pursue this inquiry further, because it clearly appears from the language of the Article, and it has been decided by this court that the stipulation was temporary, and ceased to have any effect when the then inhabitants of the Territory of Louisiana, in whose behalf the stipulation was made, were incorporated into the Union.

In the case of New Orleans v. De Armas et al. 9 Pet. 224, the question was, whether a title to property, which existed at the date of the Treaty, continued to be protected by the Treaty after the State of Louisiana was admitted to the Union. The 3d article of the Treaty was relied on. Mr. Chief Justice Marshall said: "This article obviously contemplates two objects. One, that Louisiana shall be admitted into the Union as soon as possible, on an equal footing with the other States; and the other, that, till such admission, the inhabitants of the ceded Territory shall be protected in the free enjoyment of their liberty, property and religion. Had any one of these rights been violated while these stipulations continued in force, the individual supposing himself to be injured might have brought his case into this court under the 25th section of the Judicial Act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States."

The cases of Choteau v. Marguerita, 12 Pet. 507, and Permoli v. New Orleans, 3 How. 589, are in conformity with this view of the Treaty.

To convert this temporary stipulation of the Treaty, in behalf of French subjects who then inhabited a small portion of Louisiana, into a permanent restriction upon the power of Congress to regulate territory then uninhabited, and to assert that it not only restrains Congress from affecting the rights of property of the then inhabitants, but enabled them and all other citizens of the United States to go into any part of the *ceded Territory [*633 with their slaves and hold them there, is a construction of this Treaty so opposed to its natural meaning, and so far beyond its subject matter and the evident design of the parties, that I cannot assent to it. In my opinion, this Treaty has no bearing on the present question.

For these reasons, I am of opinion that so much of the several Acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the River Mississippi, were constitutional and valid laws.

I have expressed my opinion, and the reasons therefore, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass, to arrive at a judgment on the case at bar. These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less, would have been inconsistent with my views of my duty.

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.

End of Volume 60.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

DECEMBER TERM, 1857.

Vol. 61.

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REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

DECEMBER TERM, 1857,

AND REPORTED HEREIN.

VOLUME 61,

AS HAVE ALSO BEEN REPORTED IN

20 HOWARD AND IN 2 MILLER'S DECISIONS.

20 How.	Title.	2 Miller.	Here in.
1–2	Morgan v. Curtenius,	239	823
2–3	" "		824
3	Wynn v. Morris,	241	800
4–6	" "		801
6	Garland v. Wynn,	242	801
7–8	" "		802
8	Jones v. McMasters,	245	805
17–19	" "		809
19–22	" "		810
22	" "		811
22	Bacon v. Howard,	251	811
23–24	" "		812
24–26	" "		813
26	Christ Church v. Co. of Philadelphia,	254	802
27–28	" "		803
28	Doswell v. De La Lanze,	256	824
29–32	" "		825
32–34	" "		826
34	Wade v. Leroy,	261	813
43–44	" "		815
44	" "		816
45	Hudgins v. Kemp,	264	853
50–52	" "		855
52–53	" "		856
54	Hudgins v. Kemp,	263	856
54–55	" "		857
55	Brown v. Shannon,	269	826
55–57	" "		827
57–58	" "		828
59	U. S. v. Cambuston,	273	828
60–61	" "		829
62–64	" "		830
64–65	" "		831
65	Dynes v. Hoover,	278	838
77	" "		842
77–79	" "		843
79–82	" "		844
82–84	" "		845
84	Withers v. Buckley,	286	816
87	" "		817
87–89	" "		818
89–92	Withers v. Buckley,		819
92–94	" "		820
94	Secombe v. Steele,	294	833
100–102	" "		835
102–105	" "		836
105–107	" "		837
107–108	" "		838
108	Com'l. B'k. v. Buckner,	302	862
113–115	" "		864
115–117	" "		865
118–120	" "		866
120–122	" "		867
122–125	" "		868
125	" "		869
125–126	Teller v. Patten,	316	831
126–128	" "		832
128	" "		833
129	Mattingly v. Boyd,	318	845
130–131	" "		846
131–133	" "		847
133–134	McMicken v. Perin,	321	857
134–135	" "		858
135	Smith v. Corp. of Washington,	322	860
146–147	" "		860
147–149	" "		861
149	Lyon v. Bertram,	327	847
150–151	" "		848
151–154	" "		849
154–156	" "		850
156	" "		851
156	Hungerford v. Sigerson,	334	869
160–161	" "		870
161	" "		871
162	Grant v. Poillon,	335	871
167	" "		872
167–169	" "		873
170	Hyde v. Stone,	339	874
173–175	" "		875
175–176	" "		876
176–178	Leitensdorfer v. Webb,	342	891
178–180	" "		892

Digitized by Google

20 How.	Title.	2 Miller.	Herein.
180–183	Leitensdorfer v. Webb,		893
183–185	" "		894
185–186	" "		895
186	Fisher v. Haldeman,	352	879
191–192	" "		881
192–194	" "		882
194	Thompson v. Selden,	356	1001
197–198	" "		1002
198	Dean v. Mason,	357	876
202–204	" "		878
204	Carroll v. Dorsey,	360	803
206–208	" "		804
208	Chaffee v. Hayward,	362	804
209–210	" "		805
211	Chaffee v. Hayward, & Day v. Hayward,		851
214–215	" "		852
216	" "		853
216–218	Day v. Union India Rubber Co.,	366	883
213	" "		884
219	Payne v. Niles,	368	895
219–221	" "		896
221–225	McGavock v. Woodlief,	371	884
225–226	" "		885
226–227	" "		886
227	Covington Drawbridge Co. v. Shepherd,	374	896
231–233	" "		898
233–234	" "		898
235	White v. Burnley,	377	886
246–247	" "		886
247–249	" "		889
249–251	" "		896
252	U. S. v. Breitling,	383	900
252–253	" "		901
253–255	" "		902
255–259	Hammenway v. Fisher,	387	799
259–260	" "		800
261	U. S. v. Pacheco,	390	820
262–264	" "		821
264	Spencer v. Lapsley,	392	902
265–266	" "		903
266–269	" "		904
269–271	" "		905
271–274	" "		906
274–276	" "		907
276–278	" "		908
278–280	" "		909
280	Mussina v. Cavazos,	409	878
288–290	" "		879
290–296	Silsby v. Foote,	410	822
296	" "		823
296	Jackson v. The Magnolia,	412	909
297–298	" "		910
298–300	" "		911
300–303	" "		912
303–305	" "		913
305–307	" "		914
307–310	" "		915
310–312	" "		916
312–315	" "		917
315–317	" "		918
317–319	" "		919
319–322	" "		920
322–324	" "		921
324–326	"		922
326–329	" "		923

20 How.	Title.	2 Miller.	Herein.
329–331	Jackson v. The Magnolia		924
331–334	" "		925
334–336	" "		926
336–338	" "		927
338–341	" "		928
341–343	" "		929
343	Goodman v. Simonds,	458	934
356–357	" "		937
357–359	" "		938
359–361	" "		939
361–364	" "		940
364–366	" "		941
366–368	" "		942
368–371	" "		943
371–372	" "		944
372	Gaston v. Phillips,	475	958
374	" "		959
374–376	" "		960
377–378	" "		961
378	Silsby v. Foote,	480	953
385–386	" "		955
386–389	" "		956
389–391	" "		957
391–393	" "		958
393	People's Ferry Co. v. Beers,	488	961
399	" "		963
399–402	" "		964
402	" "		965
402–405	McCormick v. Talcott,	492	930
405–407	" "		931
407–409	" "		932
409–412	" "		933
412	" "		934
413	U. S. v. Fossat,	502	944
423–425	" "		945
425–427	" "		948
427	" "		950
427	Suydam v. Williamson,	506	978
430–432	" "		979
432–434	" "		980
434–437	" "		981
437–439	" "		982
439–441	" "		983
441–442	" "		984
442	Brown v. Wiley,	518	966
447–448	" "		968
448	Warner v. Norton,	520	950
456–459	" "		952
459–461	" "		953
461	Stinson v. Dousman,	525	966
463	" "		967
463–465	" "		968
465–467	" "		969
467	Roberts v. Cooper,	529	969
480–481	" "		973
481–483	" "		974
483–486	" "		975
486	" "		976
486	Ingraham v. Dawson,	536	984
494–495	" "		988
495–496	" "		989
496	Sigerson v. Mathews,	538	989
498–499	" "		990
499–500	" "		991
501	Marks v. Dickson,	541	1003
504–506	" "		1004
506–507	Selden v. Myers,	543	976

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20 How.	Title.	2 Miller.	Here in.
508–510	Selden v. Myers,		977
510–511	" "		978
511–512	Ahl v. Johnson,	548	1005
512–515	" "		1006
515–517	" "		1007
517–520	" "		1008
520–522	" "		1009
522	Moreland v. Page,	558	1009
522–523	" "		1010
523–524	McFaul v. Ramsey,	560	1010
524–527	" "		1011
527	" "		1012
527–528	Beers v. State of Arkansas,	564	991
528–536	" "		992
530	" "		993
530	Bank of Washington v. Arkansas,	567	993
531–532	" "		994
532–534	Barton v. Forsyth,	569	1012
534	" "		1013
535–536	Williams v. Gibbes & Gibbes v. Williams,	571	1013
536–538	"		1014
538–541	" "		1015
541	" "		1016
541–542	Whyte v. Gibbes & Gibbes v. Whyte,	578	1016
542–546	Snow v. Hill,	579	1017
546–549	" "		1018
549–551	" "		1019
551–552	" "		1020
552–553	Holcombe v. McKusick,	586	1020

20 How.	Title.	2 Miller.	Here in.
553–555	Holcombe v. McKusick,		1021
555	McCargo v. Chapman,	590	1021
555–557	" "		1022
558	Irvine v. Marshall,	592	994
558–560	" "		995
560–562	" "		996
562–564	" "		997
564–567	" "		998
567–569	" "		999
569–571	" "		1000
571	Sampson v. Peaslee,	605	1022
571–573	" "		1024
573–576	" "		1025
576–578	" "		1026
578–580	" "		1027
581–582	Ransom, *Ex parte*, v. City of N. Y.,		1000
582–583	" "		1001
583	Taylor v. Carryl,	616	1028
591–592	" "		1030
592–594	" "		1031
594–597	" "		1032
597–599	" "		1033
599–602	" "		1034
602–604	" "		1035
604–606	" "		1036
606–609	" "		1037
609–611	" "		1038
611–614	" "		1039
614–616	" "		1040
616–617	" "		1041

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

DECEMBER TERM, 1857.

AUGUSTUS HEMMENWAY, Claimant of the Ship Independence, Appt.,

v.

WILLIAM B. FISHER, Master of the Steamship City of Boston, for himself, and the Owners of the said Steamship, and for the other Officers and Crew of the said Steamship.

(See S. C. 20 How. 255-260.)

Admiralty rules—appeal applicable to admiralty cases—judgments and decrees, upon affirmance, carry interest—but not in admiralty cases—court has discretion in such cases to award damages by way of interest—but cannot in case where court is equally divided.

The 18th rule never applied to admiralty cases.

By the Judiciary Act of 1789, decrees in chancery and admiralty, as well as judgments at common law in the Circuit Courts, were removable to this court by writ of error, and not in any other manner.

This provision in the Act of 1789 was repealed by the Act of March 2, 1803, and the ordinary mode of appeal substituted in the place of the writ of error.

18th and 20th rules have been superseded and annulled by the 62d rule, adopted in 1851.

By this last mentioned rule, judgments at common law and decrees in chancery, upon affirmance in this court, carry interest until paid, according to the rate in the State in which the judgment or decree of the court below was given.

Cases in admiralty, however, are not embraced in the 62d rule.

No rule, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties.

And a discretionary power is reserved, to add to the damages awarded by the court below, further damages by way of interest, in cases where, in the opinion of this court, the appellee, upon the proofs, is justly entitled to such additional damages.

This allowance of interest, pro tanto, is a new judgment.

In this case no new judgment could be given in this court, because the court, being equally divided, could not change the decree of the Circuit Court, nor exercise its discretionary power to allow interest on the decree, for this would have been a new decree.

Argued Dec. 11, 1857. Decided Dec. 24, 1857.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

On motion by the appellee to amend the decree rendered in the case at the last term, by giving to the appellee damages on the decree of the Circuit Court, at the rate of six per cent. per annum.

The case is stated by the court.

Mr. Dehon, for appellant.
Mr. Bartlett, for appellee.

Mr. Chief Justice Taney delivered the opinion of the court:

This case was decided at the last term. It was an appeal from the decree of the Circuit Court for the District of Massachusetts, sitting as a Court of Admiralty. The decree was affirmed here by an equal division of the Justices of this court; and the decree of affirmance was entered by the Clerk for the sum awarded by the Circuit Court and costs, and did not give interest on the amount decreed by the court below. The mandate was issued according to the decree; but was not filed or proceeded on by the appellee, because he supposed that, under the 18th rule of this court, he was entitled to interest upon the amount recovered in the Circuit Court, from the date of the decree, and that its omission was a clerical error. And he has now moved the court to correct it by amending the decree and mandate.

If an error has been committed by the Clerk, it is, without doubt, in the power of the court to correct it at the present term.

But the judgment is correctly entered, and the mandate conforms to it. And the mistake on the part of the appellee has arisen from supposing the 18th rule to be still in force, and to be applicable to cases in admiralty. But it never applied to admiralty cases.

It will be observed by reference to the 17th rule, to which the 18th refers, that these rules are in express terms confined to cases brought here by writ of error. And it is true that, by the original Judiciary Act of 1789, decrees in chancery and admiralty, as well as judgments at common law, in the Circuit Courts, were removable to this court by writ of error—and were not made removable in any other manner. And if that provision in the Act of 1789 was still in force, and the rule unrepealed, the appellee would be entitled to the interest he claims, to be calculated under the 20th rule, to the day of the affirmance of the decree.

But the writ of error, from its form, and the principles which govern it, is peculiarly appropriate to judgments at common law, and is inconvenient and embarrassing when used as process to remove decrees in chancery and admiralty to a superior *court. The or- [*259 dinary and uniform mode of removing such decrees to the appellate and revising court, wher-

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ever such jurisdictions have been established, has been by appeal, with the single exception of this Act of Congress. And in order to remove the inconvenience and embarrassment which this provision in the Act of 1789 created, it was repealed by the Act of March 2, 1803, and the ordinary mode of appeal substituted in the place of the writ of error. And as this case came up by appeal, the rules of this court referred to in the argument do not apply to it.

Nor indeed were they intended to apply to chancery or admiralty decrees. They were adopted at February Term, 1803, and that term continued until the 2d of March. It was on that day that the Act of Congress changing the provision in the Act of 1789 was approved by the President. And it appears by the minutes of the court that the rules in question were adopted on the same day, that is, March 2d. This Act of Congress had, therefore, undoubtedly, passed both Houses of Congress before these rules were adopted, and it is evident that they were carefully framed with reference to this change in the law, so as to exclude from their operation admiralty and chancery appeals.

It may be proper to add, that the 18th and 20th rules are no longer in force, even in common law cases. They have been superseded and annulled by the 62d rule, adopted in 1851. By this last mentioned rule, judgments at common law and decrees in chancery, upon affirmance in this court, carry interest until paid; and the interest is to be calculated according to the rate of interest allowed in the State in which the judgment or decree of the court below was given. The object in changing the rule in this respect was to place the suitors in the courts of the United States upon the same footing with the suitors in the State courts in like cases. For the interest allowed in the several States differs, and in many of them it is higher than six per cent., and in most if not all of them a judgment or decree in a court of the State carries interest until it is paid.

Cases in admiralty, however, are not embraced in the 62d rule. It applies to cases of law and equity only. And, indeed, cases in admiralty could not have been justly included. For there could be no reason for giving one rate of interest where a case of collision or salvage was in the first instance tried and decided in Louisiana, and another rate of interest where it was tried and decided in New York, or in any other State where the interest allowed by the state laws was different.

260*] *Moreover, in cases of collision and salvage, and more especially in the latter, it is impossible to fix the sum that ought to be awarded with absolute certainty by any rule of calculation. It must depend mainly upon estimates, and the opinions of persons acquainted with the subject; and acting upon mere estimates and opinions, different minds unavoidably come to different conclusions as to the amount proper to be allowed.

And it will sometimes happen in an admiralty case, that this court will think that the damages estimated and allowed in the Circuit Court are too high; and yet the opinion here may approximate so nearly to that of the court below, that this court would not feel justified in reversing its judgment. Besides, new testimony may be taken here, in an admiralty case, and a new aspect given to it. No rule, therefore, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved, to add to the damages awarded by the court below, further damages by way of interest, in cases where, in the opinion of this court, the appellee, upon the proofs, is justly entitled to such additional damages. But this allowance of interest is not an incident to the affirmance affixed to it by law or by rule of court. If given by this court, it must be in the exercise of its discretionary power, and protanto, is a new judgment.

In the case before us, no new judgment could be given in this court, because, upon the question of affirming or reversing the decree of the Circuit Court, the Justices of this Court were equally divided; and the judgment was affirmed by operation of law, which from necessity affirms the judgment of the inferior tribunal when the judges of the appellate court are equally divided. Upon such an affirmance, the appellee was entitled to the full benefit of the decree of the Circuit Court, but nothing more. The court, being equally divided, could not change the decree of the Circuit Court, nor excise its discretionary power to allow interest on the decree; for this would have been a new decree. And those Justices who were of opinion that the decree of the Circuit Court ought to be reversed because the damages were too high, were of course opposed to making it still higher by the addition of interest.

The motion to amend the decree and mandate, and give interest on the amount awarded by the Circuit Court, must, therefore, be overruled.

ORDER.

On consideration of the motion made in this cause on a prior day of the present term of this court, to wit: on Friday, the 11th inst., by Mr. Bartlett, of counsel for the appellee, to amend the decree entered in this case at the last term, by giving to the appellee damages at the rate of six per cent. per annum on the decree of the Circuit Court, and of the argument of counsel thereupon had, as well against as in support thereof, it is now here ordered by the court that said motion be, and the same is hereby overruled. Per Mr. Ch. J. Taney.

Dec. 24, 1857.

ROBERT H. WYNN, Executor and Devisee of William Wynn, Deceased, Plff. in Er.,

v.

CHESLEY B. MORRIS, Martha Morris and Keziah Taylor.

(See S. C. 20 How. 3–6.)

Jurisdiction—court has none, no U. S. statute being in question.

Where complainant has no interest in land, but a naked possession not protected by an Act of Congress, this court has no jurisdiction to review a decision of a State Court adverse to such title, no statute of the United States being drawn in question.

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Submitted Dec. 10, 1857. Decided Dec. 30, 1857.

IN ERROR to the Supreme Court of the State of Arkansas.

The case is fully stated by the court.

Mr. Albert Pike, for the plaintiff in error.

Messrs. A. H. Lawrence, Geo. C. Watkins and J. H. Bradley, for defendants in error.

Mr. Justice Catron delivered the opinion of the court:

The complainant filed his bill in a state circuit court in Arkansas, to enjoin Morris from executing a writ of possession founded on a recovery by an action of ejectment for the northwest quarter of section 18, in township 16, south of Red River.

Wynn alleges that the whole of the quarter section was cultivated by him, and had been for years before the inception of Morris' title, and that he, Wynn, claimed title to the land through the State of Arkansas, and that Morris had obtained a legal title in fraud by Wynn's superior right in equity.

Morris claims through Keziah Taylor.

In 1829 and in 1830, when the Occupant Law of that year passed, she was a widow, and cultivated a small farm on the land in dispute; 5*] she sold *out her possessions there in the latter part of 1830, left the country secretly, and settled permanently in the Mexican Province of Coahuila and Texas, and there she remained without returning to Arkansas until December, 1842, when she made her appearance, proved her cultivation in 1829, and her continuing possession in May, 1830, in the form prescribed by the Act of that year, had her preemption allowed, entered the land, and sold it to Morris. She got a patent in 1844.

The reason why Mrs. Taylor did not enter the land at an earlier day was, that the township No. 16 was not surveyed until 1841, and within one year before the date of her entry.

Wynn seeks a decree on the ground that Morris procured Mrs. Taylor to enter the land for Morris's benefit, when she had no right of pre-emption, because of the abandonment of her possession for more than ten years.

The Register and Receiver held that a preference of entry was vested by the Act of 1830, and they refused to investigate the fact of abandonment. This opinion was concurred in by the Commissioner of the General Land Office. And, to correct this alleged error, the bill was filed. The State Circuit Court refused the relief prayed; adjudged that Mrs. Taylor obtained a valid title to the land, and decreed damages against Wynn for detaining the possession. From this decree he appealed to the Supreme Court of Arkansas, where the decree of the Circuit Court was affirmed, and to that decree Wynn prosecutes his writ of error out of this court; and the first question here is, whether we have jurisdiction to re-examine and reverse or affirm the decree of the State Courts. This can only be done in a case where is drawn in question the construction of a statute of the United States, etc., and the decision is against the title set up or claimed under the Statute by the losing party. If Wynn had no title, of course he could not claim under a law of the United States, and cannot come here under the 25th section of the Judiciary Act of 1789, merely to draw in question the decree which dismissed his bill.

To this effect are the cases of Owings v. Norwood's Lessee, 5 Cranch, 344; Henderson v. Tennessee, 10 How. 311.

Wynn sets up a pretension of claim to the land in dispute through the State of Arkansas, which State was authorized to locate 500,000 acres of land by Acts of Congress passed in 1841 and 1842, and the complainant insists that he had made a contract with the State, through her locating agent, Charles E. Moore, who was acting under instructions from the Governor of said State, to the effect that he, the complainant, should be allowed to purchase the land from the State at $2 per acre. But the State did not locate this quarter section, nor *had it an interest in it at any [*6 time; so that the title was outstanding in the United States till Keziah Taylor made her entry.

The complainant Wynn, having no interest in the land but a naked possession, not protected by an Act of Congress, we order that his writ of error be dismissed for want of jurisdiction.

JOSIAH GARLAND, Plff. in Error,

v.

ROBT. H. WYNN, Executor and Devisee of Wm. Wynn, Deceased.

(See S. C. 20 How. 6-8.)

Pre-emption laws—courts have power to decide upon priority of entry, and overrule Register and Commissioner.

Where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the Government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate the conflicting claims.

Nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter land, oust the jurisdiction of the courts of justice.

Courts of justice have power to examine a contested claim to a right of entry under the pre-emption laws, and to overrule the decision of the Register and Receiver, confirmed by the Commissioner, in a case where they have been imposed upon.

Submitted Dec. 10, 1857. Decided Dec. 30, 1857.

IN ERROR to the Supreme Court of the State of Arkansas.

This action was begun in Lafayette County Circuit Court, State of Arkansas, by William Wynn against John Garland.

The Circuit Court found that the defendant, Garland, was the absolute owner of the tract of land mentioned in the bill.

The case was appealed to the Supreme Court of the State of Arkansas, which reversed the decree of the Circuit Court. Writ of error was sued out upon this judgment.

The facts upon which the action was brought are stated in the opinon of the court.

Messrs. J. H. Bradley, A. H. Lawrence and George C. Watkins, for plaintiff in error.

Mr. Albert Pike, for defendant in error.

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Mr. Justice Catron delivered the opinion of the court:

In November, 1842, Wm. Wynn (the complainant below) proved that he had a preference of entry to the quarter section of land in dispute, according to the Act of 1838, and his entry was allowed.

In February, 1843, Samuel Hemphill made proof that he had right of pre-emption to the same land, under the Act of May 26th, 1830. The two claims coming in conflict, it was decided by the Register and Receiver at the local Land Office, that Hemphill had the earlier and better right to enter the land: and in this decision the Commissioner of the General Land Office concurred.

Wynn's entry being the oldest, it was set aside, his purchase money refunded, and a patent certificate was awarded to Samuel Hemphill, who assigned it to Garland, the plaintiff in error, to whom the patent issued. The benefit of the patent was decreed to Wynn by the Supreme Court of Arkansas; to reverse which decree, Garland prosecutes his writ of error out of this court.

It appears, from the allegations and evidence, that Garland procured the proofs, and was in fact the principal in obtaining a preference of entry in the name of Hemphill, and in causing Wynn's elder entry to be vacated; that the whole proceeding, on the part of Garland and Hemphill, was a mere imposition on the officers administering the public lands; that Hemphill never had any improvement on the northeast quarter of section 18, but that his improvement was on the northwest quarter of section 17, which adjoins the quarter section in controversy; and that Garland induced the witnesses, who made the proof before the Register and Receiver to establish Hemphill's preference of entry, to confound the quarter sections and their dividing lines, and misrepresented the extent of the cleared land occupied by Hemphill in 1829 and 1830; so that the witnesses ignorantly swore that the improvement and cultivation were in part on the northeast quarter of section 18, which was wholly untrue; and by which false swearing Wynn's entry was set aside, and Garland obtained a patent of the land.

Garland insists, by an amended answer in the nature of a distinct plea, that, by the law of the land, the Circuit Court had no authority or jurisdiction to set aside or correct the decision of the Register and Receiver, and that their ad-
8*] judication *and judgment in granting and allowing the pre-emption rights to and in the name of Samuel Hemphill was final and conclusive, and cannot be inquired into, or in any manner questioned, modified, or set aside.

This matter was put in issue; and the court below, when it decreed for the complainant, necessarily decided against the bar to relief set up and claimed under an authority of the United States.

The question is, have the courts of justice power to examine a contested claim to a right of entry under the pre-emption laws, and to overrule the decision of the Register and Receiver, confirmed by the Commissioner, in a case where they have been imposed upon by ex parte affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right, who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded?

The general rule is, that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the Government, regardless of the rights of others, the letter may come into the ordinary courts of justice, and litigate the conflicting claims. Such was the case of Comegys v. Vasse, 1 Pet. 212, and the case before us belongs to the same class of ex parte proceedings; nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court.

It was, in effect, so held in the case of Lytle v. The State of Arkansas, 9 How. 328; next, in the case of Cunningham v. Ashley, 14 How. 377; and again in the case of Bernard v. Ashley, 18 How. 44.

It is ordered that the decree of the Supreme Court of Arkansas be in all things affirmed.

THE RECTOR, CHURCHWARDENS and VESTRY of CHRIST CHURCH in the City of Philadelphia, in trust for Christ Church Hospital, Plffs. in Er.,

v.

THE COUNTY OF PHILADELPHIA.

(See S. C. 20 How. 26-28.)

Jurisdiction must appear by the record—judgment of State Court.

A judgment of a State Court in regard to a state law imposing taxes, when it does not appear by express averment, or necessary intendment, or by the record, that any questions of which this Court is entitled to take cognizance, under the 25th sec. of the Judiciary Act, arose or was decided in the cause, is not within the jurisdiction of this Court to review.

Submitted Dec. 16, 1857. Decided Dec. 30, 1857.

IN ERROR to the Supreme Court of the State of Pennsylvania.

The following is the case substantially as stated by the parties:

On April 6th, 1833, the Legislature of Pennsylvania passed an Act exempting from taxation the real property, including ground rents, belonging to Christ Church Hospital. On April 14, 1851, the same Legislature passed an Act providing that all property, real and personal, belonging to any association or incorporated company, which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner as other property now by law taxable,

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Afterwards the defendants, by their officers and agents, assessed certain property belonging to the plaintiffs, which property belonged to the plaintiffs before passage of the Act of April 6, 1833. On March 28, 1852, the defendants proceeded by warrant of distress for the collection of the said taxes assessed. Whereupon the plaintiffs gave the defendants notice, claiming that the property assessed was exempt, and protesting, etc.

Subsequently the plaintiffs paid the defendants the taxes. Among these taxes were some upon the hospital buildings in the actual occupation of the plaintiffs.

The plaintiff in error then brought this suit to recover back the said taxes.

The Supreme Court of Pennsylvania held that they were entitled to recover only the taxes levied on property in actual use for hospital purposes. They have now brought the case to this court, claiming that the exemption of the Hospital property from taxation by the Statute of 1833, gave them a vested right which the Legislature could not revoke, and that the attempted repeal of the said Statute was invalid, as impairing the obligation of contracts.

A further statement appears in the opinion of the court.

Messrs. H. M. Watts and W. M. Meredith, for plaintiffs in error.

Messrs. Hazlehurst, Wm. M. Smith, and William A. Porter, for defendant in error.

Mr. Justice Campbell delivered the opinion of the court:

This is a writ of error to the Supreme Court of Pennsylvania, under the 25th section of the Judiciary Act of the 24th September, 1789.

These parties, without any pleadings, stated 28*] a case, in the *nature of a special verdict to the Supreme Court of the State of Pennsylvania, upon which a final judgment was rendered. It appears from the case, that in April, 1833, the Legislature of Pennsylvania enacted: "That Christ Church Hospital, having for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a public charge, and that, in consequence of the decay of the buildings of the Hospital estate, and the increasing burden of the taxes, its means are curtailed and its usefulness limited; therefore, that the real property, including ground rents now belonging and payable to Christ Church Hospital, in the City of Philadelphia, so long as the same shall continue to belong to the Hospital, shall be and remain free from taxes."

That in April, 1851, the Legislature of the same State enacted, "that all property, real and personal, belonging to any association or incorporated company, which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation, in the same manner and for the same purposes as other property is now by law taxable; and so much of any law as is hereby altered and supplied be, and the same is hereby repealed: Provided, That nothing herein shall be construed to exempt cemetery companies from taxation."

It further appears, in the case stated, that the County of Philadelphia, in the year 1852, caused certain real estate and ground rents of the plaintiffs in the City of Philadelphia, and which were possessed by the plaintiffs before the date of the Act first mentioned, to be valued and assessed for taxes, and that the taxes were subsequently paid to the officers of the county, under protest, by them. The Supreme Court of Pennsylvania determined that the plaintiffs were entitled to recover only for so much of the taxes assessed and paid which were levied for property in the actual occupancy of the plaintiff for hospital purposes.

It does not appear, either by express averment or by a necessary intendment from any matter stated in the case, nor does any entry on the record of the cause in the Supreme Court of Pennsylvania show, that any of the questions of which this court is entitled to take cognizance, under the terms of the 25th section of the Judiciary Act, arose in the cause, and were actually decided by that court. Therefore, in conformity with the established doctrine of this court (Armstrong v. The Treasurer of Athens County, 16 Pet. 282; Smith v. Hunter, 7 How. S. C. 738) the writ of error must be dismissed.

JANE CARROLL, Maria C. Fitzhugh, et al., Devisees of Daniel Carroll, of Dudingtown, Plffs. in Er.,

v.

NICHOLAS DORSEY, Noah Dorsey, Achsah Dorsey, Tristram S. Dorsey, Heirs of Law of Alfred R. Dowson, Deceased.

(See S. C. 20 How. 204-208.)

Writ of error, how returnable—record, when filed—irregularities in these not waived by appearance—appearance does not waive motion to dismiss.

The Act of 1789, sec. 22, requires that the writ of error should be made returnable on a certain day therein named.

The transcript of the record must be filed at the term next succeeding the issuing of the writ or the taking of the appeal in order to bring the case within the jurisdiction of the court.

These irregularities were not waived by general appearance.

Appearance does not preclude the party from afterwards moving to dismiss for the want of jurisdiction, or upon any other sufficient ground.

Argued Dec. 11, 1857. Decided Dec. 30, 1857.

APPEAL from the Circuit Court of the United States for the District of Columbia.

This was an action of ejectment brought in the Circuit Court of the District of Columbia, by the plaintiffs in error. The trial below resulted in a verdict and judgment for the defendants; whereupon the plaintiffs brought the case here on a writ of error.

NOTE.—Appearance cures defects in service of process, and its non-service except want of jurisdiction of subject matter—see note, 2 L. ed. U. S. 510. Practice and proceedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note, 66 L.R.A. 833.

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A further statement appears in the opinion of the court.

On motion to dismiss.

Messrs. Coxe and Redin, for plaintiffs in error.

Messrs. Jones and Bradley, for defendants in error.

Mr. Chief Justice Taney delivered the opinion of the court:

A motion has been made to dismiss this case for want of jurisdiction.

It appears that an action of ejectment was brought by the plaintiffs in error against the defendants in the Circuit Court of the District of Columbia, and upon the trial the verdict and judgment were for the defendants.

The particular day on which the judgment was rendered is not given; but it is stated as a judgment on the third Monday in October, in the year 1851, which it appears was the first day of the term. But it also appears that two exceptions were taken at the trial by the plaintiffs, one dated the 20th and the other the 22d of November, so that the judgment would seem to have been rendered a few days before the December Term, 1851, of this court.

No steps were taken to bring it here for revision, until the 27th of May, 1853, when an appeal bond was approved by the presiding judge, which recites that the plaintiffs had obtained a writ of error, returnable to the next term of this court, and filed it in the Clerk's office. No such writ of error, however, appears to have been issued. A paper, purporting to be a writ of error, was issued after the commencement of December Term, 1853; that is, on the 17th of that month. This paper is made returnable to the Supreme Court in general terms, without naming any day or even any term at which the defendants were required to appear. The transcript before us also contains a citation, signed by the presiding judge, and the service is acknowledged by the attorney for the defendants. But the citation, like the paper purporting to be a writ of error, specifies no day or term at which the defendants are required to appear, and, moreover, is not itself dated.

No further proceedings were had, to bring up the case, until December Term, 1856, when the record was filed without any other writ of 207*] error, bond, or citation; and at the *same term the defendants, by their counsel, appeared in this court.

It is evident, from this statement, that the case is not before the court. The Act of 1789, sec. 22, requires that the writ of error should be made returnable on a certain day therein named; and, indeed, upon common law-principles, a certain return day in a writ of error is essential to its validity. There is, therefore, no process by which the case is legally brought before this court, and consequently we have no jurisdiction over it. And if the process was free from exception, and if a writ of error, such as is known and recognized by law, had been issued and filed in the Circuit Court, yet no transcript of the record was filed here until nearly three years afterwards; and this court have repeatedly said that the transcript of the record must be filed at the term next succeeding the issuing of the writ or the taking of the appeal in order to bring the case within the jurisdiction of this court.

But it is said, on behalf of the plaintiffs in error, that these are mere irregularities, which were waived by the general appearance at the last term, and that the motion at the present term is too late.

Undoubtedly the appearance of the defendants at the last term, without making a motion to dismiss, cures the defect in the citation. The citation is nothing more than notice to the party to appear at the time specified for the return of the writ of error. And if he appears, it shows that he had notice; and if he makes no objection during the first term to the want of notice, or to any defect in the citation, he must be regarded as having waived it. The citation is required for his benefit, and he may, therefore, waive it if he thinks proper, and proceed to trial in the appellate court. This point was decided in the case of The U. S. v. Yates et al. 6 How. 605; but the court at the same time said that the appearance did not preclude the party from afterwards moving to dismiss for the want of jurisdiction, or upon any other sufficient ground.

The same point was again decided in the case of Buckingham et al. v. McLean et al. 13 How. 150, in which the court said that a motion to dismiss for want of a citation must be made at the first term at which the party appears, and is too late if made at a subsequent term. But the want of a writ of error, such as is prescribed by the Act of Congress, stands on different ground. And in the case of The U. S. v. Curry, 6 How. 106, the court held, that where the power of the court to hear and determine a case is conferred by Acts of Congress, and the same authority which gives the jurisdiction points *out the manner in which it shall [*208 be brought before us, we have no power to dispense with the provisions of the law, nor to change or modify them.

Upon this ground, the case is not legally before us, and must be dismissed for want of jurisdiction.

EDWARD M. CHAFFEE, Trustee of Horace H. Day, Plff. in Er.,
v.
NATHANIEL HAYWARD.

(See S. C. 20 How. 208-210.)

Appearance without motion to dismiss, waiver of error in citation—absence of counsel, no reason for delay of case.

The appearance of the party in this court, without making a motion to dismiss during the first term, is a waiver of any irregularity in the citation.

The absence of one or all the counsel employed by one party, in the pursuit of other business, furnishes no ground for delaying a case in this court, without the consent of the adverse party.

Argued Dec. 24, 1857. Decided Dec. 31, 1857.

THIS suit was brought in the Circuit Court of the United States for the District of Rhode Island, by the plaintiff in error, for the recovery of damages alleged to have been sus-

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tained by reason of the alleged infringement of a certain patent. The defendant pleaded to the jurisdiction of the court, that he was an inhabitant of the District of Connecticut, and that at the time of the pretended service of the writ he was not within the District of Rhode Island. The plaintiff demurred, and the court overruled the demurrer and dismissed the case for want of jurisdiction. The plaintiff brought the case here on a writ of error.

A further statement appears in the opinion of the court.

On motion to dismiss.

Messrs. T. A. Jenckes and R. H. Gillet, for plaintiff in error.

Messrs. Charles S. Bradley and Joseph S. Pitman, for defendant in error.

Mr. Chief Justice Taney delivered the opinion of the court:

In this case, a judgment in favor of the defendant in error was rendered in the Circuit Court of the United States for the District of Rhode Island, at its June Term, 1856. The plaintiff sued out a writ of error on the 27th of October, 1856, returnable to the December Term of this court, then next following—but the citation to the defendant was signed by the clerk of the court and not by the judge who allowed the writ of error.

In pursuance of this writ of error, the record was filed here and the case docketed on the 24th of November, 1856; and on the 4th of December the defendant appeared by counsel in this court.

A motion has been made at the present term to dismiss the case, because the citation is signed by the clerk and not by the judge.

The citation is undoubtedly irregular in this respect, and the defendant in error was not bound to appear under it. And if a motion had been made at the last term, within a reasonable time, to dismiss the case upon this ground, it 210*] would have *been dismissed. But the appearance of the party in this court, without making a motion to dismiss during the first term, is a waiver of any irregularity in the citation, and is an admission that he has received notice to appear to the writ of error. This point was decided in the case of McDonogh v. Millaudon, 3 How. 693; United States v. Yulee, 6 How. 605; and Buckingham et al. v. McLean et al. 13 How. 150. And these cases have been recognized and affirmed in the case of Carroll et al. v. Dorsey et al., decided at the present term.

Indeed, any other rule would be unjust to a plaintiff in error, and is not required for the protection of the defendant. The latter is not bound to appear, unless he is legally cited, except for the purpose of moving to dismiss. He knows, or must be presumed to know, whether the notice which the law requires has been served on him or not. And if the objection is made at the first term, the plaintiff, by a new writ and proper citation, might bring up the case to the succeeding term. But if the defendant does not, by motion, at the first term, apprise him of the irregularity of his proceeding in this respect, and of his intention to take advantage of it, the plaintiff is put off his guard by the defendant's appearance, and if the motion is permitted at the second term, he will be delayed an entire year in the prosecution of his suit, whenever it is the interest of a defendant in error to delay and harrass his adversary.

An affidavit has been filed by one of the counsel for the defendant in error, stating that he is the junior counsel in the case, and that he did not make the motion at the last term, because the senior counsel was absent in Europe, and the deponent did not wish to decide on the expediency of the motion to dismiss without consulting him; that he expected him to return before the term ended, but the court adjourned sooner than he anticipated, and the senior counsel did not return until the court had finally adjourned to the next term.

The facts stated in this affidavit cannot influence the decision of the motion. The absence of one or of all the counsel employed by one party, in pursuit of other business, furnishes no ground for delaying a case in this court, without the consent of the adverse party.

The motion comes too late, and is, therefore, overruled.

HORACE H. DAY, Plff. in Er.,
v.
NATHANIEL HAYWARD.

(See S. C. 20 How. 210.)

The motion to dimiss stands on same ground and is decided in same manner as in Chaffee v. Hayward, next preceding case.

Argued Dec. 24, 1857. Decided Dec. 31, 1857

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

This case is substantially the same as the preceding one. The same counsel appeared.

On motion to dismiss.

Mr. Chief Justice Taney delivered the opinion of the court:

The motion to dismiss in this case stands on the same ground with that of Chaffee, Trustee of Day, v. Hayward, just disposed of, and must, for the reasons assigned in that case, be also overruled.

JAMES R. JONES, Chas. C. Jones, Wm. G. Gorman, Robt. Lott, John Tippin, Matthew T. Tippin, and John R. Tally, Plffs. in Er.,
v.
CATHARINE McMASTERS, by her Next Friend, Manuel Ybarba.

(See S. C. 20 How. 8-22.)

Division of an empire works no forfeiture of property—the title remains as before—plea of alienage in Texas—questions exclusively for courts of equity cannot be determined in suits at law—survey and location of government land cannot be questioned at law in ejectment—if voidable, the question is for equity.

The division of an Empire works no forfeiture of a right of property previously acquired.

NOTE.—Effect of alienage on title to lands. See note to Governeur v. Robertson, 6 L. ed. U. S. 488.

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The title remains after the revolution, and erection of the new Government, the same as before.

In Texas, until some Act of the Legislature is passed on the subject of alienage, or some proceeding had, on the part of the Government, devesting the estate for alienage, effect cannot be given to the plea of alienage.

The United States courts, in a suit at law, should exclude the determination of all questions that belong exclusively to a court of equity.

There is no ground that could warrant the court in going behind a survey and location in a suit at law, which were made by the Government that granted the title.

If voidable, for irregularity or other cause, the question was not one for a court of law in an action to recover possession, but for a court of equity to reform any error or mistake.

Argued Dec. 17, 1857. Decided Jan. 11, 1858.

IN ERROR to the District Court of the United States for the District of Texas.

The case is stated by the court.

Mr. W. G. Hale, for plaintiffs in error:

The District Court should not have sustained the demurrer to the plea to the jurisdiction, pleaded by John R. Tally. It appeared by the allegations of that plea that the plaintiff was, at the time of the institution of the suit, a citizen of the State of Texas. The Constitution of the Republic of Texas declared that "all persons (Africans, the descendants of Africans, and Indians excepted) who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic, and entitled to all the privileges of such.

Const. Rep. Gen. Prov. sec. 10; Hart Dig. p. 38.

And the incorporation of the Republic of Texas into the Union, "on an equal footing with the original States in every respect," necessarily converted the citizens of the Republic of Texas into citizens of the State of Texas and of the United States.

Joint Resolution for annexing Texas to the United States, March 1, 1845, 5 Stat. at L. 797; Act of Dec. 29, 1845, 6 Stat. at L. 1.

It follows that any person, who, within the meaning of the Constitution of the Republic, resided in Texas at the time of the Declaration of Independence, and continued thus to be a citizen of the Republic until the period of annexation to the United States, became thereby a citizen of the State of Texas, and was not competent to bring a suit in the District Court of the United States against other citizens of the same State. The only point which presents any difficulty is in relation to the meaning of the phrase "who were residing in Texas" used in the Constitution of the Republic. There can be little doubt, however, that the framers of the Constitution intended this phrase to be equivalent to the corresponding one—"who had their domicil in Texas"—and did not design to deprive of their citizenship those who were physically absent from the country. Many of the most respectable and deserving residents of Texas were not personally within the limits of the Republic at the date of the Declaration of Independence. The history and legal annals of Texas are filled with examples.

Yoakum's History of Texas, Vol. II. pp. 34, 36, 118, 125, 175, 181; Ordinances of Gen. Council, pp. 52, 55, 56, 58; Republic v. Young, cited in 5 Tex. 460; Dall. 464; The State v. Skidmore, 5 Tex. 460; Russell v. Randolph, 11 Tex. 464-466.

It could not be intended by the Constitution of the new State then in need of citizens and anxious to attract them, to disfranchise such persons by a rigorous and literal application of the term "resident." And his conclusion is confirmed by the established meaning of this term.

Lamb v. Smythe, 15 Mees. & W. 434; Hylton v. Brown, 1 Wash. C. C. 314; Blanchard v. Stearns, 5 Met. 303; Crawford v. Wilson, 4 Barb. 522.

If, then, the Constitution of the Republic of Texas conferred citizenship upon those who had their domicil in the country at the time of the Declaration of Independence, it will follow that Catharine McMasters was a citizen of the Republic. It appeared by the allegations of the plea that the domicil of her birth or origin was in Texas, at the Town of Goliad, and that domicil certainly continues until another is acquired.

Somerville v. Somerville, 5 Ves. 787; Monro v. Monro, 7 Cl. & Fin. 876; Mascard v. Prob. Concl. 85, No. 1.

To acquire another domicil, an intention to abandon the domicil of origin must exist.

Monro v. Monro, 7 Cl. & Fin. 891.

And an absence of fifteen or twenty years is not in itself, without proof of such intention, sufficient to forfeit the original domicil.

Merlin, Repert, Domicil, sec. 2; Dall. Dict. Gen. Domicil, sec. 1, Nos. 9-13.

In the case of St. Germain, absent in India for forty-five years, it was decided that such absence, without proof of his intention to abandon his residence in France, did not devest him of his domicil.

Dall. Jur. Gen. Vol. VI. pp. 383, 384.

The intention or animus thus essential to the acquisition of a new domicil, must be a legal and disposing will, and the voluntary act of a mind capable in law of acting. It can only be evinced by a person sui juris.

Somerville v. Somerville, 5 Ves. 787; Guier v. O'Daniel & Young, note to 1 Binn. 349, 352.

And a fortiori, an infant or child cannot be capable of such an intention. Nam enfans, et qui infanti proximus est, non multum a furioso distat. Inst. 3, 19, 10.

A minor without parents or legal tutor, can therefore never lose or abandon proprio mat marte the domicil of origin.

Story Confl. Laws, secs. 46, 506, note; 1 Burge, Com. Col. Laws, 38, 39; Poth. Cout. d'Orleans, ch. 1, sec. 1 Nos. 12-18; ed. de Brugnet, Vol. 1, p. 5; Desduitz de St. Pierre v. Revel, Sirey, 35, p. 2, 556; Robbins v. Weeks, 5 Mart. N. S. 379; Succession of M. J. Robert, 2 Rob. La. 435, 436.

It is true that the surviving father or mother —that is to say, the natural tutor—may change at will the domicil of the minor and transfer it to a different country, Potinger v. Wightman, 3 Mer. 67, 79; but this power does not extend to a mere friend or to a person assuming, without the direct authority of law, the custody of the minor's person.

Robbins v. Weeks, 5 Mart. N. S. 379.

These rules are well explained by J. Voet, in his Commentaries on the Pandects, Lib. 5, Tit.

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1, No. 100, where he says: "Ut enim haud difficiliter admittendum sit minorennem non magis posse domicilium mutare quam contrahendo se obligare; tamen quemadmodum contrahere auctore tutore permissum ei est, itaque et domicilium cum patre matreve tanquam tutelae ejus aut saltem educationi praeposita, tutoribus caeteris non contradicentibus, mutare nihil vetat." It is because the authority of the tutor supplies the defect of legal capacity or volition in the minor, that the latter acquires the domicil to which he accompanies the guardian; but the authority of the delegated or appointed tutor ceases, when he removes beyond the limits of the country.

Johnstone v. Beattie, 10 Cl. & Finn. 42, 87, 113, 148.

Only the natural guardian—the parent of the minor, whose power remains unimpaired—can change the domicil of his ward to a new country.

School Directors v. James, 2 Watts & S. 568, 572.

These principles are substantially recognized in the case of Hardy v. DeLeon, 5 Tex. 234-238.

The case made by the present plea in abatement, is stronger than that of Hardy v. DeLeon. Catharine McMaster was a child, less than five years of age at the time of her removal from the domicil of her parents and of her own birth, in Texas, to a foreign country.

Her parents were both dead: she has had no recognized tutor, nor has she been emancipated by marriage: she was removed by the family of Manuel Sabariego, with which she has continued to reside, and it does not appear that the family which she thus accompanied had any legal authority, whatever, to control her course in life, or decide on her domicil.

These views are confirmed by a recent decision of the Supreme Court of Texas, made at Tyler in 1857, in the case of Wheeler v. Hollis, 19 Tex. 522, (see manuscript opinion): "when an infant has no parents, the law, it is true, remits him to his domicil of origin, or to the last domicil of his parents; but when he has a surviving parent, it is difficult to conceive the justice or propriety there would be in not permitting her to make her domicil that of her children." And the court cites the opinion of Ch. J. Gibson, in School Directors v. James, 2 Watts. & S. 568, with approbation, and affirms the rule, that "whatever may be the power of the guardian over the person and property of the ward, he cannot exercise it so as to injure the ward himself. The very end and purpose of his office is protection, and there is no imaginable case in which the law makes it an instrument of injury by implication." It is evident from this decision that Sabariego had no power to remove the infant plaintiff from the domicil of origin for any reason, much less to make such removal, when it would work the forfeiture of the minor's lands in Texas.

This part of the case, however, can be put upon higher ground. The principles of the Spanish law—and not the law of nations or of nature—controlled the political rights of persons under both the Republics of Mexico and of Texas. The jurisprudence of Spain in relation to questions of citizenship, was strictly, and perhaps, too exclusively national in its spirit. It admitted of no divided allegiance; it suffered no expatriation from the native soil. The domicil of the origin fixed the political rights and duties of the subject and citizen forever. "By law no man can denaturalize himself."

Part 2, 18, 29, part. 4, 24, 5.

And Aguila y Roxas, in his excellent notes to his grandfather's treatise on the conflict of laws in relation to entailments, sums up the whole doctrine in this paragraph: "Originarius hujus Regni, qui in aliud se transtulit, non amittit originem, quia quemadmodum patrem mutare non possumus, ita nec patrian; pro qua videndi qui hanc sententiam sequuntur, Bart. in L. Assumptio in princ. ff. ad. Municipal; Sozin. in cap. licet ratione ult. num. 52, de for. compet; Sanchez de Matrim, lib. 3, disp. 23, num. 4; Barbos. in L. Haerens absens, Section proinde n. 24 & 5, 26, 41, 87, 102 & 130, cum seq. de Judic.; Menoch, Cons. 1076, a num. 3 & cons. 600 num. 7 & Cons. 80 num. 10, & seq. & cons. 112, n. 61; Pasc. de vir. pat. potest, 3 cap. 2, n. 31; Peregrin, cons. 55; Manuel Barbos. ad Ordin. Portugal, lib. 2, tit. 56, in prin. num. 2; Ciarlin controv. for cap. 149, ubi elegans ratio ibi; quia statim atque natus est patria, illi hypothecatus est; Vide D. Amaya in L. 7 C. in col. num. 32, et seq; Carleval de Judic. tit. I, disp. 2, hum. 124; Surd. cons. 560, num. 5; Cald. Pereyæa in Resp. pro D. Joan. de Tassis, n. 9."

See Aguila y Roxas, Additae Quaest, p. III. ch. I. no. 8; Notes of Greg Lopez to part IV. 24, 5.

The political existence of Catharine McMasters was attached to the soil, and in the language of Ciarlini, above cited, she was mortgaged to it as her country.

II. The District Court should not have instructed the jury that "the plaintiff's title being the elder, is paramount to any right shown by the defendants, unless its validity has been successfully impeached by the defendants;" because this charge presupposed that the plaintiff had proved the derivation of title to her from the original grantee of the land; but there was no proof that the plaintiff was the daughter of Juana Trejo, the wife of McMasters, and the daughter of Maria de Jesus y Barbo, to whom the land was first granted.

III. The District Court erred in instructing the jury that if the plaintiff as a Mexican citizen had continued to reside out of Texas, from a period anterior to the Declaration of Independence, her right to the land remained as it was before that Revolution, both upon general principles and by force of the Treaty of Guadaloupe Hidalgo.

McKenny v. Saviego, 18 How. 238.

IV. The District Court erred in refusing to instruct the jury, that if they should find from the evidence that the survey and grant under which the plaintiff claimed, was deliberately and designedly made so as to include a large area out of the limits prescribed by Decree No. 190 of the Laws of Coahuila and Texas, then they were to consider the grant void for the excess, and entirely void for want of any legal survey of the boundaries of the land. A grant in violation of law, or for more or different land than the law authorizes, is void, and may be attacked collaterally in an action of ejectment.

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11 Wheat. 382, 385; 1 Wheat. 155, 158; 2 How. 317.

V. The District Court was requested to instruct the jury, that if they believed from the evidence that the survey and grant under which the plaintiff claimed title, extended so as to include a large area out of the limits prescribed by the law, and the survey and grant were so made by fraudulent procurement on the part of the grantee by her agent in that behalf, then the jury might consider the grant as entirely void. The court gave the instruction with the addition, that unless the Alcalde Commissioner was informed, at the time he gave the possession and issued the title, of the fact that said survey extended so as to include a large area out of the limits prescribed by the law as before stated, the grant would not be void for the cause aforesaid, and that such fraudulent procurement of the survey alone would not vitiate the grant. This addition was erroneous.

9 Pet. 720; 2 How. 318; 4 Dall. 244; 9 Tex. 603; 10 Tex. 505.

VI. The District Judge was requested to instruct the jury, that the grant under which the plaintiff claimed title was one of a class that might be forfeited for non-performance of conditions; but ordinarily a law of the Legislature and judicial action under it, would be necessary to avoid such a grant. Yet the claimant under such a grant, might act so as to supersede the necessity for such a judicial determination; and if the conduct of the claimant should amount to an admission of the forfeiture or negation of claim, the claimant could not afterward set up that right, especially against any person who had, in the meantime obtained a legal survey on a valid claim for land; and that it was a question of fact for the jury to return, whether the conduct of the claimant amounts to such admission of forfeiture or negation of right. This instruction was given, but with the addition that it was a question as to the actual intention of plaintiff; and the jury should be satisfied, considering her infancy and other circumstances, that such was in fact her intention, or that they should find against plaintiff on such ground. That an abandonment of a legal claim or title to land may be presumed from the actions of the claimant, is well settled.

13 How. 3-6; 15 How. 29; 12 How. 434.

Negligence may preclude a party from reasserting a claim so as to defeat junior titles.

1 How. 195; 15 Tex. 414.

The fact of abandonment does not depend upon mere intention; it is a presumption of law from the acts of the party.

1 S. & R. 120; Star v. Bradford, 2 Pa. 384; Atchison v. McCulloch, 5 Watts, 14; McDonald v. Mulhollan, 5 Watts, 175.

The District Judge erred, therefore, in annexing the qualification to his instruction on this point.

Mr. Robert Hughes, for defendant in error:

After reviewing the pleadings, the counsel proceeded:

This plea shows that plaintiff below did not reside in Texas at the day of the Declaration of Independence, but was then residing in Matamoras, or elsewhere in Mexico.

The Declaration of the Constitution of the Republic is, "all persons (Africans excepted, etc.) who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic, and entitled to all the privileges of such."

Const. of Rep. General Provisions, sec. 10, Hartley's Dig. p. 38.

But to avoid the effect of this provision, it is contended that the word "residing," in the connection it is found, should be construed the same as "domicil"; and to show that there might be a domicil without a continued actual residence, numerous authorities will no doubt be referred to—all of which, as before stated, will be admitted to be good law; but they do not meet the case. For it is manifest that the Convention which framed the Constitution did not intend to indicate "domicil" by the language used. There were, and could not have been otherwise than great numbers of persons within the limits of Texas who had not become citizens, and all such it was intended to make citizens. This will appear from an examination of the other provisions of the same 10th section, and other sections of the Constitution. But again, had the word "domicil" been used instead of "residing," there would have been something in the argument. Domicil does not necessarily indicate residence.

The plea shows that Catharine McMastera, was, from the time of her birth up to about the age of four years, domiciled in Goliad, the place of her birth, but removed therefrom by those under whose charge she was to Matamoras before the Declaration of Independence. She then was a native Mexican, owing allegiance to the Republic of Mexico. When she was removed, a revolution had commenced, and was subsequently perfected by the Declaration of Independence. If she had remained in Texas, she would have been regarded as a Texan citizen. But having been removed from Mexico, she thereby adhered to Mexico, though she had no will on the subject. But being a minor, not having power to make an election, she had time until majority to make such election, and when made, she would be a citizen of that State to which she adhered; but in the meantime, she could be considered in no other light than a citizen of Mexico. These principles have been recognized in this court, and applied to the case occurring during our Revolution.

A native-born American, resident in New York, united himself to the English forces in possession of New York, and adhered throughout the struggle to the British side, and went off with the British forces, and died in the British dominion. His son, born in New York, was taken with him and continued under his charge. This son afterwards claimed an estate by descent, and it was determined that he was an alien and could not take by descent.

Inglis v. The Sailor's Snug Harbour, 3 Pet. 99.

And this is the case which shows the distinction between mere questions of domestic domicil and the more important question as to national character. In the former, the question of domicil of a minor is settled by that of his father, or the last of the father when he is dead; while in the latter, the national character depends upon election whether the party be adult or minor, through the act of the father making his election may operate an election

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for the son, if his dissent be not made in due time.

But did Catharine McMasters show either a dissent or an election to become a Mexican instead of a Texan? It will be seen by an examination of the plea in question that she was about four years of age when she was removed by Manuel Sabariego to Matamoras before the Declaration of Independence in March, 1836; She was, therefore, of age eighteen years afterwards in the year 1853. We have no evidence of a dissent to the act of removal by Sabariego, or of an election to become a citizen of Texas; and upon the principles established in the case referred to in this court, it must be presumed that she ratified the act of her friend and remained a citizen of Mexico, and was so by relation, from the time of removal and the declaration.

The counsel reviewed the instructions of the court to the jury and contended that they were correct. On the last instruction asked for by the plaintiff in error (see VI, above), he said this instruction clearly should not have been given, because, 1. There was not a particle of evidence before the jury conducing to show either a forfeiture or negation of her claim; and 2. There are no facts stated in the charge to be ascertained by the jury, upon the finding of which there would be a forfeiture or negation of the claim.

15 Tex. 410; 12 How. 436; 13 How. 3-6; 15 How. 29.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the District Court of the United States, possessing circuit court powers, held in and for the District of Texas.

This suit was brought in the court below by Catharine McMasters to recover the possession 18*] of a tract of land lying in the *County of Goliad, in the forks of the San Antonio River and the Cabaza Creek, containing four leagues of land. Four of the defendants put in a plea of not guilty. At a subsequent day, John R. Tally was allowed to come in and defend as landlord of Lott, one of the defendants. Whereupon, he put in a plea to the jurisdiction of the court, upon the ground the plaintiff was a citizen of the State of Texas. The plea states that she was born at Goliad, then in the State of Coahuila and Texas, when it was a part of the Republic of Mexico; that the domicil of her father and mother were at this place at the time of her birth, and continued there till their deaths. That the plaintiff was removed from the Territory of Texas to Matamoras, west of the Rio Grande, in Mexico, when she was about four years of age, during the revolutionary movements in Texas, and before the Declaration of Independence, which was on the 2d March, 1836. That she was removed in the family of M. Sabariego, in which she had lived in Texas, and with whom she has continued to reside since in Mexico. There was a demurrer to this plea, which was allowed, and the defendant required to answer over. The defendant then put in a plea of not guilty, and also a special plea in bar of alienage, and limitation of nine years before suit brought, founded upon a statute of the State of Texas.

There was a demurrer to this plea, but undisposed of for aught that appears on the record, when the parties went down to the trial of the issues of fact.

On the trial, the plaintiff proved a title in due form, under date of the 16th July, 1833, to the land in controversy, in her grandmother, Maria de Jesus Ybarba Trejo, followed by the official survey and judicial possession; also, that her grandmother died in possession of the premises, leaving the plaintiff's mother, her only child, at the death of her mother and father. Her grandmother and mother died about the year 1834. Her father was killed in the same year.

The defendants claimed under patents from the State of Texas, one dated 15th September, 1849, for three hundred and twenty acres; the other, the 20th of February, 1847, for like number; which covered the possessions on the tract in dispute of two of the defendants.

When the evidence closed, the counsel for the defendants prayed the court to charge the jury, that if the plaintiff, as a Mexican citizen, had continued to reside out of Texas from a period before the Declaration of Texan Independence, the action could not be sustained; which was refused, and a charge given, that her right remained as it was before the Revolution, both according to general principles and by force of the Treaty of *Guadaloupe Hi- [*19 dalgo; and that if she had a right of property, that gave her the right to sue here.

The counsel also prayed the court to charge, that if the jury should believe, from the evidence, that the survey and grant under which the plaintiff claims title extends so as to include a large area out of the limits prescribed by law, as dated in the decree No. 190, of the laws of Coahuila and Texas, and that the error did not arise from mistake or quantity, but from intention to depart from the legal mode of survey, then the jury might consider the grant void as to such area as might be out of the limits prescribed by law, and also that the grant itself would be void in such cases for want of legal survey. Which prayer was refused.

The counsel also requested the court to charge, that if the jury should believe, from the evidence, that the survey and grant under which the plaintiff claimed extended so as to include a large area as aforesaid, and that the grant and survey were so made by fraudulent procurement on the part of the grantee, by an agent in that behalf, then the jury might consider the grant as entirely void.

The court so instructed the jury; but with the addition, that unless the Alcalde Commissioner was informed, at the time he gave possession and issued the title, of the fact that the survey had been extended so as to include a large area, etc., the grant would not be void; that the fraudulent procurement of the survey alone would not vitiate the grant.

The counsel also requested the court to charge, that the grant under which the plaintiff claimed is one of the class that might be forfeited for non-performance of conditions. That ordinarily a law of the Legislature, and judicial action under it, would be necessary to avoid such a grant. Yet that claimant might act so as to supersede the necessity of such a

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judicial determination; and if conduct of plaintiff amounted to an admission of the forfeiture, she could not afterwards set up the right, especially against a person who had, in the meantime, acquired a grant from the State; and that it was a question for the jury to determine, whether the conduct of the plaintiff amounted to an admission of forfeiture.

The court gave the instruction, with the addition, that it was a question as to the actual intention of the plaintiff; and the jury should be satisfied, considering the infancy and all other circumstances, that such was in fact her intention, or they should find for the plaintiff.

The jury found a verdict for the plaintiff.

As the practice in the court below permits pleas, of whatever nature or description, to be 20*] put in as a defense to the suit at *the same time, and without regard to the order of pleas, as known to the system of the common law, it will be necessary in the first place to examine the question raised on the demurrer to the plea to the jurisdiction. It is insisted that the plaintiff is a citizen of the State of Texas, according to the facts as stated in the plea and admitted by the demurrer; and if so, as she is not a citizen and resident of a different State, but a resident of Texas, the suit cannot be maintained within the 11th section of the Judiciary Act. We think the objection not well founded.

The plaintiff was born under the dominion of the Mexican Republic, and has lived under it ever since her birth, and beyond all question, therefore, is a citizen of that Government, owing it allegiance, which has never been interrupted or changed. There has been no act of hers, or of anyone competent to represent her, or to determine her election, indicating an intention to throw off this allegiance, and to attach herself to the new sovereignty of Texas. Having been born and having always lived under the old Government, the burden rested upon the defendants, who claimed that she was a citizen of the new one, to establish the fact of the change of her allegiance.

2 Cranch, 280; 4 Cranch, 209; 1 Dall. 53; 20 Johns. 313; 3 Pet. 99, 122, 123; 2 Kent's Com. 40, 41.

The facts set up in the plea prove the contrary. According to these, the plaintiff was nineteen years old when this suit was commenced, and between twenty-two and twenty-three years when the plea was put in to the jurisdiction. If she was competent to make an election while a minor, but after she had arrived at mature years, as to the Government to which she would owe allegiance, the presumption, upon the facts, is, that she has made it in favor of the one under which she has lived since her birth. If she was incompetent to make it during her minority, then the allegiance due at her birth continued, and existed at the time of the commencement of the suit.

We do not enter upon the question of the domicil of a minor discussed on the argument, nor express any opinion upon it, as the question here is one of national character, and does not stand upon the mere doctrines of municipal law, but upon the more general principles of the law of nations.

3 Pet. 242; 2 Johns. Cas. 29.

Assuming that the plaintiff is an alien, and not a citizen of Texas, the next question is, whether or not she is under any disability that would prevent her from the assertion of her title to the premises in question; in other words whether her absence and alienage worked a forfeiture of the estate. The general principle is undisputed, that the division of an Empire works no forfeiture of a right of property previously acquired. Kelly v. Harrison, *2 [*21 Johns. Cas. 29; 7 Pet. 87. And consequently, the plaintiff's right still exists in full effect, unless the new sovereignty created, within which the lands are situate, have taken some step to abrogate it. The title remains after the Revolution, and erection of the new government, the same as before. The 10th section of the Constitution of the Republic of Texas, adopted the 17th March, 1836, provided that "no alien shall hold land in Texas, except by title emanating directly from the Government of this Republic."

By the 20th section of the 7th article of the present Constitution of the State, it is provided "that the rights of property and of action which have been acquired under the Constitution and laws of the Republic of Texas shall not be devested; nor shall any rights or actions which have been devested, barred, or declared null and void, by the Constitution and laws of the Republic of Texas, be reinvested or reinstated by this Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution." And by the 4th section of the 13th article, it is provided "that all fines, penalties, forfeitures, and escheats, which have accrued to the Republic of Texas under the Constitution and laws, shall accrue to the State of Texas; and the Legislature shall, by law, provide a method for determining what lands may have been forfeited or escheated."

It is understood that the Legislature of Texas has not yet passed any law providing for the steps to be taken to give effect to escheats for alienage, or otherwise—at least, no such law has been referred to, or relied on, in the argument; and the course of decision in the courts of Texas appears to be, that, until some Act of the Legislature is passed on the subject, effect cannot be given to the plea of alienage, or, at least, that some proceeding must be had, on the part of the Government, devesting the estate for this cause, before effect can be given to it. 15 Tex. 495.

The defense of alienage, therefore, was properly overruled by the court below.

The counsel for the defendants insist that the estate of the plaintiff became forfeited under the Mexican laws, by her removal from the State of Coahuila and Texas to Matamoras, while under the Mexican Government, and a permanent residence taken up there.

But the removal that worked a forfeiture under Mexican colonization laws, and a devestiture of the title without judicial inquiry, was a removal out of the Republic of Mexico, and settlement in a foreign country. The principle has no application in this case.

18 How. 235, McKinny v. Saviego.

*The remaining questions in the case [*22 relate to those arising upon the survey and location of the premises in question. This survey and location were made by the Government Sur-

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veyor, under the direction of the Alcalde and land Commissioner of the Municipality, who was deputed by the Governor to cause the land to be surveyed, and to convey the title in due form. The counsel for the defendants claimed the right to inquire into the regularity of this survey and location, and also into the bona fides of the transaction.

It must be remembered that this is a suit at law to recover the possession of the land in dispute; and that, although it may be the course of practice in the courts of the State of Texas, in a suit of this description, to blend in the proceeding the principles of law and equity, in the federal courts sitting in the State, the two systems must be kept distinct and separate. This principle is fundamental in these courts, and cannot be departed from. The court, therefore, in a suit at law, should exclude the hearing and determination of all questions that belong appropriately and exclusively to the jurisdiction of a court of equity. In a case calling for the interposition of this court, and turning upon equitable considerations, relief should be sought by bill in equity. Many of the cases at law coming up from the District Court of this State are greatly complicated and embarrassed, from the want of the observance of this distinction in the proceedings before it. In respect to the survey and location in the case before us, we perceive no ground that could warrant the court in going behind them in a suit at law. They were made by the Government that granted the title, and there is no ground, or even pretense, for saying that they were made without authority; and hence, altogether void. If voidable, for irregularity or other cause, the question was not one for a court of law in an action to recover possession, but for a court of equity to reform any error or mistake. 9 Pet. 632; 13 Pet. 368, 369; 3 Wheat. 212, 221; 7 How. 844. We think a satisfactory answer might be given to the several objections taken to the survey and location; but we prefer to place it upon the ground above stated.

The judgment of the court below affirmed.

JOHN BACON, Alex'r Symington, and Thos. Robins, Compts. and Appts.,
v.
VOLNEY E. HOWARD.

(See S. C. 20 How. 22-26.)

Effect of annexation of Texas on its previous laws—each State may legislate on the remedy or rules of prescription—when latter same in equity, as at law.

The accession of Texas to the Union had no effect to annul its Limitation Laws, or revive rights of action prescribed by its previous laws as an independent State.

Rules of prescription are in the full power of every State. There is no clause in the Constitution which restrains this right in each State to legislate upon the remedy in suits on judgments of other States, exclusive of all interference with their merits.

In a case where the complainant has been compelled to have recourse to a court of chancery, because the corporation no longer exists, in whose name the action at law could be sustained, he is subject to the same rules of prescription as if he were in a court of law.

Argued Dec. 18, 1857. Decided Jan. 11, 1858.

THE bill in this case was filed in the District Court of the United States for the District of Texas, by the appellants, on a foreign judgment. The defendant having demurred, the court sustained the demurrer, and dismissed the bill. Whereupon the complainants took an appeal to this court.

The further statement of the case appears in the opinion of the court.

Mr. W. G. Hale, for appellant:

1. The bill shows sufficient equity to entitle the complainants to relief. As assignees of a chose in action, they had the right to apply to a court of chancery to enforce the collection of their demand.

Story, Eq. Jur. sec. 1040; Story, Eq. Pl. sec. 153; Lenox v. Roberts, 2 Wheat. 373; Field v. Maghee, 5 Paige, 540; Trecothick v. Austin, 4 Mas. 41.

Especially when the assignor had ceased to exist, and could not be made a plaintiff at law.

Bacon v. Robertson, 18 How. 486; Grand Gulf Bank v. State, 10 Sm. & M. 428; Bacon v. Cohea, 12 Sm. & M. 516.

2. It is contended by the appellee, that the Mississippi Statute of Limitation (Feb. 24, 1844, sec. 8; Hutch. Dig. 830, 31) virtually annuls the judgment recovered by the Planters' Bank, unless it be shown that a scire facias was sued out, or an action of debt instituted within seven years before the filing of bill. To this there are three answers.

(a) The bill expressly alleges that the judgment sued on is in full force, and this is admitted by the demurrer.

(b) The Act is not applicable to a suit in Texas, as Statute of Limitations are part of the lex fori.

Story, Confl. of Laws, 577, 582 b; Bank U. S. v. Donnally, 8 Pet. 361; Bulger v. Roche, 11 Pick. 36; Hays v. Cage, 2 Tex. 505.

(c) The Act was prospective, not retrospective, in its operation.

R. R. Co. v. Stockett, 13 Sm. & M. 395.

3. The 1st section of the Act of Limitations of Texas, approved Feb. 5, 1841, has no application to the present case. The judgment of a sister State does not fall within its provisions.

Clay v. Clay, 13 Tex. 204; Reid v. Boyd, 13 Tex. 243.

The Act of Jan. 19, 1841, was annulled by the effect of annexation.

Const. of U. S. art. 4, sec. 1; Act of May 26, 1790, sec. 1; 1 Stat. at L. 122; Lambeth v. Turner, 1 Tex. 368.

4. The Act providing for the mode of authenticating foreign judgments, etc., of June 28, 1845, by its terms limits suits only to be brought "in the courts of this Republic," that is, Texas, and cannot be used to defeat the remedy of the complainants in a court of the United States. The opinions of the Supreme Court of Texas only sustain that part of the 4th sec. which prescribes the limitations of a year and six months, as operative in the courts

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of Texas, and do not claim that it is a statute of a general nature, binding upon any other courts.

Robinson v. Peyton, 4 Tex. 276; Pryor v. Moore, 8 Tex. 250; Kirkman v. Hendrick, 8 Tex. 253.

5. If the Act of 1845 should be held binding upon the courts of the United States, as well as those of the Republic of Texas, still the circumstances of this case would relieve it from the operation of the Statute.

The only period of limitation applicable to it under the 4th sec. of the Act, was 60 days. So short a period is, of itself, sufficient to make this clause of the Act unconstitutional, on account of its impairing the obligation of a contract.

Green v. Biddle, 8 Wheat. 75; Bronson v. Kinzie, 1 How. 315; Story on Const. sec. 1385; Jackson v. Lamphire, 3 Pet. 290; Call v. Haggar, 8 Mas. 430.

An abolition of all remedies would impair the obligation of the contract.

Ogden v. Saunders, 12 Wheat. 284; Sturges v. Crowninshield, 4 Wheat. 200.

In this case, the period of 60 days as a limitation to suits on all foreign judgments, is clearly too short to be reasonable or just.

6. In the present case, the bill alleges and the demurrer admits that the assignees of the judgment resided in Philadelphia and the debtor in San Antonio, at the time of the passage of the Act of 1845, at a distance of more than 2,000 miles apart, and the complainants could not with any reasonable diligence, have learned the passage of the Act, and commenced suit within 60 days. The defendant, therefore, admits that the complainants could not have brought a suit within the time limited, and in the same breath insists on the forfeiture of the complainants' right, because the suit was not brought.

Mr. Robert Hughes, for appellee.

Mr. Justice Grier delivered the opinion of the court:

The complainants are assignees of a judgment obtained by the Planters' Bank against the defendant in the State of Mississippi. The charter of the Bank has been forfeited. The complainants, as equitable owners of the judgment, demand payment by their bill. The judgment claimed by them is dated on the 19th of October, 1840, and their bill was filed on the 22d of October, 1850. Anticipating the defense of the Statutes of Limitation of Texas, the bill avers "that, at the time of passage of the Act of Congress of the Republic of Texas, approved June 28th, 1845, entitled 'An Act to authenticate foreign judgments, and to limit suits thereon,' the defendants resided in San Antonio, Texas, and the complainants in Philadelphia—more than 2,000 miles apart; and that complainants could not, according to the regular course of the mails, and with any reasonable diligence, have learned the passage of said Act, and caused suit to be instituted upon the judgment within sixty days after its passage." The respondent has demurred to the bill, and assigns as a cause of demurrer, among other reasons, "that the complainants, by their own showing, are barred by the 1st section of an Act entitled 'An Act of Limitations,' approved Feb. 4, 1841, and also by the 4th section of the Act referred to in the bill."

If this allegation be found correct, it will be unnecessary to notice the others.

On the 10th of January, 1841, the Legislature of the Republic of Texas enacted, "that no suit, proceeding,, judgment, or decree, shall be brought, prosecuted or sustained in any court or judicial magistracy of this Republic, on any judgment or decree of any court or tribunal of any foreign nation, State or Territory," etc. "But this provision is in no degree to affect the validity or obligation of contracts, engagements, or pecuniary liabilities, originat- [*24 ing abroad, or the original evidence, testimony, or proof, to establish the same," etc.

On the 5th of February, 1841, "An Act of Limitations" was passed, the 1st section of which, after prescribing shorter limitations for other causes of action, declares that "all actions of debt grounded on any contract in writing shall be commenced and sued within four years next after the cause of such action, and not after."

Without criticising the peculiar expressions used in these Acts, it is obvious that their policy and object was to bar the prosecution of any claim for money, or property at farthest in four years from the time when the right of action first accrued.

Now, the original cause of action, on which the judgment in question was obtained, must have existed or accrued at the latest on the 19th of October, 1840, when judgment was entered thereon in the court of Mississippi. Counting from that date, the action would have been barred on the 19th of October, 1844. But assuming that the time did not commence to run till the 17th of March, 1841, when the Act of 5th February, 1841, is said to have taken effect, the action was barred on the 17th of March, 1845.

On the 23d of June, 1845, the Congress of the Republic gave their consent to the annexation of Texas to the United States, and the Convention which formed the Constitution of the State met on the 4th of July of the same year.

It would seem that doubts and apprehensions were entertained, that when Texas became a State of the Union, that section of the Constitution of the United States which prescribed that full faith and credit should be given to the judicial proceedings of each State might have the effect of reviving the claims of creditors in other States, on which judgments had been obtained. To obviate this anticipated difficulty, an Act was passed on the 28th of June, 1845, "to prescribe the mode of authenticating foreign judgments, and to limit suits thereon." The 4th section of this Act provides: "That all foreign judgments, decrees, and adjudications, upon which suit shall be brought in the courts of this Republic, should the same be of four years' standing and upwards, shall forever be barred and prescribed, unless sued on in sixty days from and after the passage of this Act; those under four and over two years, unless sued on in six months; and those under two years, unless sued on in one year: provided, the original cause of action shall remain unimpaired, and may be sued on at the election of the creditor, subject to prescription."

At first view, this Act might be accused of

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making a very curt limitation, and to be retro-
25*] spective in its operation. But *when it is recollected that it gives a new form of remedy before denied, and that it only continues the rule of limitation to which the cause of action was already subject, and in fact gave a further grace to the creditor, he has no right to complain.

Giving the complainant in this case the most favorable construction of the Act of Limitations of 1841, his cause of action was barred on the 17th of March, 1845. The Act of June, 1845, took away no existing right, but extended the time till the 27th of August of the same year. It is, therefore, not retrospective in its operation. It confers a favor, though it be a small one. The complainants may have failed to take advantage of it, for the reasons set forth in the bill. But the Legislature has not seen fit to make any saving in the Act in favor of distant creditors, and the court cannot interpolate it. The Republic of Texas had the power to prescribe such rules to its own courts as best suited their condition, and their policy cannot be mistaken. Its accession to the Union had no effect to annul its Limitation Laws, or revive rights of action prescribed by its previous laws as an independent State. It is true, any legislation which denied that full faith and credit which the Constitution of the United States requires to be given to the judicial proceedings of sister States would be ipso facto annulled after the annexation, on the 29th of December, 1845. Thereafter, the authenticity of a judgment in another State, and its effect, are to be tested by the Constitution of the United States and Acts of Congress. But rules of prescription remain, as before, in the full power of every State. There is no clause in the Constitution which restrains this right in each State to legislate upon the remedy in suits on judgments of other States, exclusive of all interference with their merits. The case of McElmoyle v. Cohen, 13 Pet. 312, leaves nothing, further to be said on this subject.

The 20th section of the 7th article of the Constitution of the State of Texas exhibits the extreme solicitude of her citizens to prevent any misconstruction of their cherished policy on this subject.

It declares that "the rights of property and of action which have been acquired under the Constitution and laws of the Republic of Texas shall not be devested; nor shall any rights or actions, which have been devested, barred, or declared null and void, by the Constitution and laws of the Republic of Texas, be reinvested revived, or reinstated, by this Constitution, but the same shall remain precisely in the situation which they were before the adoption of this Constitution."

The complainant's cause of action had been twice barred before annexation, and this sec-
26*] tion of the new Constitution *leaves no room to question the policy of their laws as to a revival of rights once forfeited by laches.

In a case like the present, where the complainant has been compelled to have recourse to a court of chancery, because the Corporation no longer exists, in whose name the action of law could be sustained, he is, of course, subject to the same rules of prescription as if he were in a court of law.

We are of opinion, therefore, that complainant's cause of action is barred by the Statutes of Texas, and that the matters set forth in the bill to avoid their effect are insufficient.

The judgment of the District Court of Texas is, therefore, affirmed, with costs.

AMOS WADE, Plff.,
v.
JACOB R. LEROY and Henry E. Pierrepont.

(See S. C. 20 How. 34-44.)

Evidence, tending to support issue, competent—of effects of personal injury—direct and necessary consequences of.

Evidence, which tends to support any issue between the parties, or has a direct connection with other evidence competent to maintain the averments of the declaration, cannot be rejected.

Evidence, in action for personal injury by defendants' negligence, that before the injury, plaintiff had been engaged in a business which required mental and bodily vigor, and his time was of pecuniary value, and that after the injury he could not attend to such business, and that his physicians deemed it imprudent for him to do so, is competent.

These were the direct and necessary consequences of the injury, and sustained strictly, and almost exclusively, as an effect from it.

Argued Dec. 23, 1857. Decided Jan. 11, 1858.

ON a certificate of division between the Judges of the Circuit Court of the United States for the Southern District of New York.

This is an action on the case brought in the court below by the plaintiff, to recover damages for injuries sustained by him upon the defendants' ferryboat, from a collision.

A further statement appears in the opinion of the court.

Messrs. R. H. Gillet and Lewis B. Reed, for plaintiffs:

First point. The evidence offered was admissible under the general allegation of damages. When the breach of the contract for the injury complained of per se entitles the plaintiff to maintain his action, special damage need not be averred. All the injury or damage that necessarily or naturally flows from the act complained of, may be taken into the estimate of damage by the jury; and to aid them in their estimate, evidence may be given as to its extent.

2 Greenl. on Ev. secs. 254, 278; Sedgwick on Damages, pp. 65, 575; 1 Chit. Pl. (Springfield ed.) 371; Mayne on Damages, 314 (in vol. 92, Law Library, p. 280); Browning v. Newman, 1 Stra. 666, note 5; Ingram v. Lawson, 5 Bing. N. C. 66; Dewint v. Wiltse, 9 Wend. 325; Ward v. Smith, 11 Price, 19; Driggs v. Dwight, 17 Wend. 71; Hutchinson v. Granger, 13 Vt. 386; Harding v. Brooks, 5 Pick. 246; Dickinson v. Boyle, 17 Pick. 78; Lincoln v. Schen. and Sar. R. R. Co. 23 Wend. 425; Vanderslice v. Newton, 4 N. Y. 130.

Second point. If the losses which the plaintiff sustained by reason of not being able to attend to his business, are not recoverable as general damages, but required a special verdict, then the declaration sufficiently avers the special damage.

2 Greenl. Ev. sec. 254; Squier v. Gould, 14 Wend. 159; Mayne on Damages, 314, 315.

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Third point. The evidence offered under the second point, of difference of opinion, is whether the very words of the allegation of damage, "that he was prevented by the injury from attending to his necessary and lawful affairs." Nothing but an unjustifiable prolixity and redundance in pleading could make it more specific.

1 Chit. Pl. 369, 428, E.

Messrs. Benjamin D. Silliman, Charles O'Conor and F. P. Stanton, for defendants:

Both in respect to breaches of contract and torts, Mr. Chitty lays down the rule of pleading in the same way.

"Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place and are not implied by law."

1 Chit. Pl. 395; 2 Greenl. Ev. secs. 254, 278, and notes; Sedgwick on Damages, 2d ed. p. 575.

In actions on contract, the declaration is good on demurrer if it shows a breach, because any and every breach of contract is a presumable injury to the other party. For this injury, we can always recover nominal damages at least; so the mere general averment ad damnum, suffices to support the action. In tort it is otherwise. Some wrongful acts are not actionable per se, as, for instance, slander of title, or verbal imputations of a minor grade. In these cases, if special damages be wrought by the speaking, that circumstance gives a right of action; and inasmuch as the special damage is an essential element in the constitution of the plaintiff's title to sue, he must aver such special damage in his declaration, or the pleading will be bad on demurrer.

Keeping this distinction in view, all the judicial determinations, whether in actions of tort or on contract, touching the necessity of averring special damages, will be found to bear directly on the question now before the court.

In actions for torts not actionable per se, special damages must be alleged in the declaration. In actions on contract and in all actions of tort, if the plaintiff, for the purpose of enhancing his recovery, wishes to give evidence at the trial of any particular injury suffered by him, and not being a consequence which in a greater or less degree must always result under the circumstances stated from such an act or omission as is complained of, he must specify such particular injury in the declaration.

The degree of certainty and precision with which special damage must be alleged, to avoid a demurrer in the one class of cases, and to let in evidence at the trial in the other, is precisely the same.

Mr. Chitty says, in reference to actions ex contractu: "Such damages as may be presumed necessarily to result from the breach, need not be stated with any great particularity in the declaration. But in other cases, it is necessary to state the damages resulting from the breach of contract specially and circumstantially, in order to apprise the defendant of the facts intended to be proved, or the plaintiff will not be permitted to give evidence of such damages on the trial."

1 Chit. Pl. 338.

Again; he states the rule in reference to actions ex delicto:

"Damages are either general or special. General damages are such as the law implies or presumes from the wrong complained of. Special damages are such as really took place and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the utterance of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing." "It does not appear necessary to state the former description of damages in the declaration; because presumptions of law are not in general to be pleaded or averred as facts." "But when the law does not necessarily imply that the plaintiff's sustained damage by the act complained of, it is essential to the validity of the declaration, that the resulting damage should be shown with particularity." "And when the damages sustained have not necessarily accrued from the act complained of" (to convey the writer's evident intent this should be, are not such as must necessarily have accrued in a greater or less degree, from such an act as is described in the declaration, with the accompanying circumstances therein stated), "and consequently are not implied in law; then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state (in the declaration) the particular damage which he has sustained, or he will not be permitted to give evidence of it."

These statements of the rule are accompanied by numerous opposite illustrations.

1 Chit. Pl. 396, 397.

This cautious writer says "in general," not because the rule of law itself requires any such qualification, but because some not well considered decisions, involving a departure from the rule, may be found in the books.

Proofs of the universality of the rule.

For the general proposition as stated by Chitty, see 1 J. S. Saund. Pl. & Ev. 136; Obstruction of Lights, 1 J. S. Saund. Pl. & Ev. p. 83; Assault and Battery, 1 J. S. Saund. Pl. & Ev. 105; Assumpsit, J. S. Saund. Pl. & Ev. 151, 906; Case Tort, 1 J. S. Saund. Pl. & Ev. 344; Trespass, 865, 520, 653, 660; see, accordingly, 3 Bouvier's Inst. secs. 28, 72.

In the following cases evidence of special damage was rejected, because not specially set forth in narr.: Pettit v. Addington, Peake, 63; Lowden v. Goodrick, Peake, 46; Westwood v. Cowne, 1 Stark, 172; Bodley v. Reynolds, 8 Ad. & E. N. S. 780; Boyden v. Burke, 14 Howard, 575; Kendall v. Stokes, 3 How. 87-90; Strang v. Whitehead, 12 Wend. 65; Pritchett v. Boevey, 1 Cromp. & M. 778; Jones v. Lewis, 9 Dowl. Pr. C. 150; Patten v. Libby, 32 Me. 378; Vanderslice v. Newton, 4 N. Y. 132, 133; Dumont v. Smith, 4 Den. 322; Alston v. Huggins, 3 Brev. 188; Dickinson v. Boyle, 17 Pick. 79; Furlong v. Polleys, 30 Me. 493; Laing v. Colder, 8 Pa. St. 479; Squier v. Gould, 14 Wend. 160; Ingram v. Lawson, 5 Bing. N. C. 66; 6 Scott, 775-779; Carr & P. 326.

In slander and libel, when the action lies only by reason that the defamatory matter

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complained of touched the plaintiff in some particular office, employment or relation, the averment of that office, etc., is not called by pleaders an averment of special damages. It is a part of the cause of action; but being notified to the defendant, it may be proved, and of course may have its just weight with the jury. Here there is no danger of surprise.

Ingram v. Lawson, 5 Bing. N. C. 66; Ingram v. Lawson, 6 Scott, 775; 9 Carr. & Payne, 326; 1 Selden, N. Y. 20; Donnell v. Jones, 17 Ala. 692-695; S. C. 13 Ala. 509; Delegall v. Highley, 8 Carr. & Payne, 444; Rolin v. Steward, 25 Eng. L. & Eq. 345.

There was no difficulty in stating in the declaration the special consequential injury offered to be proven. It was not a violation of decency to place it on the record; it did not tend to burdensome prolixity; it was known to the plaintiff and quite susceptible of being accurately described by him. There was, consequently, no excuse for its suppression.

2 Wm. Saund. 411, note 4; 8 T. R. 133; 1 Stark. 172; Lowden v. Goodrick, Peake, 46; 2 Greenl. Ev. sec. 278; per Kenyon, Ch. J. 8 T. R. 133; Driggs v. Dwight, 17 Wend. 71; Ward v. Smith, 11 Price, 19; see Tullidge v. Wade, 3 Wils. 19.

This evidence is the more objectionable, if unaccompanied by any proof of the particular value of this large and extensive business of distilling and manufacturing turpentine in which the plaintiff was engaged.

Fairman v. Fluck, 5 Watts, 518.

Evidence that the injury would permanently disqualify the plaintiff from pursuing any business, was objectionable in a twofold point of view. In the first place, the declaration does not affirmatively allege that the injury would produce any such result, or that the defendant was a person engaged in any business; and second, inasmuch as in speaking of bodily pain, etc., the declaration has a future aspect, and the general allegation, of consequent incapacity to attend to affairs, is confined to the past, the idea of any probable future incapacity is impliedly negatived.

Hodsoll v. Stallbrass, 9 C. & P. 63; S. C., 3 Perry & D. 200; Thompson v. Wood, 4 Ad. & E. N. S. 497.

Mr. Justice Campbell delivered the opinion of the court:

This case comes before this court upon a certificate of the judges of the Circuit Court of the United States for the Southern District of New York, of their division in opinion upon questions arising in the trial of the cause in that court.

It is an action against the owners of a steam ferryboat, plying between the cities of New York and Brooklyn, for the transportation of passengers, by the plaintiff, a passenger, who suffered an injury in consequence of a collision between two boats belonging to the defendants, and which was attributable to the mismanagement of the servants and agents to whom their navigation was instrusted.

The declaration charges that the plaintiff was wounded on the head by a blow from a piece of iron that had been broken off the boat on which he was a passenger, in the collision, and thrown against him. That, in consequence of the wound, his brain was affected and injured, so that his understanding and memory were impaired. That for some time he was insensible, and his life despaired of; and before his recovery, he suffered much mental and bodily pain. That he was detained in New York, at a distance from his home, and subjected to much expense about his care, support and maintenance, and had been hindered and prevented for a long period from transacting and attending to his necessary and lawful affairs, by him during all that time to be performed and transacted; and lost and was deprived of great gains, profits and advantages, which he might and otherwise would have derived and acquired.

The plea was the general issue.

Upon the trial, the plaintiff offered to prove, "that before and up to and at the time of the alleged injury, the particular business in which he was engaged was that of a distiller and manufacturer of turpentine, and that he was largely and extensively engaged in that business." The plaintiff also offered "to prove, by a physician who had attended the plaintiff, that when the plaintiff, after his convalescence, left New York to return to North Carolina, he (plaintiff) could not safely attend to any business or occupation, and that the witness deemed it imprudent and indiscreet for the plaintiff thenceforth to devote himself to any business." To this evidence the defendants' *coun- [*44 sel objected, on the ground that the declaration of the plaintiff did not contain any specification of such business, or of its nature or extent, or contain any statement that the plaintiff was obliged or did relinquish or abandon the same. The judges were divided in opinion as to the admissibility of such evidence, and have certified the questions for the decision of this court.

The precise object for which this evidence was adduced was not stated in the certificate of the judges; but if the evidence tends to support any issue between the parties, or has a direct connection with other evidence competent to maintain the averments of the declaration, either to illustrate its meaning or to ascertain its probative effect, it cannot be rejected as impertinent, or as founded upon matter that does not appear in the pleadings of the cause. The evidence objected to conduces to prove that the plaintiff was seriously injured; that he had been confined in New York, at a distance from his home, and had incurred expense in consequence. That before that time, he had been concerned in conducting a business that required a degree of mental and bodily vigor, and that his time was of some pecuniary value; or, that he had suffered a loss of some profit; and that, after some detention in New York, he had returned to his house in an infirm condition—so infirm that his medical attendant and adviser deemed him incapable of pursuing any ordinary business or occupation, and had advised him to abstain from personal exertion.

This evidence would certainly assist a jury to determine that the plaintiff had sustained an injury of no slight character—an injury to his person, and which was followed by expense, suffering, and loss of time, which had for him a pecuniary value.

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These were the direct and necessary consequences of the injury, and sustained strictly and almost exclusively as an effect from it. This evidence may have an application without any inquiry into any remote or contingent consequences which could not have been foreseen, or which were peculiar to the circumstances or condition of the plaintiff. The record does not inform us that the evidence was designed to aid in such irrelevant inquiries, and we cannot presume that, if admitted, the court would allow any miscontruction of its legal import, or any use of it by the jury contrary to law.

The opinion of the court is, that the evidence is competent, and we direct that the certificate to the Circuit Court shall be made accordingly.

DAVID D. WITHERS, Plff. in Er.,
v.
RANSOM BUCKLEY, Dan'l Wilson, Newton Huff, Hugh R. Davis, Douglass H. Cooper, Chas. Vaughn, and Jas. Metcalf.

(See S. C. 20 How. 84-94.)

This court cannot declare state law void as violating State Constitution—state decision on that subject not reviewable—Mississippi law—fifth amendment to U. S. Constitution not applicable to legislation of States.

This court has no authority, on a writ of error from a State Court, to declare a state law void, on account of its collision with a State Constitution.

The conformity, therefore, to the State Constitution, of the Statute appointing the Commissioners of the Homochitto River and prescribing their powers and duties, was a question appropriately belonging to the State Court, and its decisions of that question is not properly subject to re-examination here.

The Act of the Legislature of Mississippi, is strictly within the legitimate and even essential powers of the State; is in violation of neither the Constitution nor laws of the United States; and presents no conjuncture or aspect by which this court would be warranted to supervise or control the decree of the High Court of Errors and Appeals of Mississippi.

The fifth amendment to the U. S. Constitution is not applicable to, or restrictive of, the legislation of the States.

Argued Dec. 22, 1857. Decided Jan. 11, 1858.

IN ERROR to the High Court of Errors and Appeals of the State of Mississippi.

The plaintiff in error filed his bill in one of the State courts of Mississippi for an injunction. The defendants demurred, and the court overruled the demurrer. The case having been appealed to the High Court of Errors and Appeals by that court, the decree of the court below was reversed, the demurrer sustained, and the bill dismissed, with costs; whereupon the complainant brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Messrs. George S. Yerger and J. P. Benjamin, for plaintiff in error:

There is no doubt of the jurisdiction of the Court of Equity upon the case stated by the bill.

4 Cush. 86; 3 Wend. 636; 2 Johns. Ch. 165; 6 Paige, 262.

Apart from any public or private nuisance the bill alleges special injury to the complainant.

The Act of 1850 is unconstitutional. First because it provides no compensation to the complainant; and second, that it is void because prohibited by the Ordinance of Congress.

1. As to its unconstitutionality. The land of the complainant is on the waters of Old River and the Narrows. The water runs through it. This is not a navigable stream, according to the common law meaning of the term. But a grant of land on, or bounded by such a stream as this, passes the right to the land to the middle of the stream. The use of the water also as an incident passes by the grant, and is as sacred a right as the land itself.

See Morgan v. Reading, 3 Sm. & M. 366; 2 Johns. Ch. 165.

Where a grant of land is on a stream above the ebb and flow of the tide, the land passes and the water also, subject only to the right of the public to navigate it. The use of the water is part of the freehold.

Ang. Water-courses, pp. 1-29; Co. Litt. 4; 2 Brown, Com. 142; Bullen v. Runnels, 2 N. H. 255.

In all cases above the ebb and flow of the tide, a right of property in the water passes with a grant of the land, and it cannot be devested or taken away without compensation, as the above authorities show.

The case from Harr. and from 2 Pet. were cases of navigable waters according to the

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NOTE.—Jurisdiction of U. S. Supreme Court to declare state law void, as in conflict with State Constitution—see note, 7 L. ed. U. S. 679; and note, 62 L. R. A. 542. It is for state courts to construe their own Statutes. Supreme Court will not review decisions except when specially authorized to by statute—see note, 12 L. ed. U. S. 169.

Eminent domain. Payment for private property taken for public use. Fifth amendment to Constitution of U. S. applies only to the General Government, and not to States.

The right to take private property for public use is an incident to the sovereignty of every government. The right of eminent domain or inherent sovereign power, gives to the Legislature the control of private property for public uses. The interest of the public is deemed paramount to that of the individual, and the maxim of law is, that private mischief is to be endured rather than a public inconvenience. The obligation to make just compensation is concomitant with the right. The settled and fundamental doctrine is, that Government has no right to take private property for *public* purposes without a just compensation. Bell's Principles of Law of Scotland, 173, 174; Stat. 1 & 2, William IV. ch. 43; and Code Napoleon, art. 545; and the Constitutional Charter of Louis XVIII. Grotuis de Jure. B. & P. b. 3, ch. 19, sec. 7, ch. 20, sec. 7; Puff. de Jure. Nat. et Gent. b. 8, ch. 5, secs. 3, 7; Bynk. Q. Jur. Pub. b. 2, ch. 15; Vattel, b. 1, ch. 20, sec. 244.

The concluding clause of the fifth amendment to the Constitution of the United States, that private property shall not be taken for public use without just compensation, is an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in national equity, and is laid down by jurists as a principle of universal law. 2 Story on Constitution, sec. 1790; 1 Black. Com. 138, 139, 140; 2 Kent, 275, 276; 3 Wilson's Law Lect 203; Rawle on Const. ch. 10, p. 123; Ware v. Hylton, 3 Dall. 194, 235; Van Horn v. Dorrance, 2 Dall. 384.

The provision of the fifth amendment of the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exer-

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common law, as the cases show, in which case there can be no individual right to the water.

In the case in 8 Cow. 146, the only injury to plaintiff, was the temporary erection of bridges to build the pier, and that it was like materials used in building, it might be a temporary inconvenience to a neighbor, etc.

See pags 150 and 151.

It may be said that the principle of the common law, as to streams where the tide ebbs and flows, applies to the waters of the Mississippi, and the streams which flow into it.

But this was the great point, argued most laboriously and decided by the High Court of Mississippi, in the case of Morgan v. Reading, 3 Sm. & M. 366, and numerous other authorities are against it.

See, also, Gardner v. Village of Newburgh, 2 Johns. Ch. 165; Belknap v. Belknap, 2 Johns. Ch. 463; 3 Paige, 577; 1 Dev. 121; 6 Paige, 262; 4 Mas. 379.

But the Ordinance of Congress also prevents the Legislature from obstructing the navigation of the Mississippi and its waters. It may improve them, but it cannot obstruct, by damming up the water, or diverting it from its natural course, so as to entirely prevent its navigation.

Hutchinson's Code, 55, 57, 59.

The case in 1 McLean is directly in point. It decides that a private injury must be alleged; that the mere fact of a right to navigate without using or intending to use the right, and without private injury alleged, would not do. But when the navigation was obstructed and a private injury alleged, equity would interfere.

See pages, 343, 344, 346, 350-353.

Act of 1819, p. 106, declares Homochitto navigable, and the bill alleges that from time immemorial the grantors of plaintiff and himself used the waters to supply this place, and to transport cotton and supplies to and from his place.

Messrs. **J. M. Carlisle and George E. Badger**, for defendants in error:

The defendants in error will rely mainly upon the following view of the case.

The jurisdiction of this court is assumed upon the allegation which the plaintiff in error is to maintain, that the Statute of Mississippi is unconstitutional: because it purports to authorize the taking of private property for public use, without just compensation; and because it is repugnant to the 4th sec. of the Act of March 1st, 1817.

3 Stat. 349.

But the bill does not show any case of taking private property for public use. The complaint is of an apprehended consequential injury, resulting from diverting the waters of the Homochitto. No land of the complainant lies on that river. It is a navigable river, lying wholly within the territorial limits of the State of Mississippi. As such, it is subject to the power exercised by this Statute; and its waters are not the subject of private property, in any sense of the words "private property" in the Constitution, or in any sense which can interfere with the full exercise of the power in question, according to the discretion of the Legislature. If the plaintiff in error suffer loss through the lawful exercise of this public power, it is damnum absque injuria.

Least of all (it is submitted) can a party so situated, restrain by injunction, the exercise of such a power.

As to the supposed conflict with the Act of 1817, the obvious answer is, that the Statute is not to obstruct the Homochitto, but to improve its navigation. "Old River and the Narrows" are not "navigable rivers and waters," in the meaning of that Act. Besides, even if they were, it is submitted that the plaintiff in error, upon the case made by his bill, would have no standing either at law or in equity, and has no right to call upon this court to pronounce upon the unconstitutionality of the Statute of Mississippi.

Mr. Justice **Daniel** delivered the opinion of the court:

Upon a writ of error to the High Court of Errors and Appeals of the State of Mississippi, under the authority of the 25th section of the Act of Congress of September 24th, 1789, establishing the judicial courts of the United States.

The plaintiff in error, by his bill in the State Court, alleged that he is the owner of a large and valuable plantation in the State of Mississippi, situated on what is called "Old River," being a former bed of the Mississippi River, but which was cut off and made derelict by a change in the course of the Mississippi in the year 1796. That the Homochitto River, in said State, empties its waters into the said "Old River" at a point above, or north of, the complainant's plantation, and at low stages of

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cise of power by the Government of the U. S. and is not applicable to the legislation of the States. Barron v. Mayor, etc. of Balt. 7 Pet. 243; Livingston v. Mayor, etc. of N.Y. 8 Wend. 85; 1 Bald. 220.

The right of taking property for public use is exercised by a State subject to no power vested in the Federal Government. The proprietary right of the United States can in no respect restrict or modify the exercise of this sovereign power by a State. U. S. v. R. R. Br. Co. 6 McLean, 517.

The U. S. may lawfully make title to land in one of the States by expropriation as of the eminent domain of such State, and with the assent thereof. 7 Op. Atty.-Gen. 114.

Necessity of such proceedings by U. S. under State Statute, and proper mode of conducting them. U. S. v. Block. 3 Biss. 208.

The right of eminent domain exists in the Government of the United States, and may be exercised by it within the States so far as is necessary to the enjoyment of the power conferred upon it by the Constitution. Proceedings may be taken under the national right of eminent domain, and the proper Circuit Court of the U. S. has, under general grant of jurisdiction by Act of 1789, jurisdiction of the proceedings brought by the U. S. for condemnation of the ground. Kohl v. U. S. 1 Otto, 367; U. S. v. Inlots, 2 Am. L. Rec. 315, 513, 577.

Where the owner of a hay press offered to sell it to a quartermaster, but refused to let it, and the officer subsequently puts the machine to use in the Government service, it must be considered as property taken for public use, and the owner may recover its reasonable value, and cannot be required to take it back and accept compensation for its use. Peck v. U. S. 14 Ct. of Cl. 84.

Where real property is taken by Government for temporary use, an action may lie for the implied rent, but not where the taking is in perpetuity. The implied relation of landlord and tenant cannot then exist. Langford v. U. S. 12 Ct. of Cl. 338.

U. S. cannot take private land in one of the Territories for the construction of a road without some legal form of expropriation, either by Act of Congress or of the Territory. 7 Op. Atty.-Gen. 320.

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the waters of the Mississippi the waters of the Homochitto pass around through the bed of "Old River," and out by the narrows thereof into the Mississippi. That the flow of the waters of the Homochitto removes the deposits of mud occasioned by the overflow of the Mississippi, and thus keeps open the outlet of Old River, to the great advantage of the complainant, and of others similarly situated on Old River.

That the Legislature of Mississippi, by a law approved on the 5th of March, 1850, entitled "An Act regulating and defining the powers of the Commissioners of Homochitto River," appointed the defendants Commissioners for the purpose of "improving the navigation of the Homochitto River, and any outlet from the same, through Old River and Buffalo Bayou to the Mississippi River, and for removing any obstructions in said streams, and excavating and digging a canal unto the Buffalo from the Homochitto River, or from Old River into the Buffalo." That said canal commences on Old River below the mouth of the Homochitto River, and above the lands of the complainant, and will neither begin, pass through, nor terminate upon, the lands of the complainant. That the complainant and his grantors have ever enjoyed and used the waters flowing through his and their lands, for agricultural and domestic purposes, and for navigation in transporting their crops to markets, and receiving supplies therefrom; first, when Old River was a part of the Mississippi, and since the cut-off in 1796, by the waters supplied to Old River from the Homochitto, and the back waters of the Mississippi in time of floods. That, by the said laws of Mississippi, no compensation is pro-88*] vided *for the injury to be done to the complainant by the diversion of the waters of Homochitto and Old River from the lands of complainant, and the destruction of the navigation which said waters afford to his plantation, because said canal or contemplated outlet is not to be made upon the complainant's lands. The bill of the complainant then charged that the laws of Mississippi are invalid for having omitted to provide compensation for the injury to be inflicted by them upon the complainant, and are, by that omission, in violation of the fundamental laws both of the United States and of the State of Mississippi, the Constitutions of both of which declare that private property shall not be taken for public use without just compensation being made therefor; and are also in violation of the Act of Congress of March 1st, 1817, authorizing the people of Mississippi to form a Constitution, and of the Ordinance passed on the 15th of August, 1817, in pursuance of the Act of Congress, both the Act of Congress and the Ordinance providing that the Mississippi River, and the navigable rivers leading into the same, shall be common highways, and forever free, as well to the inhabitants of Mississippi as to other citizens of the United States.

To this bill a demurrer was interposed by the defendants in error, and the cause having been carried to the High Court of Errors and Appeals of Mississippi, by that court the demurrer was sustained, and the bill dismissed, with costs.

The correctness or incorrectness of the decree of the High Court of Errors and Appeals is the subject of inquiry and decision now before this court. In the prosecution of our inquiry, it is proper to disembarrass it of matters with which it has been attempted to associate or surround it; matters having no just connection therewith, and the introduction of which tends only to obstruct and obscure the elucidation of truth.

Thus it is charged, in the complainant's bill, that the law authorizing the improvement of the Homochitto River is void, because it violates the Constitution of Mississippi, by omitting to provide a compensation for the injury which might be done to individuals by carrying that law into effect; the Constitution of the State having declared that private property shall not be taken for public use without just compensation being made therefor. In answer to this charge, it is sufficient to state that this court never has, and does not, assume the right to pronounce authoritatively upon the wisdom or justice of the legislation of the States, when operating upon their own citizens, and upon subjects of property clearly within their own territory and appropriate cognizance, except so far as the Constitution of the United States *expressly, or by inevitable implication, [*89 may have made it the duty of this court to control the action of the State Governments. Nor has it been deemed the province of this court to abrogate or overrule the interpretation put upon their own respective statutes by the courts of the several States, whether such interpretation had reference to the ordinary rights of person or property, or to the nature and extent of the legislative powers vested by the Constitutions of the several States, and their coincidence with Acts of legislation performed under the delegation of those powers. These are functions wisely and necessarily left by this court untouched in the state tribunals, the assumption of which by the Federal Judiciary, as it would embrace every matter upon which the Governments of the States could operate, would, in effect, amount to the annihilation of those Governments. The doctrine of this court as here stated has been clearly affirmed.

In the case of Jackson v. Lamphire, in 3d of Pet. on page 289 of that volume, this court has declared that it "has no authority on a writ of error from a state court to declare a state law void on account of its collision with a State Constitution, it not being a case embraced in the Judiciary Act, which alone gives power to issue a writ of error to the state court." This court say, "that they will therefore refrain from expressing any opinion of the points made by counsel in relation to the Constitution of New York." See, also, the ruling of this court upon the construction of state laws, in the cases of Polk's Lessee v. Wendal et al. in 9th Cranch, p. 87, and of the West River Bridge Company v. Dix et al. 6 How. p. 507. The conformity, therefore, to the State Constitution, of the Statute appointing the Commissioners of the Homochitto River, and prescribing their powers and duties, was a question appropriately belonging to the State Court and its decision is not properly subject to re-examination here.

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The Statute of Mississippi is next assailed, on the charge that it violates the 5th article of the Amendments of the Constitution of the United States, of which the clause in the Constitution of Mississippi, relied on by the plaintiff in error, is a literal transcript. In this charge is instanced another effort to confuse and obstruct the only legitimate inquiry arising on the record before us, viz.: that which relates to the authority of the High Court of Errors and Appeals of Mississippi, for their decree pronounced in this cause.

To every person acquainted with the history of the Federal Government, it is familiarly known, that the ten amendments first engrafted upon the Constitution had their origin in the apprehension that in the investment of 90*] powers made by that *instrument in the Federal Government, the safety of the States and their citizens had not been sufficiently guarded. That from this apprehension arose the chief opposition shown to the adoption of the Constitution. That, in order to remove the cause of this apprehension, and to effect that security which it was feared the original instrument had failed to accomplish, twelve Articles of Amendment were proposed at the first session of the first Congress, and the ten first articles in the existing series of Amendments were adopted and ratified by Congress and by the States, two of the twelve proposed amendments having been rejected. The amendments thus adopted were designed to be modifications of the powers vested in the Federal Government, and their language is susceptible of no other rational, literal, or verbal acceptation. In this acceptation this court has repeatedly and uniformly expounded those amendments in cases having reference to retroactive statutes, to the right of eminent domain, to the execution of plans for internal improvement; in opposition to which, the clause in the fifth article of the amendments of the Constitution has been urged. In all such cases, this court has ruled, that the clause in question was applicable to the Federal Government alone, and not to the States, except so far as it was designed for their security against Federal power. Indeed, so full, so emphatic, and conclusive, is the doctrine of this court, as promulged by the late Chief Justice Marshall, in the case of Baron v. The Mayor, etc., of Baltimore, in the 7th of Peters, pp. 247, 248, that it would seem to require nothing less than an effort to unsettle the most deliberate and best-considered conclusions of the court, to attempt to shake or disturb that doctrine. An extract from the reasoning of the Chief Justice, so full, so unanswerable on this point, may not be unfruitful of benefit as a guide to the future. After stating that the case was brought before the virtue of the 25th section of the Judiciary Act, the Chief Justice proceeded: "The plaintiff in error contends that it comes within that clause of the fifth amendment to the Constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented we think of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves; for their own government, *and not for the government of the indi- [*91 vidual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular Government as its judgment dictated. The people of the United States framed such a Government for the United States as they supposed best adapted to their situation, and best adapted to promote their interests. The powers conferred on this Government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the Government created by the instrument. They are limitations of power granted by the instrument itself; not of distinct Governments, framed by different persons, and for different purposes.

If these propositions be correct, the fifth amendment must be understood as retraining the power of the General Government, not as applicable to the States. In their several Constitutions they have imposed such restrictions on their respective Governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest."

Again, adverting to the causes which led to the proposal and adoption of the amendments of the Constitution, the same judge remarks, Ib. p. 250—and these remarks embrace the whole series of articles adopted: "In almost every Convention in which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government; not against those of the local Governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State Governments. This court cannot so apply them." Vide, also, the cases of Fox v. The State of Ohio, 5 How. 411, and of The West River Bridge Company v. Dix et al. 6 How. 507.

From the aforegoing view, it follows that neither the Constitution and laws of Mississippi, as interpreted by the High Court of that State, nor the fifth article of the Amendments of the Federal Constitution, as construed by this court, can have any just applicability to the legitimate inquiry now before us.

The remaining objection to the decree of the High Court of *Errors and Appeals—that [*92 which is most directly pertinent to the present controversy—is that founded upon the allegation, that the law of Mississippi of March 5th, 1850, creating the Board of Commissioners of the Homochitto, for the purpose of improving the navigation of that river, and of any outlet from the same through Old River and Buffalo

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Bayou to the Mississippi, and for excavating a canal into the Buffalo from the Homochitto, or from Old River to the Buffalo, is a violation of the Act of Congress of the 1st of March, 1817, authorizing the people of the Mississippi Territory to form a Constitution, which Act declares "that the Mississippi River and the navigable rivers and waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of the State of Mississippi as to other citizens of the United States."

In considering this Act of Congress of March 1st, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign Government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of Pollard's Lessee v. Hagan, 3 How. p. 223. The Act of Congress of March 1st, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into this river, could not have been designed to inhibit the power inseparable from every sovereign or efficient Government, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary, changes in the channels or courses of rivers within the interior of the State, or might be productive of a change in the value of private property. Such consequences are not unfrequently, and indeed, unavoidably, incident to public and general measures highly promotive of and absolutely necessary to the public good. And here it may be asked, whether the law complained of, and the measures said to be in contemplation for its execution, are in reality in conflict with the Act of Congress of March 1st, 1817, with respect either to the letter or the spirit of the Act. On this point may be cited the case of Veazie et al. v. Moor, in 14 How. 568.

By the allegations of the bill it appears that this trace or channel, which is distinguished by the appellation of Old River, is not, in fact, and never was, a separate navigable river. It 93*] *was once the bed or channel of the Mississippi, but, by natural causes, the latter many years since changed its bed or course, thereby rendering derelict the former bed or channel, which would be wholly without water, except what occasionally is forced into it from freshets in the Mississippi, and that which is received from the current of the Homochitto. With no propriety of language, then, can it be pretended that the contemplated communication between the Homochitto and the Buffalo Bayou would be the violation of a law which declares that the waters of the Mississippi, and the navigable rivers and waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of the State as to other citizens of the United States. Old River was once the bed or a portion of the Mississippi, but never a separate navigable river flowing into the Mississippi. Any improvement, therefore, in the facilities of reaching the Mississippi by another river cannot be an obstruction in what never was, in any correct sense of the phrase, a navigable river leading or flowing into the Mississippi.

But, for argument, let it be conceded that this derelict channel of the Mississippi, called Old River, is in truth a navigable river leading or flowing into the Mississippi; it would by no means follow that a diversion into the Buffalo Bayou of waters, in whole or in part, which pass from Homochitto into Old River, would be a violation of the Act of Congress of March 1st, 1817, in its letter or its spirit; or of any condition which Congress had power to impose on the admission of the new State. It cannot be imputed to Congress that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of that State, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the State. Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied. Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very nature of the federal compact. Obviously, and it may be said primarily, among the incidents of that equality, is the right to make improvements in the rivers, water-courses and highways situated within the State. Thus situated, as appears on the face of the bill, are the derelict bed of the Mississippi, called Old River, the Homochitto River, the Buffalo Bayou, and the line of the canal by which it is proposed that *the last two shall be [*94 united for the more easy and certain access to the Mississippi.

The Act of the Legislature of Mississippi, therefore, is strictly within the legitimate and even essential powers of the State, is in violation of neither the Constitution nor laws of the United States, and presents no conjuncture or aspect by which this court would be warranted to supervise or control the decree of the High Court of Errors and Appeals of Mississippi.

We are, therefore, of the opinion that the decree of that court be affirmed.

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*THE UNITED STATES, Appellants, [*261

v.

JUANA SANCHEZ DE PACHECO.

(See S. C. 20 How. 261-264.)

Appeal may be taken within five years—California appeal dismissed, when.

By the Judiciary Acts of 1789 and 1803, the party may take his appeal at any time within five years after the passing of the decree by the inferior court.

The appellant, in a case from California, is entitled to have the case docketed and dismissed, if the transcript of the record is not filed in this court within the first six days of the term next

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ensuing such appeal, provided the decree of the court below was rendered sixty days before the commencement of the said term of this court.

Argued Dec. 31, 1857. Decided Jan. 11, 1858.

APPEAL from the District Court of the United States for the Northern District of California.

On motions by the appellee to dismiss the appeal under the 63d rule, and on the ground that the same had not been prayed and allowed within the time prescribed by law.

Mr. Jeremiah S. Black, Atty.-Gen., for appellants.

Mr. Crittenden, for appellee.

Mr. Chief Justice Taney delivered the opinion of the court:

A motion has been made to docket and dismiss this case.

It appears, by a certified copy of the record in the District Court of the United States for the Northern District of California, that a decree was passed by that court on the 22d of September, 1856, confirming the title of Pacheco to certain lands therein mentioned. No appeal was taken by the United States at the term at which the decree was made, but an appeal was entered at the next succeeding term in March, 1857.

Pacheco by his counsel now moves to docket and dismiss the case, upon two grounds: 1st. Because the appeal was not taken at the term at which the decree was rendered; and 2d. If the appeal might legally be taken at the succeeding term, yet no transcript of the record was filed here within the first six days of the present term of this court.

The first question raised by the motion depends upon the construction of the Act of Congress of March 3, 1851, which authorizes an appeal to this court in cases of this description. The Act gives the right in general terms to the party against whom the judgment is rendered; and does not limit the time within which the appeal shall be made; nor refer to any particular Act of Congress by which the time shall be regulated. It must, therefore, be governed by the Judiciary Acts of 1789 and 1803, which regulate writs of error and appeals to this court from inferior tribunals. And by these Acts the party may take his appeal at any time within five years after the passing of the decree by the inferior court. The appeal in question was, therefore, made in time; and this motion cannot be maintained on that ground.

263*] *The second reason assigned in support of the motion depends upon the 63d rule of this court. Under this rule, the appellee, in a case from California, is entitled to have the case docketed and dismissed, if the transcript of the record is not filed in this court within the first six days of the term next ensuing such appeal; provided the decree of the court below was rendered sixty days before the commencement of the said term of this court.

As we have already said, the decree was rendered in September, 1856, and the appeal taken in March, 1857. Consequently it was the duty of the appellant in this case to file a transcript of the record within the first six days of the present term. This was not done. And it appears that no transcript of the record has yet been filed by the appellant. The appellee is, therefore, entitled to have the case docketed and dismissed under the rules above mentioned.

It is true he has not filed the certificate mentioned in the rule, but has filed a full transcript of the record. But the transcript shows all of the facts which the Clerk by the rule is required to certify; and it has always been held by the court to be equivalent to the certificate which the rule prescribes.

It is proper, however, to add, in order to prevent mistake on this subject, that the only effect of docketing and dismissing a case under this rule, is to enable the party to proceed to execute his judgment in the court below. It removes the bar to further proceedings in that court, which the appeal created, and does nothing more. And after the case has been docketed and dismissed, the party against whom the decree was rendered, may still, at any time within five years from the date of the decree, take a new appeal in the inferior court; and if he files the transcript of the record in this court within the first six days of the term next ensuing his appeal, the appeal will be valid, and the case as fully before this court, for examination and revision, as if it had been brought here at the first term. The Act of Congress authorizes the appeal at any time within five years, and the period allowed by law cannot be shortened by any rule or practice of a court. Nor was it intended to be diminished by the rules in question. And when an appeal is taken in the court below, if the appellee desires a speedy and final decision of the controversy, it is in his power to bring the case up to the next succeeding term of this court.

Indeed, it sometimes happens, under this rule, that the court permits the transcript of the record to be filed by the appellant, and the case docketed for argument, at the same term at which it had previously been docketed and dismissed on the motion of the appellee. And where the appellant satisfies the *court [*264 that the omission to file the transcript within the first six days was not owing to any fault or negligence on his part, the court has always allowed him to file it at the same term, and docket the appeal for trial, without putting him to the expense and delay of another appeal.

It follows, from what we have said, that although the case before us must be docketed and dismissed, yet this will not prevent the United States from filing a transcript at the present term, and docketing the case for argument, if they can show that the delay has not arisen from any fault or negligence on their part. And if they fail to do so, they may yet take another appeal at any time within five years, and bring here the decree of the District Court for examination and revision. And if the appellee, after the case is docketed and dismissed, proceeds upon the decree of the District Court, and obtains a patent for the land, his title will still be subject to the decision of this court, if the Government shall hereafter bring up the case within the time limited by law.

We have deemed it proper on this occasion to enter into this full explanation of the rule of court referred to, on account of the multitude of appeals which must unavoidably come up from the district courts of California, and which, in some shape or other, may be brought before this court, upon motions to dismiss.

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Orders, Jan. 11.

On consideration of the motion of Mr. Crittenden, of counsel for the appellee, made on a prior day of this term, to wit: on Thursday, the 31st ultimo, to dismiss this appeal, on the ground that the same had not been prayed and allowed within the time prescribed by law, and of the arguments of counsel thereupon had, as well against as in support of said motion, it is now here ordered by the court, that the said motion be, and the same is hereby overruled. Per Mr. Chief Justice Taney.

Mr. Crittenden, of counsel for the appellee, having filed a transcript of the record of this cause duly certified by the Clerk, under the seal of the District Court of the United States for the Northern District of California, and having stated that the appellants had altogether failed to file the record of said cause in this court, or in any way to prosecute the appeal in this case, now here moved the court, in pursuance of the 63d rule of this court, to have this appeal docketed and dismissed; on consideration whereof, it is now here ordered and adjudged by this court, that this appeal from the District Court of the United States for the Northern District of California, be, and the same is hereby docketed and dismissed; and that this cause be, and the same is hereby remanded to the said District Court, for further proceedings to be had therein in conformity to law and justice, the said appeal notwithstanding.

Per Mr. Chief Justice Taney.

Appeals in cases of
U. S. v. Hensley,
U. S. v. Bidwell,
U. S. v. Sunot,
were dismissed for similar reasons, and upon orders similar to the foregoing, and no separate opinion written.

HORACE C. SILSBY, Washburn Race, Abel Downs, Henry Henion, and Edward Mynderse, Appts.,

v.

ELISHA FOOTE.

(See S. C. 20 How. 290–296.)

Citation when necessary on appeal—appeal, when stay of proceedings.

If an appeal is taken in court, at the time of rendering the decision or during the term, no citation is necessary.

When thus taken, it is regular, and stays execution in the court below.

Also, if taken within ten days after the decree is settled and signed by the judge, and filed with the clerk, it is in time to stay the proceedings.

Argued Dec. 31, 1857. Decided Jan. 11, 1858.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

On motion by appellee to dismiss this appeal on the ground that the same matters are appealed from in a prior case (No. 54), now pending on the docket of this court.

The case is stated by the court.

For the history and facts of the case and the opinion of this court on the merits, see post, 953, 20 How. 378.

Messrs. Charles M. Keller, Samuel Blatchford and William Sackett, for appellants.

Mr. Elisha Foote, in person, and Mr. R. H. Gillet, for appellee.

Mr. Justice Nelson delivered the opinion of the court:

This is a motion to dismiss an appeal docketed as No. 106, on the ground that a previous appeal, docketed No. 54, *had been tak- [*295 en by the same parties, and from the same portions of the decree below. The final decision had been made by the court, between the parties, on the coming in of the Master's report on the 28th August, 1854, and an appeal duly taken on the 4th September following. The decree was special in its terms, and was not settled or signed by the judge till the 11th December, 1856, on which day the second appeal was taken. As the appellant desired to appeal within the ten days, so as to stay execution, the second appeal was taken for abundant caution, as there might be a doubt from which period the ten days should be counted, namely: the time of the final decision of the court, or of the signing and filing of the special decree in form.

By the 22d section of the Judiciary Act, modified by the 2d section of the Act of March 3, 1803, an appeal from a final decree must be taken within five years after the rendering or passing of the judgment or decree complained of. And by the 23d section, as modified above, the appeal is a supersedeas, and stays execution in cases only where it is taken and a copy lodged for the adverse party within ten days (Sundays exclusive) after rendering the judgment or passing the decree complained of. The time to be taken as when the judgment or decree may be said to be rendered or passed may admit of some latitude, and may depend somewhat upon the usage and practice of the particular court. In the case of a simple judgment or decree, such as an affirmance or reversal, and the like, there would seem to be no difficulty in taking the appeal at any time within the ten days after the decision on the case was pronounced. But where the decree is special, and its terms to be settled, there is a propriety in waiting for its settlement before taking the appeal. Whether taken or not, may sometimes depend upon the decree as settled. In the second circuit, with the practice of which I am most familiar, it is supposed by many of the profession that the proper time for taking the appeal in such a case is after the settlement of the decree. As this court, however, has always held, that if an appeal is taken in court at the time of rendering the decision, or during the term, no citation is necessary; and as appeals are, perhaps, more frequently taken within the ten days after the decision is pronounced and entered on the minutes by the Clerk, it may be admitted when thus taken it is regular, and stays execution in the court below. And we are also of opinion, that if taken within ten days after the decree is settled and signed by the Judge, and filed with the Clerk, that it is in time to stay the proceedings. The recognition of the two periods from which the ten days may be counted *becomes necessary, on [*296 account of the difference in the modes of proceeding and practice in the different circuits.

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This question cannot arise in England, as the time for appeal runs two years from the enrollment of the decree. 3 Dan. Pr. 131. The time of enrollment cannot well be adopted by this court, as on many of the circuits it is understood, according to the practice, no enrollment of the decree takes place.

As, upon our view of the case presented on the motion, the first appeal was regular, the one taken and standing on the docket No. 106 should be dismissed.

1*] *BENJAMIN F. MORGAN, Plff. in Er.,

v.

ALFRED G. CURTENIUS and John L. Griswold.

(See S. C. 20 How. 1-3.)

Subsequent title to grantor inures to prior grantee—this court follows State decisions as to title,—but will not reverse judgment because State decisions have been changed.

Where a party conveys land to another, without covenants of warranty, by quitclaim deed, and afterwards receives a patent for it from the United States, such subsequent title, under the Illinois Statute of 1833, inures to such prior grantee.

His title is better than that of one to whom the patentee, after obtaining his patent, again deeds the land.

This court follows State decisions which are State rules of property, in regard to titles to land.

But where the Circuit Court has decided a case of title to land in accordance with the then State decisions, this court will not reverse the decision of the Circuit Court, because since that decision the State courts have reversed their decisions.

Submitted Jan. 14, 1858. Decided Jan. 25, 1859.

IN ERROR to the Circuit Court of the United States for the District of Illinois.

This was an action of ejectment brought in the court below, by the plaintiff in error, to recover possession of certain lots in the Town of Peoria.

The final trial below resulted in a verdict and judgment in behalf of the defendants; thereupon the plaintiff brought the case here on a writ of error.

A further statement of the case appears in the opinion of the court.

Mr. E. B. Washburne, for the plaintiff in error:

The question in this case arises upon the construction of the deed of Bogardus to Underhill, taken in connection with the patent of said Bogardus.

It was first decided in the Supreme Court of the State of Illinois in 1845 (Frisby v. Ballance, 2 Gilm. 141), that by virtue of this deed and patent, the fee in the premises inured, under the Statute of the State, to Underhill and his assigns.

In the trial of the present case in this court in 1849, the same question was involved, and the Circuit Court properly followed the above decision of the State Court. After trial below, however, the question again arose in the Supreme Court of the State of Illinois, in 1853.

Frink v. Darst, 14 Ill. 304.

The court there overruled the case of Frisby v. Ballance.

It is, therefore, now the law of Illinois, that the said deed did not, by the subsequently acquired title of Bogardus, pass the title in fee.

The plaintiff in error, therefore, asks a reversal of the judgment by this court.

Messrs. C. Ballance, R. Johnson and Purple, for the appellee:

Plaintiff relies upon reversing the judgment of the court below, because, although it was right when made, being in accordance with the law of evidence in Illinois at the time, yet it afterwards became wrong, by reason that the law of Illinois on the subject was altered.

In Frisby v. Ballance, 2 Gilm. 141, the Supreme Court of Illinois decided that the deed to Underhill was such a deed as by the law would vest the after-acquired title. For nearly five years that decision was acquiesced in. Subsequently the Supreme Court of Illinois decided that that deed was not such a one as the law contemplated. What then? The law was changed. The construction of the court upon a law, constitutes a part of the law as much as if the Legislature had enacted it; but a change of the law does not make that wrong which was once right. It is not pretended that after the United States Courts have followed the State Courts in the construction of their own statutes, they may not change and decide cases as they may arise, according to the new construction of law; but it is utterly denied that the United States Supreme Court would thence gather up all the old cases that had been settled under the law as it then stood and make them conform to the new law.

*Mr. Justice Grier delivered the opinion [*2 of the court:

The plaintiff in error, who was also plaintiff below, brought his ejectment for certain lots in the town of Peoria. On the trial he gave in evidence a patent from the United States to John L. Bogardus, dated 5th of January, 1838; the will of Bogardus, proved 7th of July, 1838, in which he authorizes his executrix to sell his lands; a deed from the executrix, dated Sept. 25th, 1845, to Seth L. Cole; also, a deed from Cole to Frink, and from Frink to plaintiff. The defendants claimed under Isaac Underhill, to whom Bogardus had conveyed by deed, dated 5th August, 1834, purporting, for the consideration of £1,050, "to grant, sell and convey" to Underhill alll Bogardus's "right and interest" to the land in dispute; "to have and to hold the same, unto the said Underhill, his heirs and assigns forever."

The defendants, moreover, proved that Underhill paid the purchase money for the land, and took out the patent in the name of Bogardus, in whose name the entry had been made.

The plaintiff's counsel then moved the court to exclude from the jury all the evidence given by the defendants. This motion was overruled, and the court instructed the jury that the plaintiff had no title to the premises claimed in the declaration. To this instruction plaintiff's counsel excepted, and now alleges it as error.

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It was contended that the deed from Bogardus to Underhill was but an ordinary quit-claim deed, conveying only such interest as the releasor had in the premises at the time of its execution; and being without any direct covenants of warranty, or that implied in the terms "grant, bargain and sell," Bogardus was not estopped from evicting Underhill, under his legal title afterwards vested in him by the patent. The defendants contended that however this might be at common law, the title acquired by Bogardus inured to the benefit of his grantee by virtue of the 7th section of the Statute of Illinois, passed in 1833, concerning conveyances of real property, which is as follows; "If any person shall sell or convey to another by deed or conveyance purporting to convey an estate in fee simple absolute in any tract of land or real estate, lying and being in this State, not then being possessed of the legal title or interest therein at the time of the sale of conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held in trust, and for the use of the grantee or vendee, and the conveyance aforesaid shall be 3*] held and taken, and shall be *as valid as if the grantor or vendor had the legal estate or interest at the time of sale or conveyance."

Now, this case was tried in the court below, on the 8th of June, 1849, and this section of the Act of 1833 had been construed by the Supreme Court of Illinois, as to its application to the conveyance in question, in the case of Frisby v. Ballance, decided in that court in 1845, and reported in 2d Gilman, 141. It was held in that case that the fee in the premises inured under the Statute to Underhill and his assigns. This construction of the Statute was, therefore, a settled rule of property at the time of the decision of this case in the court below, which that court was bound to follow; and having so decided, there was certainly no error in the decision at the time it was made.

But it is argued, that though the decision of the Circuit Court was in accordance with the established construction of the Statutes of Illinois, and the rules of property as then declared by her highest tribunal, yet that it has become erroneous, because of a change of the law since that time, by a decision of the Supreme Court of the State in 1853, in the case of Frink v. Darst, 14 Ill. 305; by which the case of Frisby v. Ballance was overruled and reversed. It is true that the same conveyance and the same Statute were in question in the last case, and have received a contrary construction to that which had governed such conveyances as a rule of property for more than eight years.

If the judgment of the Circuit Court in this case had been given since the last decision of the Supreme Court of Illinois. this court might have been compelled to decide whether they considered themselves bound to follow the last decision of that court, or at liberty to choose between them. But, however the latter decision may have a retroactive effect upon the titles held under the deed in question, it cannot have that effect upon the decisions of the Circuit Court, and make that erroneous which was not so when the judgment of that court was given.

It is therefore affirmed, with costs.

*J. TEMPLE DOSWELL, Plff. in Er., [*29

v.

ENRIQUE DE LA LANZO et al.

(See S. C. 20 How. 29–34.)

Decision on motion for new trial, no ground of error—adverse possession, what is—by different persons—title in stranger may be shown to defeat ejectment—survey, when valid—error in name in patent, may be corrected.

The decision of the court below on a motion for a new trial, which was excepted to, affords no ground for a writ of error. Such a motion is addressed to the discretion of the court below.

Possession, to be effectual, either to prevent a recovery or vest a right under the Statute of Limitations must be an actual, continued, adverse and exclusive possession of the space of time required by the Statute.

It need not be continued by the same person; but when held by different persons, it must be shown that a privity existed between them.

In the action of ejectment, the defendant may show a paramount outstanding and subsisting title for the same land in a stranger, to defeat the plaintiff.

If a deputy-surveyor make a survey, when approved by the surveyor, it becomes the act of the latter, and valid.

The commissioner in issuing a patent, performs a ministerial duty, and if it be fraudulently or negligently issued to an improper person, the error should be corrected.

Argued, Dec. 22, 1857. Decided, Jan. 25, 1858.

IN ERROR to the District Court of the United States for the District of Texas.

This was an action of trespass brought in the court below, by the plaintiff in error, to try the title to a certain tract of land.

The trial in the court below, resulted in a verdict and judgment for the defendants.

The plaintiff then sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. W. G. Hale, for plaintiff in error.

Messrs. Walter Merriman and Robert Hughes, for defendants in error.

Mr. Justice McLean delivered the opinion of the court:

This case is brought before us by a writ of error to the Circuit Court for the District of Texas.

In his petition, the plaintiff claims two leagues of land, worth $25,000, in Nueces County, San Patricio District, on the Bay of Corpus Christi, and west of the Nueces; and he alleges that the defendants, on or about the 4th day of October, 1849, entered into the possession of one fourth of the above premises, and ejected the petitioner, etc.

The defendants pleaded the general issue, and, by leave of the court, filed an amended answer, containing six pleas in bar. The first plea alleged an adverse possession of more than ten years by Enrique Villareal. The second, that he had peaceable and adverse possession for more than three years after the right accrued to the person under whom the plaintiff claims; and that he did not make entry or commence an action to try title to the land before the 16th of June, 1842; and that after that day,

NOTE.—Requisites of adverse possession—see notes, 5 L. ed. U. S. 398; 40 L. ed. U. S. 215; 13 L.R.A. 206. Occupancy necessary to constitute adverse possession—see notes, 9 L. ed. U. S. 624; 4 L.R.A. 641. What title or interest will support the action of ejectment—see note, 18 L.R.A. 781.

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Henry L. Kinney, being seised of the land from Villareal, held adverse and uninterrupted possession, without entry or action by plaintiff, up to the commencement of this suit. Third, that Villareal, and those claiming under him, held adverse and peaceable possession on the 17th of March, 1841, and up to the commencement of the action.

In the fourth plea, ten years' adverse possession was alleged; and in the fifth, an adverse possession of three years. The sixth plea avers that each of the defendants, and those under whom they claim, had adverse, peaceable, and 30*] continuous possession *of the land for more than three years, under color of title, before the commencement of the action.

Special demurrers were filed to these pleas, except the sixth, on which issue was joined. The demurrers were sustained to the first and fourth pleas, but overruled by the court as to the third and fifth. The issues before the jury were upon the plea of not guilty, and the second, third, fifth and sixth pleas of prescription.

On the trial before the jury, two patents issued by the Republic of Texas, dated the 10th of April, 1849, to Levi Jones, were given in evidence by the plaintiff. One of these patents purported to be issued to Levi Jones, as assignee of Miguel Basquez, for one league of land in the San Patricio District, survey No. 20, on the west side of the Nueces, on Corpus Christi Bay, by virtue of head right certificate No. 288.

The other patent was issued to Levi Jones, assignee of José Ma. Bargas, for a league of land in the same district, known as survey No. 21, on the west side of Corpus Christi Bay, adjoining survey No. 20, by virtue of head right certificate 499.

To show the position and outlines of the two leagues of land, the plaintiff gave in evidence a part of Grammont's map, duly certified by the Land Office.

The plaintiff also gave in evidence a deed of conveyance of the land by Levi Jones to him, dated the 2d of October, 1849. It was proved that the town of Corpus Christi is included in the surveys, and is situated on the shore of the bay. Felix A. Butcher, a witness, came to Corpus Christi first in the year 1846. He knows all or most of the defendants were in possession of the land at least one year prior to the 8th of October, 1849; and at that time the lots upon which the defendants resided were worth about $10 each; now they are worth $100 each. in the best localities. The occupants have made valuable improvements on the lots.

The defendants then offered to read certified copies of two patents from the record, issued by the State of Texas on the 11th of July, 1845, one to Kelsey H. Douglass, and the other to John S. Thorn, assignee, etc., for the land claimed by plaintiff. Both of these patents on the record book had written upon them a memorandum: "This patent canceled, April 10th, 1848."

It was proved that these patents had been inadvertently issued to Douglass and Thorn, when the field notes of the surveys had been returned in the name of Levi Jones, assignee, etc. They were canceled on the advice of the Attorney-General. The plaintiff objected to the introduction of the above copies; but the objection was overruled, and the papers admitted.

*Proof was then made that Enrique [*31 Villareal held possession of a tract of ten leagues, including the land in controversy, from the year 1810 down to the year 1839, claiming it from 1810 to 1831 under a title from the Spanish Government; that in 1839 Henry L. Kinney succeeded Villareal in possession, but the deed for the land was not made to him until the following year; that Villareal was a native of Mexico, and at the time of the grant to him by the State of Tamaulipas was a citizen of that State, and held a commission in the army. The grant was alleged to have been lost, and the court held it could not be proved by parol; but documentary and parol proof were admitted to show the boundaries claimed and the possession of Villareal. A great number of facts were proved, historical and otherwise, in regard to this claim, which it is unnecessary here to state.

Objection to this part of the defense was made, but overruled, and the evidence was admitted.

The plaintiff then requested the court to give the jury twenty-one instructions, principally in relation to the title of Villareal; which go into details of great length, but which, from the view we have taken of the case, it is not necessary to repeat.

The court refused to give any of the instructions requested by the plaintiff, but charged the jury, "that the plaintiff must recover on the strength of his own title, not on the weakness of his adversary's; that if the surveys on which the patents in evidence were issued were void when made, the plaintiff can claim no title to land under such patents; that if the surveys were made west of the Nueces River, on Corpus Christi Bay, prior to the 24th of May, 1838, by the Deputy-Surveyor of San Patricio County, they were void, because San Patricio County did not, at that time, extend west of the River Nueces; and the approval of the County-Surveyor. Buchanan, even if given after the 24th of May, 1838, relates back in point of time to the date of the surveys by his deputy, but does not have the effect of making good the surveys, if at the time they were made by the Deputy-Surveyor they were out of the limits of the county; that if Villareal had acquired a title to the land, under the Government of Spain or Mexico, before his death, and if he died an alien enemy to the Republic of Texas in 1845, leaving only alien enemies as his heirs, still his title to the land in controversy did not escheat to the Republic, and consequently could not pass by the subsequent patents issued by the Republic or State; that as these instructions are sufficient for the decision of the case, the court refused the instructions asked by the plaintiff. Exceptions were taken by the plaintiff, as well to the *instructions asked by him and refused, [*32 as to those given against him, on the prayers of the defendants.

The decision of the court on a motion for a new trial, which was expected to, affords no ground for a writ of error. Such a motion is addressed to the sound discretion of the court, on a consideration of the evidence before the jury; and this court can no more control that

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discretion than when it is exercised by the Circuit Court, in granting continuances or amendments of the pleadings.

As to the pleas which set up the claim and possession of Villareal, as a bar, under the Statute of Limitations, to the plaintiff's action, it does not appear from the evidence that the defendants are in any way connected with that title. There is nothing in the facts of the case which conduce to show an entry under it by the defendants, or that they entered under any claim of title. It is proved by one witness, that a part of the defendants, if not all of them, were in possession of the premises they now occupy, at least one year prior to the 8th of October, 1849. On the 3d of that month and year, the seisin of the plaintiff is stated in his petition. From this, it would appear that the defendants' possession was prior to the seisin of the plaintiff; so that, in regard to him, they cannot be considered as having ejected him by their entry, his legal title not having then accrued. But if the defendants entered without claim of title, which must be presumed, as they have shown no title, they became trespassers on the premises of the plaintiff after his title accrued.

Villareal died in 1844 or 1845. It is contended that he retained possession of the premises up to 1839, and that Kinney took possession in that year under him, and continued in the possession until the commencement of this action. This possession is controverted by the plaintiff, on evidence that Kinney's residence was in another county, and that he was only occasionally at Corpus Christi; but, if his possession be admitted as asserted, it is not perceived how it could inure to the benefit of the defendants under the Statute of Limitations, as Kinney is not a defendant, and they show no privity with his title. Possession, to be effectual, either to prevent a recovery or vest a right under the Statute of Limitations, must be an actual possession, attended with a manifest intention to hold and continue it. It must be, in the language of the authorities, an actual, continued, adverse and exclusive possession for the space of time required by the Statute. It need not be continued by the same person; but when held by different persons, it must be shown that a privity existed between them. Wheeler v. Moody, 9 Tex. 372.

33*] *In the action of ejectment, the defendant may show a paramount outstanding and subsisting title for the same land in a stranger, to defeat the plaintiff; and the rule of evidence is the same in this action, although it is prosecuted under the forms adopted by Texas. A large portion of the evidence in the record, and many of the authorities cited in the Circuit Court, were to show an older and paramount title to the same land, under the Mexican Government, by Villareal, and Kinney, his assignee; but as there are other points on which the case may be decided, the court will not consider the validity of that title.

The court instructed the jury, that if the surveys were made west of the Nueces River, on Corpus Christi Bay, prior to the 24th of May, 1838, by the Deputy-Surveyor of San Patricio County, they were void, because San Patricio did not at that time extend west of the River Nueces; and the approval of the County Surveyor, Buchanan, even if given after the 24th of May, 1838, does not make them valid.

It was held in Linn v. Scott, 3 Tex. 67, that a survey made by a surveyor of any other county than that in which the land lies, is a nullity. But, in Horton v. Pace, 9 Tex. 81, the court say, "We do not question the right of a surveyor to adopt a previous survey he thinks correct; but we do not admit it was the duty of the court to oblige him to adopt one shown to be incorrect." And in Warren v. Shuman, 5 Tex. 441, it is said a survey, whensoever made, if supported by a recommended certificate, is, in contemplation of law, valid; if otherwise, it is without legal foundation. In Lake v. Wafer, 16 Tex., the court held, "A survey made in 1841 without certificate, and applied to the certificate of 1844, constitutes no objection to the validity of the patent." If a Deputy-Surveyor make a survey for himself, on a certificate belonging to himself, when approved by the District-Surveyor, it becomes the act of the latter, and was so far valid. Howard v. Perry, 7 Tex. 259.

Under these decisions, the Circuit Court erred in giving the above instruction. If the surveys were void when made west of the Nueces, as being without the limits of San Patricio County, they were made valid by the subsequent approval of the County Surveyor, after the county limits were extended west of that river.

The cancellation of the patent stated by the acting Commissioner of the Land Office, by the advice of the Attorney-General, was proper.

The Commissioner, in issuing a patent, performs a ministerial duty, and if it be fraudulently or negligently issued to an improper person, the error should be corrected. *The devestiture of the title by the Gov- [*34 ernment can only be accomplished in the mode authorized by law.

It is desirable that points of exceptions and instructions asked from the court to the jury should be as few and as concisely expressed as may be consistent with the interests of the respective parties.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings.

ISAAC BROWN, Appt.,

v.

JOSEPH P. SHANNON et al.

(See S. C. 20 How. 55-58.)

Jurisdiction, court has for infringement of patent, although amount is less than $2,000, but not for violation of contract and injunction unless amount is over $2,000—amount estimated not by penalty of injunction bond, but by sum claimed in bill.

While this court can exercise no appellate power in a case arising under contracts unless the amount or value of the matter in controversy exceeds $2,000, it may yet lawfully exercise its appellate jur-

NOTE.—Jurisdiction of U. S. Supreme Court dependent on amount. Interest cannot be added to give jurisdiction. How value of thing demanded may be shown. What cases reviewable without regard to sum in controversy. See note to Gordon v. Ogden. 7 L. ed. U. S. 592.

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isdiction where a far less amount is in dispute, if the party is proceeding either at law or in equity for the infringement of a patent right to which he claims to be entitled.

Where, to prevent the fraudulent violation of a contract, the complainants seek the aid of the court and ask for an injunction, and it is a proceeding founded on a contract between the parties, this court has no appellate power, unless the matter in controversy is of the value of more than $2,000.

The value may not be estimated by referring to the penalty of the bond taken in Circuit Court when the injunction was granted.

The sum mentioned in the bill, and for which the privilege to use patent in question was sold by the appellant, must, therefore, be taken as the true value of the matter in controversy; and being less than $2,000, the appeal must be dismissed for want of jurisdiction in this court.

Argued Jan. 5, 1858. Decided Jan. 25, 1858.

THE bill in this case was filed in the Circuit Court of the United States for the District of Maryland, by the appellees, to restrain the defendant by injunction from using a certain patented invention.

The court below entered a decree granting the injunction prayed for. From that decree this appeal was taken.

A further statement of the case appears in the opinion of the court.

Mr. **Wm. Schley**, for appellant:

The bill is multifarious. The complainants, according to the statement of the bill, have several, but separate rights. They cannot unite their complaints in one suit, unless it be a rule of equity pleading, that parties, who have several and distinct rights, can unite in one bill, when the act of another party violates at the same time several and separate rights of all the complainants. There is no such rule of pleading in equity.

Story Eq. Pl. sec. 271, 279, 530; Harrison v. Hogg, 2 Ves. Jr. 323; Campbell v. Mackay, 1 Myl. & C. 618; Boyd v. Hoyt, 5 Paige, 65; Yeaton v. Lenox, 8 Pet. 123.

Messrs. **Charles J. M. Gwinn** and **John H. B. Latrobe**, for appellees.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court for the District of Maryland.

The bill was filed by Joseph P. Shannon & Co., Gelston & Matthews, Lapouraille & Maughlin, and Griffiss & Cate, who composed four different partnership firms in the City of Baltimore, separately engaged in the business of planing, who all joined in the bill of complaint against Brown, the appellant, praying that he might be enjoined from the use of certain planing machines, mentioned in the bil, in the City of Baltimore. Upon the hearing, a perpetual injunction was granted accordingly, and from that decree this appeal was taken.

From the manner in which the bill is framed, 56*] there is some *difficulty in determining whether the complainants are seeking the aid of this court to prohibit the infringement of a patent-right assigned to them, or to enforce the specific execution of two contracts with the appellant, exhibited with the bill; for the right claimed under the patent and the right claimed under the contracts are so mingled together in the statements and allegations of the complainants, as to leave some doubt upon that point. And the first question, therefore, for this court to determine, is, upon which of these two grounds does the bill seek for relief? The jurisdiction of the Circuit Court in the one case is materially different from its jurisdiction in the other; and while this court can exercise no appellate power in a case arising under contracts like those exhibited, unless the amount or value of the matter in controversy exceeds $2,000, and may yet lawfully exercise its appellate jurisdiction when a far less amount is in dispute, if the party is proceeding either at law or in equity for the infringement of a patent-right to which he claims to be entitled. Upon looking, however, carefully into the bill, we think it must be regarded and treated as a proceeding to enforce the specific execution of the contracts referred to, and not as one to protect the complainants in the exclusive enjoyment of a patent-right. It states that three of the partnership firms named as complainants—that is to say, Joseph P. Shannon & Co., Gelston & Matthews, and Lapouraille & Maughlin, were, by regular assignments, entitled to the exclusive use of Woodworth's planing machine in the State of Maryland, east of the Blue Ridge. That the appellant had used these machines in the City of Baltimore, without any right derived from the patentee, and that, in consequence of this infringement of their rights, various suits and controversies had taken place between them and Brown, who claimed the right to use the machines in question, as the assignee of a patent of Emmons. The bill then proceeds to state, that in order to put an end to these controversies and suits, these appellees and the appellant entered into the contract of the 19th of January, 1853, which is exhibited with the bill.

By this contract, the portion of the appellees of which we are now speaking, and the appellant, agreed that each of the said three partnership firms and the appellant should have the right to use the Woodworth patent at one establishment, anywhere within the territorial limits above mentioned, not exceeding five machines at such establishment; and that each of the said parties should also have the right to use Emmons' patent.

*There are other stipulations in this [*57 agreement which it is not material to state for the purposes of this opinion.

The bill further states that Brown afterwards, on the 15th of June, 1853, assigned to Griffiss & Cate, the other complainant, all his right to use the Woodworth patent, which right he had derived from the contract before mentioned; and also the right to use the Emmons patent, the right to which he had derived from the administrator of Emmons. This contract states that the assignment was made in consideration of $1,500 paid the appellant by Griffiss & Cate. And the complainants allege that after this assignment Brown continued to use the said five machines in his establishment in Baltimore, although he had no right to do so, as they were all Woodworth's planing machines, and that he is not only a wrong-doer in using a patented invention without a license, and as such liable to be restrained by a court of equity, but that such use is a fraud upon the parties to each of the two contracts into which he had entered, as above stated. That the object of the

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contract of January 19, 1853, was to restrain the use of the Woodworth machine and the Emmons machine, so far as that right was to be used, to four establishments in the City of Baltimore, with the limited number of machines in each; and that the use of them by Brown, after he had substituted Griffiss & Cate in his place, was a fraud upon this contract, from the binding operation of which he could not withdraw himself and a fraud also upon his contract with Griffiss & Cate. And the gravamen of the bill and the ground upon which relief is sought is summed up in the paragraph immediately preceding the prayer for relief, in the following words:

"And your orators are further advised, that the misconduct of the said Brown in the premises is a fraud upon the parties to the agreement of the 19th of January, 1853, as well as upon the parties to the agreement of the 15th of June, 1853, which it is the peculiar province of a court of equity to restrain."

It is to prevent the fraudulent violation of these contracts, therefore, that the complainants seek the aid of the court, and ask for an injunction; and it being a proceeding founded on a contract between the parties, this court has no appellate power, unless the matter in controversy is of the value of more than $2.000. Now, the matter in controversy is the right of the appellants to use these five machines while the Woodworth patent continued—that is, until the 29th of December, 1856.

But it appears by the record that Brown sold 58*] this right to *Griffiss & Cate for $1.500. He admits, in his answer that he sold and assigned it for that sum; nor does he suggest that it was worth more. The establishment of Griffiss & Cate, like that of the appellant, was in the City of Baltimore. And if $1.500 was the just value of the right in controversy on the 15th of June, 1853, there is no reason for supposing that it was more on the 10th of October in that year, when this bill was filed, or at any time since; on the contrary, the period for the duration of the right under the contract was daily diminishing as the termination of the patent was approaching, and a diminution on the value of the right would be a natural and necessary consequence. It is evident, therefore. that the value of the matter in controversy is not sufficient to give appellate jurisdiction to this court.

It has, however, been suggested in the argument at the bar, that the value may be estimated by referring to the penalty of the bond taken by the Circuit Court when the injunction was granted. But this rule would be entirely too vague and uncertain for judicial purposes. It is the practice of all courts, in taking bonds of this description, to prescribe a penalty more than enough to cover all possible damages which the respondent may sustain by reason of the injunction. There was nothing before the Circuit Court when the penalty in this case was prescribed, but the bill of the complainants. And although the bill disclosed a controversy where the matter in dispute was worth in the market but $1.500; yet, when the answer came in, and testimony was taken, it might show that the matter in dispute was of far greater value. The court could not foresee whether this would be the case or not, and hence the necessity and propriety of prescribing a penalty that would cover all possible contingencies. The respondent, however, as we have said, admits that he sold the privilege now in dispute for the sum mentioned in the bill, and does not say that it was worth more, or was of greater value in his hands than in those of Griffiss & Cate. The sum mntioned in the bill, and for which the privilege in question was sold by the appellant, must, therefore, be taken as the true value of the matter in controversy; and being less than $2,000, whatever errors may be apparent in the proceedings and decree of the court below, we have yet no power under the Act of Congress to revise and correct them, and the appeal must be dismissed for want of jurisdiction in this court.

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*THE UNITED STATES, Appellants, [59
v.
HENRY CAMBUSTON.

(See S. C. 20 How. 59–65.)

Habitual grants, and mode thereof, by Mexican Governors, presumptive evidence of power and compliance with forms—but not since Act of 1824—these Acts prescribe the power and mode—except as modified by usage, equity and decisions—case not sufficient to sustain grant—new evidence.

The fact of the habitual grant of lands by Mexican Governors of the Territory of California to settlers, and also the customary mode adopted in making grants, furnish presumptive evidence both of the existence of the power and of a compliance with the forms of law in the execution. But no such presumptions are necessary or admissible in respect to Mexican titles granted since the Act of 18th of August 1824, and the regulations of 21st November, 1828.

The court must look to these laws for both the power to make the grant, and for the mode and manner of its exercise; and they are to be substantially complied with, except so far as modified by the usages and customs of the government under which the titles are derived, the principles of equity, and the decisions of this court.

The case in the court below was too defective to have warranted a confirmation of the title to the claimant, as it was unsupported by the evidence; and for aught that appears in the proofs, the alleged grant has never been recorded.

It is very difficult to resist a suspicion as to the bona fides of the grant in question. It is a pure donation. It is unaccompanied with the forms and usages always observed in disposing of the public lands.

If the objections here stated had been made at the proper time, before either of the tribunals, it may have been in claimant's power to have removed them, by the introduction of further evidence.

Argued Jan. 7, 1858. Decided Jan. 25, 1858.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition filed with the land commissioners by the appellee, asking a confirmation to him of a certain tract of land in California.

The Land Commissioners having entered a decree in favor of the claimant, the case was taken to the District Court of the United States for the Northern District of California, where the said decree was affirmed. The case is now here on appeal.

A further appeal appears in the statement of the court.

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Mr. J. S. Black, Atty-Genl., for the appellants:

I. Assuming the paper on which the claim is based to be genuine, it is nevertheless void and worthless for want of a petition and inquiry.

The written law requires a petition, and upon that petition an inquiry. The power of making a grant is not given, except under these conditions.

See the Decree of 1824 and Regulations of 1828.

In Reading's case, 18 How. 1, and in Arguello's case, 18 How. 543, the Regulations of 1828 are referred to in such a way as to indicate the opinion, that a compliance with the second and third regulations is indispensable to the validity of the grant. It is true, however, that the very point has never been directly decided.

II. The grant is inoperative, for want of evidence that it was delivered while the governor had power to make it.

III. The grant is fraudulent, fictitious, and simulated.

The circumstantial evidence which proves this title to be a fabrication, is irresistible—sufficient to convict the best citizen of the worst crime.

Messrs. J. Mason Campbell, V. E. Howard and E. L. Goold, for appellee:

In support of the decree below, the appellee respectfully insists:

1. That the grant itself is evidence, as of the power of Pico to make it, so also of the observance by him of all the necessary preliminaries, and that there is no proof to the contrary.

U. S. v. Peralta, 19 How. 347; U. S. v. Arredondo, 6 Pet. 729, 731; Delassus v. U. S. 9 Pet. 134; Minter v. Crommelin, 18 How. 88; Bagnell v. Broderick, 13 Pet. 448.

2. That the possession of the grant, is evidence of its delivery to the grantee by Pico, and the presumption of law is, that such delivery was made when it might be lawfully, and that there is no evidence to the contrary.

3. That the absence of approval by the Departmental Assembly, or of a survey, etc., will not defeat the grant.

Frémont v. U. S. 17 How. 560; U. S. v. Reading, 18 How. 7; U. S. v. Cervantes, 18 How. 553; U. S. v. Vaca, 18 How. 556; U. S. v. Larkin, 18 How. 563.

4. As no allegation of fraud was made, either before the Commissioners or before the District Court, it cannot be entertained in this court, though if entertained the circumstances of the case conclusively show the fairness of the transaction.

U. S. v. Larkin, 18 How. 557.

Mr. Justice Nelson, delivered the opinion of the court:

This is an appeal from a decree of the District Court of the United States for the Northern District of California, affirming a decree of the Land Commissioners.

The claimant below gave in evidence the following document, purporting to be a grant of a large tract of land on the upper waters of the Sacramento River, from a Mexican Governor of California, dated 23d May, 1846:

Pio Pico, Constitutional Governor of the Department of California:

Whereas, Mr. Henry Cambuston has petitioned, for his own personal advantage, for a tract of unoccupied land in the valley of the Sacramento, joining on the north to Antonio Osio, on the south Mr. Sutter, on the east Mr. Flugge, and on the southwest the River Sacramento—the investigations being previously made according to the custom, and in conformity with the law of the 18th of August, 1824, and the regulations of the 21st of November, 1828—in virtue of the powers which have been conferred on me, in the name of the Mexican nation, I grant the tract of land expressed, lying out of the boundaries of the before-mentioned landholders, declaring it his estate by the present letters, provided it shall be approved by the extreme Departmental Assembly, and under the following conditions:

*1st. He may, without prejudice to the [*61 crossings, roads, or attendances, fence it, enjoying it freely and exclusively, devoting it to any use or cultivation, as best may suit his convenience.

2d. When the title shall be confirmed, he shall demand of the respective judge judicial possession of it, by virtue of this dispatch, by which the boundaries shall be designated with the necessary landmarks.

3d. The claim of land, for which this grant is made, has an area of eleven square leagues of pasture, if there is that outside of the property of the others, whose boundaries are to be respected; and if there should not be, the grantee shall be satisfied with that which remains.

The judge who gives possession shall cause it to be surveyed according to the Ordinance, leaving the residue for the convenient uses of the nation.

Consequently, I command that he hold the present title as true and valid.

It shall be recorded in the respective book, and be delivered to the party interested, for his security and other uses.

Given in the City of Los Angeles, on the common paper, for want of sealed, on this 23d day of May, 1846.

(Signed) Pio Pico.
(Signed) Jose Matias Moreno.

This document was deposited, by the claimant, with Edward Canbey, Assistant Adjutant-General of the Army of the United States, on the 10th July, 1850, who at that time had charge at Monterey of the Government archives. These archives have since been transferred to the office of the Surveyor General, kept at San Francisco. There is no evidence in the case that it was ever seen in or out of the possession of the claimant, from its date (23d May, 1846) down to the time of depositing it, as above mentioned, except that derived from one witness, who appears to have been interested in the grant, and whose testimony, therefore, must be laid out of the case. Although the document in terms directs that it shall be recorded in the proper book of records, no record of the same was given in evidence, nor its absence accounted for. It recites, in the usual way, that the claimant had presented to the Governor a petition for a grant of the land, and also that the customary examinations had been made into the circumstances and fitness of making the grant to the petitioner. No petition was produced at the trial, nor

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any report by any officer as to the reasons and propriety of conceding the tract asked for, nor any evidence accounting for the non-production of either.

62*] *The case stands, so far as the claim of title is concerned, upon the naked document itself, purporting to be a donation of the eleven square leagues of land, together with evidence tending to establish its genuineness, and slight proof in respect to the possession of the tract.

The original document was not produced either before the Commissioners or the District Court, and the only proof of its genuineness was the testimony of two witnesses who had seen the signatures of Governor Pico and the Secretary, Moreno, on file at the Surveyor-General's office. One of them (Crosby) says he believes the signature of Pico to be genuine, but has no knowledge of the handwriting of Moreno: the other (Castro) that he knows the signatures of both Pico and Moreno, and that they are genuine. There is another witness (Morenhont), who says that he had seen Moreno write once and had corresponded with him; and that, so far as he can judge, it is his genuine signature. This witness, however, cannot be relied on, as he is the person interested in the claim.

The regulations for the colonization of the Territories of the Government of Mexico, made 21st of November, 1828, in pursuance of the Act of the General Congress, August 18, 1824, provided: 1st. That the Governors of the Territories should be empowered to grant vacant lands, among others, to private persons who may ask for them, for the purpose of cultivating and inhabiting the same. 2d. That every person soliciting lands shall address to the Governor a petition, expressing his name, country, and religion, and describing as distinctly as possible, by means of a map the land asked for. 3d. The Governor shall proceed to obtain the necessary information, whether the petition contains the proper conditions required by the law of the 18th August, 1824, both as regards the land and the petitioner, in order that the application may be at once attended to; or, if it be preferred, the municipal authority may be consulted, whether there be any objection to the making of the grant. 4th. This being done, the Governor will accede or not to such petition, in conformity to the laws on the subject. 5th. The definitive grant asked for being made, a document signed by the Governor shall be given to serve as a title to the party interested, wherein it must be stated that the grant is made in exact conformity with the provisions of the law in virtue of which possession shall be given. 6th. The necessary record shall be kept, in a book provided for the purpose, of all the petitions presented and grants made, with maps of the lands granted, and a circumstantial report shall be forwarded quarterly to the supreme government. There are many other provisions 63*] in the system of *regulations, relating to the disposition of the public lands, adopted on the 18th November, 1828, which it is not at present material to notice. Those specified have a special bearing upon the case before us. And, in view of them, it will be observed, according to the facts as presented at the trial before the commissioners, and afterwards before the District Court, to which we have already referred at large, that not one of the preliminary steps made requisite by the Act of the Mexican Congress of 1824, and the Regulations of 1828, to a grant of a public domain by the Governors, has been observed; at least, no evidence was given, before either of these tribunals, of the observance of any one of them. And we do not see how they can well be dispensed with, as they are not only expressly prescribed by the regulations as essential to guard against improvident grants, but constitute an essential part of the record of the title. It is true, the document recites that a petition was presented, and that the customary investigations had been made in respect to the application. But this cannot be regarded as conclusive, or even satisfactory evidence of these facts, when the question is raised, whether or not the alleged grant is made in conformity with the requirements of the law—in other words, whether the preliminary conditions had been complied with, which enabled the Governor in the particular case to make the grant, especially in respect to those preliminary proceedings which are required to be made matters of record, and of which record evidence should have been produced, or its non-production satisfactorily accounted for.

The question here is not whether the fact of the habitual grant of lands by Mexican Governors of the Territory of California to settlers, and also, whether the customary mode and manner adopted in making grants, do not furnish presumptive evidence both of the existence of the power and of a compliance with the forms of law in the execution. We agree, that the affirmative of these questions has been frequently determined by this court, in cases involving Spanish titles in the Territories of Louisiana and Florida. 6 Pet. 729, 731; 9 Pet. 134; 19 How. 347. But no such presumptions are necessary or admissible in respect to Mexican titles granted since the Act of 18th of August, 1824, and the Regulations of 21st November, 1828. Authority to make the grants is there expressly conferred on the Governors, as well as the terms and conditions prescribed upon which they shall be made. The court must look to these laws for both the power to make the grant, and for the mode and manner of its exercise; and they are to be substantially complied with, except so far as modified by the usages and customs of the *Government [*64 under which the titles are derived, the principles of equity, and the decisions of this court. 17 How. 542.

We think, for the reasons above stated, that the case in the court below was too defective to have warranted a confirmation of the title to the claimant, as it was unsupported by the evidence; and also, for the further reason, for aught that appears in the proofs, the alleged grant has never been recorded in the proper book, or, indeed, in any book of the Spanish records. This is expressly required by the regulations of November, 1828, and enjoined in the grant itself. The record should have been produced, or its non-production reasonably accounted for.

In the examination of the evidence in this case, we have found it very difficult to resist a suspicion as to the bona fides of the grant

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in question. It is a pure donation, without pecuniary consideration or meritorious services rendered to the Government of Mexico. It is unaccompanied, as we have seen, with the forms and usages always observed in disposing of the public lands. Although purporting to be made on the 23d May, 1846, it was unknown to any person besides the grantee himself and another interested party, till filed among the public archives, 10th July, 1850, after the cession of California, by Mexico, to this Government. It was made but a month and a half before the country was taken possession of by the arms of the United States, and made by a person who had but recently expelled from the Territory by force its lawful Governor (Micheltorena), and taken possession of it himself. Whether or not Pico had been recognized by the existing Government in Mexico, at the time the grant is dated, does not appear. Micheltorena was overthrown by the joint forces of Castro and Pico, in the spring or fore part of the summer of 1845. See Captain Sutter's evidence, in original record in U. S. v. Reading, 18 How. p. 1; also, Report of General Cass to Senate, on California Claims, February 23, 1848.

Civil commotion raged throughout the Territory, from this period down to the 7th July, 1846, when the authority of Pico and Castro themselves was subverted, and possession taken and held by the arms of the United States, until the cession of the country to this Government by the Treaty of Guadalupe Hidalgo.

The grant, purporting to have been made by Pico, so near the time when the Government of the Territory had passed from his hands, and indeed, during the very heat and conflict of the struggle in which his power was overthrown, it, and all others similarly situated, should be inquired into and scrutinized with great care, both as to the authority of the 65*] Governor *to make them, and the bona fides of its exercise, in order to prevent imposition and frauds.

The court below appears to have been very much pressed with the unsatisfactory character of the evidence, and with doubts as to the genuineness of the title, and seems to have yielded rather to the apparent acquiescence of the representative of the Government in the decision of the Commissioners, than to any settled convictions of its own judgment.

We should not hesitate to reverse the decree below, and direct a decree against the claimant were it not that the mode and manner of conducting the case, both before the Commissioners and the District Court, on behalf of the Government, may have misled him; for, if the objections here stated had been made at the proper time before either of the tribunals, it may have been in his power to have removed them by the introduction of further evidence. It would be unjust, therefore, to deprive him, under the circumstances, of the opportunity to furnish such evidence.

We shall, therefore, reverse the decree, and remand the case to the court below for a further hearing.

Rev'g—Hoff's L. C. 86.

JAMES B. TELLER and Thos. W. Swinney, Plffs. in Error,

v.

JONATHAN T. PATTEN and John J. Lane.

(See S. C. 20 How. 125-128.)

Declarations of partner, when not conclusive evidence—depositions, when inadmissible.

Declarations of defendant, sought to be charged as a partner, that he was not a partner, made to plaintiff after the partnership debt was incurred, are not evidence conclusive of that fact.

Depositions which related to the declarations of such party, that he was not such partner, not made in plaintiffs' presence, are inadmissible.

Argued Jan. 15, 1858. Decided Jan. 25, 1858.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of assumpsit, brought in the Circuit Court of the United States for the District of Indiana, by the defendants in error, to recover the amounts due on certain promissory notes. The trial in the court below resulted in a verdict and judgment for the plaintiffs. The defendants brought the case here on a writ of error. A further statement appears in the opinion of the court.

Mr. R. Crawford, for plaintiffs in error.

Mr. O. H. Smith, for defendants in error.

Mr. Justice McLean delivered the opinion of the court:

This case is brought here by a writ of error from the Circuit Court for the District of Indiana.

It is an action of assumpsit on four promissory notes signed by Thomas B. Teller & Co. A verdict was rendered, and a judgment entered, for $2,719.40.

Certain rulings of the court on questions of evidence which were made during the trial, and to which exceptions were taken, present the points for consideration.

Evidence was given to prove the partnership of Swinney with Teller, which was denied, and which was the only controverted fact in the case. Thomas P. Anderson, a witness, stated that in April, 1852, he introduced Swinney to divers merchants in the City of New York, including the plaintiffs, as a person wishing to buy goods for Fort Wayne, as the father-in-law of Teller, and capitalist of the concern, which was not denied by Swinney. Several other witnesses gave evidence conducing to prove that Swinney was a partner of Teller, and had by his declarations and conduct at Fort Wayne on divers occasions, in 1852 and 1853, held himself out to the world at a partner of Teller, who was then doing business as a merchant, and that Swinney has suffered Teller to hold him out as such.

It was further proved, by the book-keeper of the plaintiffs, that Swinney was in New York,

NOTE.—Evidence. Declarations and admissions to prove partnership. General reputation and common rumor.

A declaration or admission by a person, that he is a partner, is evidence against him, and will, as far as he is concerned, be evidence of the existence of the partnership. Therefore, words uttered or letters written, in the course of commercial transactions, are constantly received in evidence, to charge the speaker or writer as a partner. De

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in June, 1854, a period prior to the extension of the notes sued on, and in conversation with 127*] *Patten and Lane, the plaintiffs, he admitted that he was a partner of Teller & Co., in the house at Fort Wayne. About the same time, two of the daughters of Swinney testified that their father stated, at the Astor House, in New York, to Patten, one of the plaintiffs, that he was not a partner of Teller.

The defendants then offered several depositions, conducing to prove that Swinney, on his way to New York, with Solomon D. Bayless, to purchase goods, etc., and to whom he said that he was not to be a partner with Teller, who was his son-in-law; that he intended to purchase a small stock to start him in business; but that he had no further interest or connection in the matter. The same statement was made by Swinney to several persons in New York. Witness introduced him to a number of merchants in that city, and to those persons he did not represent him as the partner of Teller. This was before Thomas P. Anderson arrived at the city. At none of these conversations does it appear that plaintiffs were present, or either of them. Other depositions were offered, to prove that on the trial of one Michael Dougherty for larceny, at Fort Wayne, in January, 1853, Swinney and Teller were both witnesses, in the absence of the plaintiffs, and both swore that Swinney was not a partner of Teller's. But the court, on objection being made, overruled the depositions which showed the declarations of Swinney made to different individuals at different times, in the absence of the plaintiffs, and also the oaths made by Swinney and Teller in the criminal case stated, as incompetent; but the evidence of the two daughters of Swinney was not overruled.

After the evidence was given, and the argument of counsel closed, the defendant's counsel requested the court to charge the jury, if they believed from the evidence that in June, 1854, Swinney told Patten, in New York, that he was not, and never had been, a partner of Teller, the plaintiffs could not afterwards deal with him so as to bind Swinney, unless proof were made of a new authority given to him. But the court refused to give the instruction prayed for, and said, if the jury were satisfied, from the evidence, that Swinney was actually a partner with Teller in the establishment at Fort Wayne, his declarations to the contrary to Patten, in New York, could not relieve him from liability in this action.

An exception was taken to the instruction refused, and to that which was given.

The instruction given on the evidence before the jury was proper. It was the province of the jury to determine the weight of evidence before them. The instruction asked by the defendant would have restricted this right, as it would have *thrown out of the case the [*128 evidence of the plaintiffs. The jury might believe that the remarks were made to Patten by Swinney, in the presence of his daughters, "that he was not, and never had been, a partner of Teller, at Fort Wayne," and yet, from the plaintiffs' evidence, find them to be untrue. This statement is represented to have been made in 1854, some two years after the merchandise had been purchased. It is said this was prior to the extension of the notes; but that is immaterial, as the partnership debt had been long before incurred. No one can manufacture evidence for himself in such a case. The judge treated the evidence fairly by submitting it, with the other facts, to the consideration of the jury.

The depositions which related to the declarations of Swinney, at different times and occasions, that he was not a partner of Teller's, were properly suppressed; they were not made in the presence of the plaintiffs, or their agent,

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Berkom v. Smith, 1 Esp. 29; Gibbons v. Wilcox, 2 Stark. 43; Parker v. Barker, 3 Moore, 226; Short v. Streatfield, 2 Mood. & Malk. 9; Williams v. Mudie, 1 C. & P. 158; Champlin v. Tilley, 3 Day, 306; Mitchell v. Roulstone, 2 Hall, 351; Thomson v. Kalback, 12 Serg. & R. 238; McGregor v. Cleveland, 5 Wend. 475; Reynolds v. Cleveland, 4 Cow. 822; McPherson v. Rathbone, 7 Wend. 216; 11 Wend. 96; Grant v. Shurter, 1 Wend. 148; Halliday v. McDougal, 20 Wend. 81; Gowan v. Jackson, 20 Johns. 176; Whitney v. Ferris, 10 Johns. 66.

The mere acknowledgment of two partners that a third person was a copartner, is not sufficient to charge him. Whitney v. Sterling, 14 Johns. 215; Miller v. McClenechan, 1 Yeates, 144; Carps v. Robinson, 2 Wash. 388; McPherson v. Rathbone, 7 Wend. 216; Robbins v. Willard, 6 Pick. 464; Martin v. Caffrath, 16 Serg. & R. 120.

General reputation, standing alone and not offered in corroboration of facts and circumstances, is inadmissible in evidence to prove a partnership. Quære, whether it be admissible even as auxiliary evidence. Halliday v. McDougal, 20 Wend. 81; McPherson v. Rathbone, 11 Wend. 96; Gowan v. Jackson, 20 Johns. 176.

Admissions or declarations of a person may be given in evidence against him, to show that he is a partner in the firm. But the declarations of one person, that another person is a partner, are not legal evidence as to the latter. They are evidence only against those who make them. Kirby v. Hewitt, 26 Barb. 607; Davidson v. Hutchins, 1 Hilt.123.

As against any one defendant, whether litigating the case, or not appearing, or even not served, evidence of his own admission, whether made to the plaintiff or to third persons, and whether made at or after the transaction in suit, or within a reasonable time before it, is competent to prove the existence of the firm, his own membership, who were his copartners, and what was the nature and scope of the business. Taylor v. Henderson, 16 Serg. & R. 453; Grafton B'k v. Moore, 14 N. H. 145; Campbell v. Hastings, 29 Ark. 512; Hoppock v. Moses, 43 How. Pr. 201; Bennett v. Holmes, 33 Ind. 108; Ralph v. Harvey, 1 A. & E. N. S. 845; 41 Eng. C. L. 803; Johnson v. Warden, 3 Watts, 101; Edwards v. Tracy, 62 Pa. St. 374; Crossgrove v Himmelrich, 54 Pa. St. 203; Fleshman v. Collier 47 Ga. 253; Smith v. Collins, 115 Mass. 388.

Such evidence is incompetent, except against declarant, unless in connection with other prima facie evidence that the other person was a partner with declarant, or authorized him to make the statement, or was aware of it and silent. Pleasants v. Fant, 22 Wall. 120; Robins v. Ward, 111 Mass. 244; Donley v. Hall, 5 Bush, 549; Johnson v. Gallivan, 52 N. H. 143; Van Epps v. Dillaye, 6 Barb. 244; Bancroft v. Harworth, 29 Iowa, 462. The declaration does not really corroborate as against the others, but it ceases to be error to receive it as against them. Gardner v. Northwestern M'f'g Co. 52 Ill. 367.

General reputation, common rumor, belief or opinion of witnesses founded on hearsay, are not competent evidence of partnership. Bowen v. Rutherford, 60 Ill. 41; Brown v. Crandall, 11 Conn. 93; Turner v. McIlhaney, 8 Cal. 575; Tumlip v. Goldsmith, 40 Ga. 221; Hicks v. Cram, 17 Vt 449; Union B'k v. Mott, 29 Barb. 180.

See, also, on this subject, the following English cases: Songster v. Mazaredo, 1 Stark. 161; Studdy v. Sanders, 2 D. & R. 347; Booth v. Quin, 7 Price 193; Martyn v. Gray, 14 C. B. N. S. 824; Edmundson v. Thompson, 31 L. J. Exch. 207; 8 Jur. N. S 235; 10 W. R. 300; 5 L. T. N. S. 428; 2 F. & F 564.

As to proof against one, of declarations of another, to show partnership—see note, 20 L.R.A 595.

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and of which the plaintiffs could have had notice. The oaths said to have been made on a certain occasion, by Teller and Swinney, belong to the same category.

The existence of the partnership at Fort Wayne seems to have been proved to the satisfaction of the jury. The firm was known by the name of Teller & Co. This was the admission of a partnership in their course of dealing; and if Swinney was not the partner, it would have been easy to prove who was.

The ruling of the court in the admission of the evidence to the jury, and the exclusion of that which was offered, was correct.

The judgment of the Circuit Court is affirmed, with costs.

DAVID A. SECOMBE et al., Plffs. in Er.,
v.
FRANKLIN STEELE.
(See S. C. 20 How. 94-108.)

Decree not defective for want of judge's signature—time or place, when essence of contract—Minnesota Code—assignee, when may be made party.

Decree of District Court of Minnesota is not defective because it wants the signature of the judge.

The Statute that directs the signature is directory; and other evidence to establish its verity as a record, may be considered.

Time may be made the essence of the contract, by express stipulation, or become essential from the nature of the property.

But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it.

Facts of the case in reference to this question examined, and plaintiff held not guilty of laches.

The Code of Minnesota enlarges the powers of the Court of Chancery of that Territory, and enables it to act in rem, and to pass the title without any act of the defendant.

If a person pendente lite takes an assignment of the interest of one of the parties to the suit, he may make himself a party by bill, but not by petition.

Argued Jan. 13, 1858. Decided Jan. 28, 1858.

IN ERROR to the Supreme Court of the Territory of Minnesota.

The action below was instituted by Steele, the present defendant in error, in the District Court for the Second District of the Territory of Minnesota, under the following sections of the Revised Statutes of the Territory, ch. 74, sec. 1: "An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse claim, estate or interest."

Section 2. "If the defendant in such action disclaim in his answer any interest or estate in the property, and suffer judgment to be taken against him without answer, the plaintiff cannot recover costs."

The plaintiff joined as defendants fifty-four different parties, who claimed distinct parcels of the land in controversy in distinct and several rights. Only thirty-two were served with process; only eighteen appeared; and only twelve appealed to the Supreme Court of the Territory.

The proceedings were as follows:

The several defendants filed their answers. The plaintiff demurred. The court sustained the demurrer and allowed the defendants to file amended answers.

The amended answer of Secombe (standing by stipulation for all the others, mutatis mutandis), introduces into this action the record of a certain pending suit in equity, which had been instituted prior to the abolishing of that form of proceeding, in its appropriate forum. The plaintiff moved to strike out portions of the amended answer, and demurred to the residue.

The court sustained the motion to strike out, and the demurrer, and rendered a final judgment against the defendants.

The case was then taken to the Supreme Court of the Territory, and the judgment below affirmed.

The case further appears in the opinion of the court.

Messrs. George E. Badger and J. M. Carlisle, for plaintiffs in error.

The plaintiffs in error will maintain, as primary propositions in this cause, the following:

1. In Taylor's estate in the lands was the subject of execution, and the same passed to the plaintiffs in error in respective parcels, subject to whatever equity Steele might establish in the then pending suit in equity. It was the legal estate which was seized and sold. But even if it were otherwise, it was still the subject of execution.

Rev. Stat. p. 363, sec. 91; p. 346, sec. 139; p. 361, secs. 76, 77; 2 Sto. Eq. Jur., secs. 1049, 1051.

2. That the title thus acquired was "by operation of law," and therefore not even a decree thereafter passed against Taylor would have affected such title; his assigns by operation of law not being parties to the same.

Sto. Eq. Pl., sec. 343, and notes; sec. 351, and note, Sedgwick v. Cleveland, 7 Paige, 290; Boring v. Lemon, 5 H. & J. 225; Bennet v. Williams, 5 Ohio, 462; Deas v. Thorne, 3 Johns. 543; Storm v. Davenport, 1 Sandf. Ch. 135.

3. That by virtue of the title so acquired, the plaintiffs in error were subrogated to Taylor's rights in respect of the purchase money, in the event of Steele's equity upon the lands being established. Therefore they had an "adverse claim, estate or interest" in the land, which were to be "determined in this suit." For the lands stood as security for the purchase money; and they, holding the legal titles, could not be decreed to convey or otherwise be devested of the same without their consent, except on payment of the purchase money.

Moyer v. Hinman, 17 Barb. 137, and cases cited by the court in that case; Tomlinson v. Blackburn, 2 Ired. Eq. 509, and cases then cited by the court.

4. In fact there was no decree even against Taylor. What is erroneously printed as part of the record under title of "Copy of consent for decree" and "Copy of decree," never were part of the record, nor in this cause for any purpose. But if such decree by consent had been passed, it would have been, in effect, the mere act of the parties. It is for this reason that no rehearing or appeal lies in such case.

NOTE.—Specific performance. Plaintiff must show readiness to perform and offer to perform. Will not be decreed when there is default in payment of purchase money, etc. See note to Colson v. Thompson, 4 L. ed. U. S. 254; and note to Pratt v. Carroll, 3 L. ed. U. S. 627.

Necessity that judgment be signed in order to complete the record—see note, 28 L.R.A. 624.

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Webb v. Webb, 3 Swanst. 658; Lansing v. Alb. Ins. Co. Hopk. 102; Bradish v. Gee, Amb. 229; Harrison v. Rumsay, 2 Ves. 488; 1 Belt's Supp. 413.

Disregarding these principles, the court below so proceeded as to debar these plaintiffs in error from setting up any "adverse claim, estate or title," in these lands, whether by reason of defect in Steele's equity, or by way of holding the legal titles as security for the purchase money; and this is a suit brought against them "to determine such adverse claim, estate or title;" and while their appeal was pending from the decree dismissing their petitions in the original suit between Taylor and Steele.

The special errors which have led to this result and which are now assigned, are as follows:

1st. The Supreme Court of Minnesota erred in that it did not reverse the order of the District Court in the suit granting the motion of the plaintiff Steele to strike out portions of the answer of Secombe (by stipulation answering for all the defendants).

(a) The first, fourth, fifth and eighth portions of the said answer stricken out by the said order, were directly responsive to allegations contained in the plaintiff's "complaint," tendering material issues necessary to be decided in order to the "determining of the adverse claim, estate or interest" of the defendants.

(b) The second portion of the said answer so stricken out, tendered to the plaintiff a material issue. The action being "for the purpose of determining such adverse claim, estate or interest," it is difficult to perceive how the defendants could be denied the right to show that the land which they had purchased was clear of the pretended equity of Steele.

(c) The sixth and seventh portions so stricken out alleged fraud and collusion between Steele and Taylor, to defraud and defeat the creditors of Taylor and purchasers at the sheriff's sale.

2d. The said court erred in that they did not reverse the order and judgment of the District Court sustaining the demurrer to the residue of the defendant's answer.

(a) The first special cause of demurrer assigned, is to the effect that the bond to convey on conditions performed, vested such a title in Steele as absolutely precluded these plaintiffs in error from setting up any "adverse claim, estate or title" in the land, whether as free of the pretended equity of Steele (conceding it), or as security for the payment of the purchase money. This pretension is based upon the supposed effect of the recording of the bond; but it is evident that the record has no other effect than that of constructive notice of the contents of the bond.

(b) The second cause assigned is, that the answer assumes that the title of Steele is founded upon the proceedings in equity; whereas the demurrer asserts that it is wholly independent of that suit. This is shown to be erroneous, if the principles hereinbefore asserted are correct.

(c) The third case assigned is, that whereas the answer sets up that there was no decree as against Taylor, yet it appears from the "paper book" exhibited with the answer, that there was such a decree. But it will be observed that it is only certain specified papers which are referred to in the answer, and reference is made to the paper book for true copies of these only. Besides, it has already been shown that this was only the form of a decree, not signed or enrolled; and that even if it had been signed or enrolled, it was by consent, and is only the act of the parties; and that it could not affect the "adverse claim, estate or interest" of the plaintiffs in error, which was the subject matter of this suit.

Messrs. C. Cushing and R. H. Gillet, for defendants in error:

1. The agreement between Steele and Taylor for the sale of the land, was a bona fide and fair transaction, and is unimpeached, and constituted a valid lien upon said land, and Steele's interest therein was unaffected by the purchase of Secombe and others.

2. That Steele performed the agreement on his part, and the title in him became complete upon the execution of the deeds to him by Taylor.

3. That Steele paid Taylor the full face of the agreement is not denied, but is admitted by the pleadings and proved by the record attached to the defendant's answer, and especially by their petitions to share in the money paid into court by Steele for Taylor.

4. That the deeds from Taylor to Steele conform to the terms of the agreement and the requirement of the decree.

5. Under the decree the title was perfect without the execution of the deeds.

6. The pleadings in the equity case, and also in this suit, show facts upon which a court of equity would compel a performance by Taylor, of his agreement to convey to Steele.

7. That at the time of the sheriff's sales, under which the defendants claim, Taylor had no estates in the land which he could have transferred, the land belonging to Steele and the purchase money to Taylor, the claim of the latter upon the land being that of security for the payment of the purchase money.

8. The answers of the defendants present no material issuable facts.

9. That there is nothing before this court except the questions arising upon the answers after being amended by the order of the court, the final judgment being upon the remaining portions of the answer.

10. That the decree in the suit between Steele and Taylor cannot be impeached collaterally, but only by direct proceedings.

Erwin v. Lowry, 7 How. 172. Nothing can be assigned for error which contradicts a record.

11. That the defendants had no right to intervene in the equity suit.

Tasker v. Small, 3 Myl. & C. 63 (14 Eng. Ch.); Smith Ch. Pr. 423; Wood v. White, 4 Myl. & C. 460 (18 Eng. Ch.); Hoxie v. Carr, 1 Sumn. 173; Deas v. Thorne, 3 Johns. 543; Murray v. Lylburn, 2 Johns. Ch. 441; Gaskell v. Durdin, 2 Ball. & B. 167; 1 Dan. Ch. Pr. 328, 329.

12. No appeal will lie from the motion to strike out portions of the defendant's answers.

When amendments are within the discretion of the court, no appeal lies from the order granting or refusing them.

Smith v. Babcock, 3 Sumn. 583; St. John v.

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West, 3 Code. Rep. 85; Seneca Bank v. Garlinghouse, 4 How. Pr. 174; Roth v. Schloss, 6 Barb. 308; Brown v. McCune, 5 Sandf. 229; Walden v. Craig, 9 Wheat. 576.

13. Every material fact, to show the right of Steele to the land, is admitted in this case, and no fact set up in the answers shows any right in the defendants.

14. From the admitted facts in this case, if Taylor had conveyed to the defendants, instead of to Steele, the latter, on the performance of the agreement now shown by him, could have compelled them to convey to him.

Mr. Justice Campbell delivered the opinion of the court:

This cause comes before this court upon a writ of error to the Supreme Court of the Territory of Minnesota.

The defendant in this court (Steele) instituted a suit in the District Court of Ramsey County, Minnesota Territory, against fifty-four defendants, to determine the validity of their "claim," "estate," or "interest," in certain real property at St. Anthony's Falls, in that county, of which he was possessed, and in which he claimed to have an estate in fee simple, under certain conveyances, which are appended to his complaint. This complaint shows that in 1849 the plaintiff and Arnold W. Taylor were tenants in common of a parcel of land which includes the property in dispute, and so occupied it until 1852. A portion was laid off into town lots, some of which were sold; expensive mills and other improvements were projected and partially completed on it; and controversies arose, and suits were pending between them, when the parties, in January, 1852, came to an agreement of sale. By this agreement, Taylor contracted to sell to the plaintiff his interest in the real property unsold, and the money and securities taken for the lots sold, for the sum of $25,000, and upon the condition that the plaintiff should acquit him from the payment of a certain demand, and assume his liabilities 101*] on *certain contracts for labor and building materials. Of this sum $1,000 were to be paid presently, and the remainder was to be paid in sixty days from the date, at the Merchants' or Suffolk Bank at Boston, and a certificate of deposit furnished to Taylor at St. Anthony's Falls; and in case of a default, the deposit of $1,000 was to be a forfeit. But if the payment was made in the manner stipulated, conveyances were to be executed by Taylor; and meanwhile he was to remain in the possession of the mill. The conveyances referred to in these articles were not executed until May, 1853, and purport to have been made in obedience to a decree of the District Court of Ramsey County, in a suit commenced by Steele against Taylor.

The complaint of Steele against the fifty-four defendants is, that they claimed an "estate," "interest," or "right," in that property, have from time to time declared that they were owners thereof, and have executed conveyances for a portion, and offer to sell or dispose of other parts, contrary to the right of the plaintiff.

The object of the suit is, to relieve the title of the plaintiff from the mischief of these adverse claims; to quiet his possession by means of a decretal order requiring the defendants to release them, or, in case of their failure to do so, that the judgment of the court may stand and be recorded in its stead. This proceeding is authorized by the Revised Statutes of Minnesota, ch. 74, sec. 1.

The twelve persons who are plaintiffs in this court, and were defendants in the District Court, appeared there, and severally claimed title to parcels of land included in the conveyances of Taylor to the plaintiff. Their claims respectively rest upon the facts, that between November, 1852, and April, 1853, judgments were rendered against Taylor in the District Court, upon which executions issued, and levies and sales were made of those parcels before May, 1853, in the regular course of judicial proceeding. At these sales the defendants were either purchasers, or derive title from such persons.

The defendants aver that their title is paramount to that of the plaintiff; for that the plaintiff is not entitled to any benefit from the articles of agreement executed by Taylor, in January, 1822, and then recorded, because he failed to comply with the obligation to pay $24,000 as agreed to by him.

And to avoid the recitals in the deeds, to the effect that they were executed under a decretal order of the court, they say that in May, 1852, the plaintiff filed a bill in the District Court, to compel Taylor to a specific performance of the contract of *January preceding. That [*102 upon the bill the Judge made an order for the payment of the $24,000 into court by Steele; and, upon the fulfilment of this fiat, that an injunction should issue to restrain Taylor from selling, conveying, or incumbering the property, or in anywise intermeddling with it. That an injunction and supœna issued, and that Taylor appeared, answered, and unsuccessfully moved to dissolve the injunction, in July, 1852. That no other act was done by the plaintiff until April, 1853, when the rights of the defendants had attached by those purchases from the sheriff. That in March, 1853, the defendants applied to the District Court to be made defendants in the cause, which application was finally unsuccessful, and that the plaintiff and Taylor then fraudulently closed their controversy by a decree rendered by consent under which the conveyances were made, and that their object was to defeat the claims of these defendants.

That, by this arrangement, the terms of the contract of January, 1852, were not adhered to, and that the $24,000 were not paid as stated in the deed.

It was a question in the District Court, as well as in this court, whether the decree and the agreement leading to it, that form a part of the record here, properly belong to the case. The defendants in the District Court maintained that it was pleaded by them. They are found in an exhibit to the answers—an exhibit which purports to be a transcript from a record in the Supreme Court of Minnesota, as furnished on an appeal from the District Court of Minnesota by the defendants, upon the decree disallowing their claim to be made defendants. Portions of this transcript are referred to in the answers, as forming material papers in the chancery suit, and the whole suit is referred to in the answers to support its allegations; and it is specifically set up and pleaded. We think therefore, that the record of that suit, as it ap-

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pears in the exhibit, must be taken as authentic, in deciding upon the sufficiency of the answer as a bar to the plaintiff's complaint. The decree purports to have been made by the court; it is formal, and disposes of the cause, and is only defective in not having the signature of the Judge. But it comes from the legal custody, has been accepted by the parties, and acted on by them; and was certified to the Supreme Court of the Territory, as a paper in the cause. We do not regard the signature of the Judge as indispensable to its authenticity. The Statute that directs the signature must be considered as directory; and other evidence, to establish its verity as a record of the court, may be considered.

In the District Court, the plaintiff moved to 103*] strike out portions *of the answer, for insufficiency and on other grounds, and demurred to the residue. His motion and demurrer were sustained, and a final decree rendered for the plaintiff. This decree was affirmed on appeal to the Supreme Court, and the defendants in that court prosecute their writ of error to this court. The Statutes of Minnesota prescribe: "That the court must, in every stage of an action, disregard any error or defect in the pleadings and proceedings which does not affect the substantial rights of the adverse party, and no judgment can be reversed or affected by reason of such error or defect." The question to an appellate court in the present case is, do the answers of the defendants, as pleaded by them, disclose a valid claim to the property in dispute, so as to bar the petition of the plaintiff for relief? No objection is taken to the validity of the contract of January, 1852, between the parties, Steele and Taylor. The record of that contract is notice to subsequent purchasers; and Steele, by the Statutes of the Territory, was entitled to have "precedence of" them, and "a lien upon the land, according to the import and meaning of the contract." Rev. Stat. ch. 47, sec. 3.

It is not denied that the plaintiff paid $1,000 at the execution of the contract, nor that the $24,000 were paid within sixty days into a bank at Boston—a bank of solvency and credit—nor that a certificate of deposit within a reasonable time afterward was offered to Taylor, at St. Anthony's Falls; nor that, upon his refusal to take the latter, the money and interest were immediately tendered to him; and upon a farther refusal, that relief was sought from a court of chancery, whose order for the payment of the money into court was promptly complied with. The precise grounds of complaint are, that neither the Merchants' nor Suffolk Bank was made the depository of the money, and a certificate from one of them has never been tendered to Taylor, and that he has the right to rely upon the letter of his contract. No specification has been made of any injury or inconvenience suffered by him, as a consequence of the deposit having been made in the Bank of Commerce, rather than in the Banks mentioned in the agreement. And the plaintiff avers, that the only reason for the change was, the refusal of those Banks to give a certificate of the kind mentioned.

At law, if there is an express agreement for the payment of the purchase money, and the delivery of the conveyance of the land by a particular day, and at a particular place, the parties will be bound by it, and time will be of the essence of the contract. But, in equity, the estate bargained and agreed to be sold becomes the property of the purchaser as soon as the *agreement is concluded. It will de- [*104 scend to his heirs at his death, or may be devised by him; while the purchase money vests in the vendor, and forms a part of his personal estate. In the ordinary case of the purchase of an estate, the assignment of a particular day or a specified place for the perfection of the title is considered as merely formal, the general object of the contract being the sale of an estate for a given sum, and the stipulation signifying that the purchase shall be completed promptly, and in a reasonable manner, regard being had to the circumstances of the case, and the nature of the title and property. Time may be made of the essence of the contract by express stipulation, or it may become essential by considerations arising from the nature of the property, or the character of the interest bargained. And the principle of the court of equity does not depend upon considerations collateral to the contract merely, nor on the conduct of the parties subsequently, showing that time was not of the essence of the contract in the particular case.

But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it.

Hepwell v. Knight, 1 Y. & C. Exch. 416.

In Parkin v. Thorold, 16 Beav. 59, the Master of the Rolls said: "A contract is undoubtedly construed alike both in equity and at law; nay, more—a court of law is the proper tribunal for determining the construction of it. But courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that, by insisting on form; the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. For instance, A has contracted to sell an estate to B, and to complete the title by the 25th October; but no stipulation is introduced, that either party considers time of the essence of the contract. A completes the title by the 26th: at law, the contract is at an end, and B may bring an action for the non-performance of the contract, and obtain damages for the breach; but equity holds, that unless B can show that the delay of twenty-four hours really produced some injury to him, he is not to be permitted to bring this action or to avoid the performance of the contract; not, certainly, on the ground that the 25th October was not a part of the contract, but on the ground that it is unjust that B should escape the performance of a contract which has been substantially performed by A, by reason of some omission in a formal but immaterial portion of it." Upon a view of the chancery record, our conclusions are, that the plaintiff, in good faith, attempted a literal performance *of his contract [*105 with Taylor; that the deposit of the money due, in a bank of solvency and credit, other than those named in the contract, did not inflict an injury upon Taylor, and the offer of its

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certificate of deposit, prima facie, was a substantial performance of its requirements. That his subsequent offer of the money and the interest that had accrued, and on the refusal of Taylor to receive it, his prompt application to chancery, and payment of the money into court, relieve the plaintiff from every imputation of laches or delay. The District Court expressed an opinion corresponding to this, in July, 1852, in denying the motion to dissolve the injunction, and this was a virtual decision of the cause in that court.

These transactions occurred before the judgments against Taylor, under which the land was afterwards sold, were rendered by the District Court. The District Court had the parties before it, and held the defendant (Taylor) under restraint, by injunction, and the purchase money in its custody. It had been empowered by a statute of the Territory "to pass the title to real estate by a decree, without any other act to be done on the part of the defendant, when, in its judgment, it was the proper mode to carry its decree into effect." Rev. Stat. Minn. p. 466, sec. 33. But, before the transfer to the plaintiff had been made, judgments were obtained and docketed against Taylor, which were "a lien upon all the real property of the debtor in the county owned by him at the date of the judgment, or afterwards acquired." The influence of these judgments, and of the levy of the executions upon the land described in the agreement of January, 1852, and the sale under those executions, remains to be considered. The twelfth of the "Ordinances in Chancery" of Lord Bacon is, that no decree bindeth any that cometh in bona fide by conveyance from the defendant before bill exhibited, and is made no party, neither by bill nor the order; but where he comes in pendente lite, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of the suit, or the court made acquainted with, the court is to give order upon the special matter according to justice. The rule has been applied with steadiness to all cases of transfer during the progress of a cause, notwithstanding the hardship of individual cases, from considerations of public policy and convenience. Suits would be interminable, if the rights of the parties could be disturbed by mesne conveyances, and a necessity imposed for the introduction of other parties on the record. The apparent exception to the rule arises when an event occurs which deprives the party on the record, not only of his interest in the subject of 106*] *the suit, but also of his faculty to comply effectively with the decree of the court. In such a case, additional parties are necessary to enable the court to make an operative decree. The Court of Chancery ordinarily acts in personam; and in cases like the present, perfects the title of the purchaser by requiring the vendor to execute a title conformable to the agreement. But, in cases of bankruptcy and insolvency, the bankrupt or insolvent is stripped of his rights of property and of his capacity to defend suits in which he is a party. In such cases the assignees are commonly made parties (Dan'l Pr. 328); but there are opposing authorities—Cleveland v. Boerum, 23 Barb. 201. And it has been decided that a purchaser under an execution issued on a judgment rendered pendente lite, need not be made a party in such a case. Scott v. Calemon, 5 Mon. 73.

The statute we have cited from the Code of Minnesota enlarges the powers of the Court of Chancery of that Territory, and enables it to act in rem. It may pass the title without any act of the defendant. The bill, subpœna, and injunction, placed the property wholly under the control of the Court of Chancery, and new parties were not requisite to enable the court to vest the title in the equitable claimant.

This principle is not peculiar to courts of chancery; but the maxim that "pendente lite nihil innovetur," is applied in real and mixed actions by the common law.

Was there a valid exercise of the jurisdiction of the court, and did the decree pass the title to the purchaser? Had the plaintiff any duty to perform, in regard to the application of the purchase money, in the registry of the court? Some authorities affirm that a purchaser of the legal title at a judicial sale immediately succeeds to the rights of the debtor, and that the equitable claimant under an executory contract becomes responsible to him for the purchase money remaining unpaid. Moyer v. Hinman, 17 Barb. 137; 16 Serg. & R. 18. Other authorities recognize the right of the purchaser to the benefit of the contract from the time that the equitable claimant has notice of the sale and conveyance by the sheriff, (Moyer v. Hinman, 13 N. Y. 180; 2 Ired. Eq. 507; 4 Madd. 506, note); while other well-considered cases deny that the purchaser at the sheriff's sale obtains a title which can be interposed to impede the progress of the legal title to the purchaser by articles, or operates as a transfer of his debt for the unpaid purchase money from his vendor to the claimant under the judgment. Chinn v. Butts, 3 Dana. Ky. 547; Lodge v. Lyseley, 4 Simon, 70; Whitworth v. Gaugain, 3 Hare, 416; Scott v. Calemon, 5 Mon. 73. The case reported in 3d Dana was a contest between two *purchasers—one [*107 under an executory contract, and the other under a judgment against the vendor while a part of the purchase money remained unpaid. The holder of the sheriff's title recovered in an ejectment; and the questions decided arose on a bill for relief filed by the defendant upon his elder equitable title. The court say, that "the purchase of the entire legal title, with notice of an outstanding equity, arising from a previous sale of the land by the same vendor to a stranger, does not per se transfer to the purchaser any right, legal or equitable, to any portion of the unpaid consideration remaining due to the vendor from the first buyer; and if there should be any extraneous ground for an equitable substitution, it should be asserted and shown by the purchaser before the stranger holding the prior equity had made full payment to the vendor. If there be such an equity, it is against the vendor, and not against the debtor; and, whether it exist or will ever be asserted, the debtor cannot be presumed to know."

Without attempting to reconcile these cases, or to discover whether that is possible, it is evident that the present case does not fall with-

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in the limits of either of them. The right of the plaintiff to precedence over the judgment creditor, or the purchaser under his execution does not depend upon the exercise of the extraordinary jurisdiction of the Court of Chancery, and is not confined by the rules under which that court administers that jurisdiction. His priority is a legal right, reposing upon the legislative authority. Before the judgment creditor had established his debt, the plaintiff had acquired possession of the property, and had paid his money into court. His purchase money was thus paid. If the purchasers from the sheriff acquired any title to that money by their purchase of the land, it is evident that it should have been asserted by direct appeal to the court, and not by an adversary proceeding at law for the land. If a person pendente lite takes an assignment of the interest of one of the parties to the suit, he may, if he pleases, make himself a party by bill, but he cannot by petition pray to be admitted as a party defendant; all that the court will do is to make an order that the assignor shall not take the property out of court without notice. Dan'l Ch. Pr. 329; Wiswall v. Sampson, 14 How. S. C. 52.

We do not consider that the act of Taylor in consenting to a decree, or the act of the plaintiff in accepting one, is evidence of any fraud, or of a conspiracy against the defendants in this suit. The decree was a consequence of the opinion of the court upon the cause as presented by the pleading, on the motion to dissolve the injunction; and so far as the equities of the parties are to be considered, the decree embodies them.

108*] *There is no other specification of fraud, and the general charges of fraud, unaccompanied by a statement of the facts constituting the fraud, have no effect or influence.

We are of opinion that there is no error in the record, and the judgment of the Supreme Court of Minnesota Territory is affirmed.

FRANK DYNES, Plff. in Error,
v.
JONAH D. HOOVER.

(See S. C. 20 How. 65–84.)

Courts-martial—Congress can provide for and regulate—where liberty of citizen is restrained in proceedings coram non judice, false imprisonment is proper action—officer executing process of court without jurisdiction, is trespasser—civil courts may give redress for illegal punishment by courts-martial, or where they have no jurisdiction—on charge of desertion, courts-martial may convict of attempt to desert—sentence by, to penitentiary of District of Columbia, legal.

Congress has the power to provide for the trial and punishment of military and naval offenses in the manner practiced by civilized nations.

Where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain rules in the proceedings, from which it deviates, whereby the proceedings are rendered coram non judice, trespass for false imprisonment is the proper remedy, where the liberty of the citizen has been restrained by process of the court, or by the executions of its judgment.

An officer, executing the process of a court which has acted without jurisdiction over the subject matter, becomes a trespasser.

Courts-martial derive their jurisdiction and are regulated by an Act of Congress, or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends.

If a court-martial has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, in an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give redress.

Argued Jan. 8, 1858. Decided Feb. 1, 1858.

IN ERROR to the Circuit Court of the United States for the District of Columbia.

This was an action of trespass and false imprisonment, instituted by the plaintiff, Frank Dynes, late a seaman in the United States Navy, against the defendant, John D. Hoover, for imprisoning him and causing him to be imprisoned in the Penitentiary of the District of Columbia. The defendant pleaded that the imprisonment was by the authority of a sentence of a naval general court-martial, convened under the Act of Congress of April 23, 1800, and that the defendant, as Marshal of the United States for the District of Columbia, was directed by the President, in a letter, to commit the said plaintiff to the Penitentiary in the District of Columbia, in accordance with the sentence of the said naval general court-martial, which direction the defendant, as Marshal aforesaid, executed and obeyed.

The defendant also alleged that the said sentence was absolute and final, and that the Circuit Court of the District of Columbia had no jurisdiction in the case.

The plaintiff demurred to the plea, on this ground that the court-martial had no jurisdiction or authority to pass such a sentence; that the sentence was illegal and void; and because the President had no jurisdiction or authority to write such letter as that pleaded; and that the letter and the directions therein contained were unconstitutional, illegal and void.

A further statement of the case appears in the opinion of the court.

Messrs. J. M. Carlisle, George E. Badger and Charles Lee Jones, for plaintiff in error.

A court-martial having no jursdiction but one limited and defined, both in respect of persons and offenses, can take no cognizance of any impropriety but such as is prohibited and punished by positive law.

There must be a certainty of the offense committed. It must be set out in such terms as bring it unequivocally and clearly within the law or statute by which it is made punishable. In some instances, even words synonymous with those of the article prohibiting the offense, do not suffice; but the very words of the whole fact must be set forth with certainty in the specifications. All the circumstances of the time, place and manner of the act charged, must be minutely described. If disrespectful, contemptuous or mutinous words be imputed to him, the very words must be specified. A court-martial more resembles a tribunal of the civil law, since the members unite in their

NOTE.—Naval courts marshal—jurisdiction of, as to persons and offenses, how constituted, etc.—see note to Wilkes v. Dinsman, 12 L. ed. U. S. 618.

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own persons the character, both of judge and juror.

Tytler, ch. 5, sec. 1. pp. 206, 218; 2 McArthur, ch. 1, secs. 3, 6-16; Hough, p. 32; Macomb, secs. 31-39, p. 25; De Hart, pp. 287, 292; Hickman, p. 168; 3 Greenl. Ev. p. 472.

The rationale of the rule is the same in all courts; which is, that the prisoner, being thus minutely informed under what law and for what offense and of what facts he is accused, may duly prepare himself for his trial. In the same spirit it is required that he be furnished with a copy of the charges and specifications, and the names and descriptions of the witnesses for the prosecution, in due time before his trial. The object of this rule is, not only that he may be prepared to meet the matter of the charge, but to canvass, and if necessary impeach, the competency or the credit of the witnesses. The charges, after a copy of them has been thus served upon the prisoner, are unalterable except under very peculiar and extraordinary circumstances.

Adye, pp. 127, 128; Tytler, 217, 244, 258; 1 McArthur, pp. 281, 282; Macomb, sec. 36 p. 26; De Hart, p. 102.

Now as to the procedure of the court-martial, whose judgment and sentence are now in question.

For the plaintiff we contend—

That the judgment and sentence of the court-martial was an absolute nullity, and affords no sort of a justification to anyone executing process under it.

The following well settled principles of law can not be controverted: "That when a court has jurisdiction, it has a right to decide every question before it, and if its decision is merely erroneous and not irregular and void, it is binding on every other court until reversed. But if the subject matter is not within its jurisdiction, or where it appears from the conviction itself that they may have been guilty of an excess, or have decided on matters beyond and not within their jurisdiction, all is void, and their judgments or sentences are regarded in law as nullities. They constitute no justification; and all persons concerned in executing such judgments or sentences, are trespassers, and liable to an action thereon.

1 Pet. 340; 2 Pet. 169; Griffith v. Frazier, 8 Cranch, 9; 14 How. 144; Wickes v. Caulk, 5 Harr. & J. 42; Bigelow v. Stearns, 19 Johns. 39; Case of The Marshalsea, 10 Co. 76; Terry v. Huntington, Hardres, 480; Shergold v. Holloway, 2 Str. 1002; Hill v. Bateman, 1 Str. 710; Perkins v. Proctor, 2 Wils. 382; Dr. Bouchier's case, cited 2 Wils. 385; Martin v. Marshall, cited 2 Wils. 386; Parsons v. Lloyd, 3 Wils. 341; Miller v. Seare, 2 W. Bl. 1145; Crepps v. Durden, Cowp. 640; Groome v. Forrester, 5 M. & S. 314; Warne v. Varley, 6 T. R. 443; Brown v. Compton, 8 T. R. 424; Moravia v. Sloper, Willes, 30; Peacock v. Bell, 1 Saund. 74; 8 T. R. 178; 2 W. Bl. 1035; The King v. Bugger, 1 Dowl. & R. 460; 3 Camp. 388; Doswell v. Impey, 1 B. & C. 169.

A court-martial is one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. It is an inferior court, in the most technical common law sense of those words. The law will intend nothing in its favor. The decision of such a tribunal in a case without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers.

Wise v. Withers, 3 Cranch, 337; Ex parte Watkins, 3 Pet. 208; Mills v. Martin, 19 Johns. 32; Smith v. Shaw, 12 Johns. 267; Brooks v. Adams, 11 Pick. 442; Duffield v. Smith, 3 Serg. & R. 599; 3 Greenl. Ev. sec. 470; Warden v. Bailey, 4 Taunt. 67; Frye v. Ogle, 1 McArthur, App. No. 24, and Hickman, App. No. 17; Moore v. Bastard, 2 McArthur, 194-200; 1 McArthur, chap. 10, sec. 9, pp. 264, 272; Hanneford v. Hunn, 2 Carr. & P. 148; Wharton's Am. Law of Homicide, 52.

Two essential vices appear on the face of the proceedings of the court-martial in question, either of which would alone render their proceedings irregular and void.

1. The finding was in a cause coram non judice, it being for an offense of which the plaintiff was never charged, and of which the court had no cognizance.

2. The subject matter of the sentence, the punishment inflicted, was not within their jurisdiction, and is a punishment which they had no authority of law to inflict. See Hickman, 149, 152, and McArthur, 158.

1st. The court-martial was brought into existence by the order or precept of the Secretary of the Navy. The plaintiff "legally brought before it" for the trial of his guilt or innocence of the following "charge and specification of a charge preferred by the Secretary of the Navy," and to no other legal intent or purpose whatsoever.

"Charge—Desertion.

Specification.

In this, that on or about the 12th day of September, in the year 1854, the said Frank Dynes deserted from the United States ship Independence, at New York.

J. C. Dobbin,
Secretary of the Navy."

Of this charge, and of this charge only, had the court-martial jurisdition to try him (see 2 McArthur, 221), and their decision as to his guilt or innocence upon this charge, would be as absolute and final as would be the decision of any other court on matters within their jurisdiction.

But the court-martial acquitted him of the only charge legally brought before them, the only subject matter whereof they had cognizance, but found him guilty of another offense of which they had no sort of jurisdiction; an offense as yet unknown to the law—not enumerated in the naval articles as one of the crimes within the cognizance of a court-martial.

The finding of the court was as follows:

"The court do find the accused, Frank Dynes, seaman of the United States Navy, as follows: Of the specification of the charge, guilty of attempting to desert; of the charge, not guilty of deserting, but guilty of attempting to desert."

This finding is in direct violation of the oath which, by the 36th article of the Act of Congress for the government of the Navy, each member of the court is required to take "before proceeding to trial," that he "will truly

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try without prejudice or partiality the case now depending;" and of the 38th article, which declares that all charges on which an application for a general court-martial is founded, shall be exhibited in writing to the proper officer, nor shall any other charge or charges than those so exhibited be urged against the person to be tried before the court, unless under the circumstances there enumerated, "in which case reasonable time shall be given to the person to be tried, to make his defense against such new charge."

See Macomb on Courts-Martial, secs. 35 and 36, p. 26; De Hart, p. 102; Tytler, 217.

It is true that at common law the jury may frequently find the prisoner guilty of a minor offense included in the charge, or of a part of the offense therein specified; as on an indictment for petit treason he may be found guilty of murder or of manslaughter, for both these offenses are included in the charge, as is also the offense of manslaughter in the charge of murder; and under an indictment charging an assault with intent to murder, the party may be convicted of a simple assault only; or under an indictment charging an assault with intent to abuse and carnally know, the defendant may be convicted of an assault with intent to abuse simply.

1 Chit. Cr. Law, 250–251.

But on an indictment for felony he cannot be convicted of a misdemeanor, because the offenses are distinct in their nature and of a distinct legal character.

Nor can a party be convicted on an indictment for a specific offense of an attempt to commit that offense. Thus, on an indictment for burglariously breaking and entering a dwelling house and stealing the goods mentioned, the party may be acquitted of the burglary and convicted of the larceny, it being included in the charge; but he cannot be acquitted of the burglary and stealing and convicted of a burglary with intent to steal or to commit any other felony, for they are distinct offenses.

See Vandercomb and Abbott's case, 2 Leach. C. L. 828–833; 1 Russell on Crimes, 831; Com. v. Roby, 12 Pick. 505–6–7.

So, on an indictment for murder, he cannot be acquitted of the murder and convicted of an assault with intent to murder. He is before the court charged with a specific offense, and is prepared only to defend himself against that charge and the matter therein specified; he may entirely rely upon the evidence of the very man of whose murder he is charged, to prove that no homicide has been committed.

Courts-martial, following these principles of the common law, may also find a party guilty of a minor offense included in the charge. As on a charge of desertion, they may acquit of that charge and find the party guilty of "absence without leave," for this offense is of a like nature, and all its ingredients are included in the charge, for absence is the principal question in issue.

Tytler, 321, 322, 323.

But attempting to desert is altogether a distinct offense, depending upon different facts and circumstances, of which the party has had no notice.

Besides, "absence without leave" is by the *British Mutiny Act*, and the 21st article of the Act of Congress for the government of the army (April 10, 1806, 2 Stat. at L. 362) made a military offense within the cognizance of an army court-martial.

But "attempting to desert" is not enumerated by the articles for the government of the navy, as an offense within the cognizance of a naval court-martial. A naval court-martial derives its sole being from, and is the mere creature of the Act of Congress, and has no jurisdiction of any other offenses than such as are therein enumerated as within their cognizance. "When a new court is erected, it can have no other jurisdiction than that which is expressly conferred, for a new court cannot prescribe."

4 Inst. 200.

But it may be contended that the 32d article covers this offense, which article is in these words: "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs at sea." However this may be, the offense at any rate should have been legally brought before the court by a charge and specification; as it is, the cause was coram non judice, and their judgment and sentence is not voidable, but absolutely void.

"A court can give no judgment in a thing not depending, or that does not come in a judicial way before the court.

2 Salk. 511; Burdett v. Abbott, 14 East, 1; Skin. 522, 524; Beaurain v. Scott, 3 Camp. 388; 1 Bl. Com. 101.

2. The sentence of the naval court-martial, sentencing the plaintiff to imprisonment at hard labor in the penitentiary of the District of Columbia, is not only without color of authority, but in positive opposition to the very terms in which the purposes and ends to which, exclusively, that institution is dedicated.

The Act of Congress, March 3, 1829, sec. 1, 4 Stat. at L. p. 365, enacts "that the Penitentiary erected in the City of Washington, in pursuance of an Act to provide for erecting a Penitentiary in the District of Columbia and for other purposes, passed May 20, 1826, shall be designated and known as the Penitentiary for the District of Columbia, and shall be exclusively appropriated to the confining such persons as may be convicted of offenses which are now, and may hereafter be, punishable with imprisonment and labor under the laws of the United States, of the District of Columbia." The Act of March 2, 1831, 4 Stat. at L. p. 448, enumerates the crimes and offenses that may be punished with imprisonment and labor, and sec. 15 enacts that "every other felony, misdemeanor, or other offense not provided for by this Act, may and shall be punished as heretofore."

Messrs. C. Cushing, Atty-Gen., and R. H. Gillet, for defendant in error:

First. The naval court-martial has jurisdiction of the offense of which the plaintiff was convicted.

Among the powers conferred upon Congress by the 8th section of the first article, are the following:

"To provide and maintain a navy.

"To make rules for the government and regulation of the land and naval forces."

The 8th amendment, which requires a pre-

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sentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation "cases arising in the land or naval forces."

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations.

In the exercise of the powers thus conferred upon the Legislative Department, the Act of April 23, 1820, 2 U. S. L. p. 45, was passed.

The 17th article of said Act provides, "And if any person in the navy shall desert or entice others to desert, he shall suffer death, or such other punishment as a court-martial shall adjudge."

The 32d provides, "All crimes committed by persons belonging to the navy which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea."

Congress specified a limited number of offenses, and among them desertion; and then in the 32d article, made provision for all possible cases which could occur in the naval service.

Among the offenses which may be committed, is the attempt to desert. Desertion is where a person, bound by his enlistment to remain in service, in violation of his duty escapes from the control of those in command. An attempt to desert is where the motive to desert is conceived and an effort made to carry it into effect, but which is not fully accomplished, owing to the want of success, or to a change of purpose. Such an offense deserves punishment in a degree but little below successful desertion. It is clearly one of the unspecified offenses provided for in the 32d article.

The 35th article provides for the appointment of courts-martial. These courts are created for the purpose of trying all cases arising in the naval service.

The 38th article provides that charges shall be made in writing, which was done in this case. It appears by the record that Dynes appeared and pleaded to the charge.

It is a well settled rule, that where a person is charged with a high offense, he may be convicted of a lower one of the same class.

In The People v. Jackson, 3 Hill, 92, Cowen, J., in delivering the opinion of the Supreme Court, said:

"The case is in principle like a conviction of manslaughter under an indictment for murder; or of simple larceny, under an indictment for burglary or robbery. The indictment charges facts enough, and more than enough, to make out a misdemeanor; and the prosecution in such case is never holden to fail, merely because all the alleged circumstances are not proved, if such as are proved, make out a crime, though of an inferior degree.

In The People v. White, 22 Wend. 167, 176, the Supreme Court of New York laid down the same rule.

Roscoe, in his work on Criminal Evidence (p. 99), cites numerous cases to prove that this rule is correct and sound.

The same principles are laid down in Phill. Ev. p. 203.

In Chit. Cr. Law, Vol. 1, 250, 251, the same rule is stated and many cases cited to prove it correct.

These rules are equally applicable to court-martial cases.

Writers on courts-martial lay down similar rules.

O'Brien says: "When the offense named in the charge admits of less degrees of criminality, the court may find the specification to amount to only one of these lesser degrees of the same crime." p. 265.

De Hart says: "A court-martial therefore may, in some instances, find a prisoner guilty of the offense in a less degree than that stated. For example, a prisoner charged with desertion may be acquitted of the charge and found guilty of absence without leave. So in all such or similar findings of a court-martial, must there exist a kindred nature between the offenses, as it would clearly be a violation of justice to find a prisoner guilty of a crime differing in kind, and therefore not depending upon degree of culpability, from that with which he stands charged." pp. 184, 185.

Simmons says: "It is scarcely necessary to remark that the punishments peculiar to desertion cannot be awarded on conviction of absence without leave, however aggravated; and that an offender, charged with desertion, may be found guilty of the minor crime of absence without leave, and receive judgment accordingly." pp. 338, 339.

The great object in view in courts-martial is to secure justice in the simplest manner possible. De Hart says (p. 146): "The same technical nicety which courts of civil jurisdiction observe in criminal cases, is not desirable or necessary in the proceedings of a court-martial; and exceptions made to form or matter, are only admitted by them when such appear essential to abstract justice."

The authorities above cited show, than on a charge for a higher offense, the accused could be tried and convicted of a less one of the same generic character. It follows that the court had ample jurisdiction to try and determine it. Having the authority to try the plaintiff, the decision upon his guilt is conclusive upon him, and is not the subject of review in this court; though if it were, its correctness would not be questioned after reading the evidence.

Second. As the court had jurisdiction, no errors committed in its exercise can be reviewed or corrected by this court.

The decisions of courts-martial are as conclusive as those of any other tribunal. Their jurisdiction is general over a class and is exclusive as to all naval offenses. Whether they exercise it wisely or erroneously while they keep within such jurisdiction, is not the subject of review by other courts. The matter becomes res judicata.

The plaintiff insists that the court exceeded its jurisdiction in requiring him to be imprisoned for six months at hard labor, in the Penitentiary of the District of Columbia. The 32d article of the Act of 1800 is referred to as proof of this. It is in these words:

"All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea."

It is contended by the plaintiff that the punishment adjudged is not according to the laws

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and customs in such cases at sea. But this does not appear.

If it is a question of law, it was clearly one for the court-martial sitting to determine, and their decision is final, and not reviewable here.

If it were a question of fact, it was equally the duty of the court-martial to consider and determine it upon the evidence before them; and that determination is equally conclusive as if it were a question of law.

It is clear, that the question of punishments authorized by the laws and customs of sea, is one purely of fact. Such customs and laws are not written in books, but exist as matters of fact resting in tradition and practice. This court cannot know them as a matter of law, and certainly not as a matter of fact. There are some thirty crimes specified in the Statute, where the punishment is within the discretion of the court-martial. This may be by being shut up in the hold, or confined on the deck of a ship, or confinement at such place, at sea or on land, as the court think proper. The sentence may include hard labor or not, at the discretion of the court.

The very points now in dispute were legitimately before the court-martial for its determination. The accused could be heard on all questions of law and fact. He gave such evidence as to both as he saw fit. The court considered the case as presented, and disposed of these same questions as a part of its duty, and thus they became finally and conclusively settled; and the proceeding having been approved by the Secretary, this court is bound to consider them rightfully settled. But if it should not, still the adjudication is binding upon it. This view of the case is sustained by the highest authority.

In Martin v. Mott, 12 Wheat. 19, 29, 30, this court held that, "the authority to decide whether the exigencies contemplated in the Constitution of the United States and the Act of Congress of 1795, in which the President has authority to call forth the militia to 'execute the laws of the Union, suppress insurrections and repel invasions,' have arisen, is exclusively vested in the President, and his decision is conclusive upon all other persons."

In Watkins' case, 3 Pet. 193, p. 202, the question of the effect of a judgment was fully considered in this court. In delivering the opinion, Story, J., said:

"A judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose judgment is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it."

In Wilcox v. Jackson, 13 Pet. 498, 511, this court, speaking of the conclusiveness of judgments, said:

"This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally in question, so long as it is unreversed."

In Elliott v. Piersol, 1 Pet. 328, 340, this court held: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding on every other court."

3. The plaintiff could be lawfully imprisoned in the Penitentiary of the District of Columbia.

Conceding that the court could lawfully adjudge the plaintiff to be imprisoned, he contends that it could not lawfully direct his imprisonment at hard labor in the Penitentiary in the District of Columbia.

There is no evidence, as a matter of fact or of law, that he could not be ordered into prison or to submit to hard labor on arriving there. For aught this court can judicially know, both were fully authorized by the laws and customs of the sea. In this case, if the determination of the court-martial was wrong upon any point, it is for the plaintiff to show it, because it is a universal rule to presume that all official personages perform their duties, until the contrary is proved.

4. The President could lawfully direct the Marshal to assist in the execution of the sentence of the court-martial.

In the present case, no officer was designated to execute the judgment of the court. No law had provided an agent to do so; but the Constitution had devolved a general duty upon the President, which included it.

5. The mandate upon which the Marshal acted, showing upon its face a trial, conviction, and sentence of the plaintiff for an offense within the jurisdiction of the court-martial protects said Marshal while acting under its directions. The President's mandate was as full as the usual writ of execution upon a civil judgment. On its face there was no defect. The Marshal was not bound to go behind the writ, and ascertain whether the court had performed its duty and rendered the proper judgment. He was only concerned in ascertaining that the court had jurisdiction, under the statute of naval offenses, and that the writ showed a conviction and sentence.

Savacool v. Boughton, 5 Wend. 170; McGuinty v. Herrick, 5 Wend. 240; Lewis v. Palmer, 6 Wend. 368; Easton v. Calender, 11 Wend. 90; Butler v. Potter, 17 Johns. 145.

So in Massachusetts, it is the received law that an officer is bound only to see that the process which he is called upon to execute is in regular form, and issued from a court having jurisdiction of the subject.

Wilmarth v. Burt, 7 Met. 257; Donahoe v. Shed, 8 Met. 326. And such is the common law in Great Britain.

Cameron v. Lightfoot, 2 W. Bl. 1190; Belk v. Broadbent, 3 T. R. 183; Tarlton v. Fisher, 2 Doug. 671; see, also, Williams v. Stewart, 12 Sm. & Mar. 533; Cody v. Quinn, 6 Ired. 191.

Mr. Justice Wayne delivered the opinion of the court:

The plaintiff brought an action for assault and battery and false imprisonment, charging that the defendant imprisoned him in the Penitentiary of the District of Columbia. The defendant pleaded the general issue, and several special pleas, in which he denied the force and injury, and set up, that he, as Marshal of the

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District of Columbia, imprisoned the plaintiff by virtue of the authority of the President of the United States, in the execution of a sentence of a naval court-martial, convened under an Act of Congress of the 23d of April, 1800; which sentence was approved by the Secretary of the Navy, which was final and absolute, and denying the jurisdiction of the court. The plaintiff filed a retraxit, admitting that there was no battery, other than the imprisonment in pursuance of the sentence of the court-martial.

The charge by the Secretary of the Navy was desertion, with this specification: "that on or about the twelfth day of September, in the year of our Lord one thousand eight hundred and fifty-four, Frank Dynes deserted from the United States ship Independence, at New York." He pleaded not guilty. After hearing the evidence, the court declared: "We do find the accused, Frank Dynes, seaman of the United States Navy, as follows: Of the specification of the charge, guilty of attempting to desert; of the charge, not guilty of deserting, but guilty of attempting to desert; and the court do thereupon sentence the said Frank Dynes, a seaman of the United States Navy, to be confined in the Penitentiary of the District of Columbia, at hard labor, without pay, for the term of six months from the date of the approval of this sentence, and not to be again enlisted in the naval service." This conviction and sentence was approved by the Secretary of the Navy, on the 26th of September, 1854. The prisoner was then brought from New York to Washington, in custody; and the President, reciting the trial and sentence, made the following order upon the defendant, the Marshal, in relation to carrying the judgment of the court into execution. "The prisoners above named (the plaintiff, Dynes, being one, among others), having been brought to the city, by direction of the Secretary of the Navy, in the United States steamer Engineer, you are hereby directed to receive them from the commanding 78*] officer of said vessel, and commit them *to the Penitentiary in the District of Columbia, in accordance with their respective sentences." These facts formed a portion of the defendant's pleas, to which the plaintiff demurred, pointing out the following causes of demurrer:

1. Because the said court-martial had no jurisdiction or authority whatever to pass such sentence as that pleaded and set forth in said plea.

2. Because the sentence is illegal and void.

3. Because the President of the United States had no jurisdiction or authority whatever to write such a letter to the defendant as that pleaded and set forth in said plea, nor in any manner whatever to direct the defendant to commit the plaintiff to the Penitentiary in the District of Columbia, in accordance with said sentence.

4. Because the said letter, and the said directions therein contained, are unconstitutional, illegal and void.

5. Because the said plea is altogether vicious and insufficient in law, and wants form.

There was a joinder in demurrer and judgment for the defendant.

This presents the question, whether the defendant, as Marshal, was authorized to execute the direction to receive the plaintiff, then in custody of the captain of the United States steamer Engineer, to deliver him to the keeper of the Penitentiary of the District of Columbia.

The demurrer admits that the court-martial was lawfully organized; that the crime charged was one forbidden by law; that the court had jurisdiction of the charge as it was made; that a trial took place before the court upon the charge, and the defendant's plea of "not guilty;" and that upon the evidence in the case the court found Dynes guilty of an attempt to desert, and sentenced him to be punished, as has been already stated; that the sentence of the court was approved by the Secretary, and that by his direction Dynes was brought to Washington; and that the defendant was Marshal for the District of Columbia, and that in receiving Dynes, and committing him to the keeper of the Penitentiary, he obeyed the orders of the President of the United States in execution of the sentence. Among the powers conferred upon Congress by the 8th section of the 1st article of the Constitution, are the following "to provide and maintain a navy;" "to make rules for the government of the land and naval forces." And the 8th amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation "cases arising in the land or naval forces." And by the 2d section of the 2d article of the Constitution it is declared that "The *President [*79 shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States."

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other.

In pursuance of the power just recited from the 8th section of the 1st Article of the Constitution, Congress passed the Act of the 23d April, 1800 (2 Stat. at L. 45), providing rules for the government of the navy. The 17th article of that Act is: "And if any person in the navy shall desert or entice others to desert, he shall suffer death, or such other punishment as a court-martial shall adjudge." The 32d article is: "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." The 35th article provides for the appointment of courts-martial to try all offenses which may arise in the naval service. The 38th article provides that charges shall be made in writing, which was done in this case. The court was lawfully constituted, the charge made in writing, and Dynes appeared and pleaded to the charge. Now, the demurrer admits, if Dynes had been found guilty of desertion, that no complaint would have been made against the conviction for want of jurisdiction in the court. But as it appears that the court, instead of finding Dynes guilty of the high offense of desertion, which authorizes the punishment of

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death, convicted him of attempting to desert, and sentenced him to imprisonment for six months at hard labor in the Penitentiary of the District of Columbia, it is argued that the court had no jurisdiction or authority to pass such a sentence; in other words, in the language of the counsel of the plaintiff in error, that "the finding was coram non judice, it being for an offense of which the plaintiff was never charged, and of which the court had no cognizance. That the subject matter of the sentence, the punishment inflicted, was not within their jurisdiction, and is a punishment which they had no sort of permission or authority of law to inflict."

But the finding of the court against the prisoner was what is known in the administration of criminal law as a *partial verdict*, in which the accused is acquitted of a part of the accusation against him, and found guilty of the residue. As when there is an acquittal on one count, and a verdict of guilty on another. Or when the charge is of a higher degree, including one of a lesser, there may be a finding by a *partial verdict* of the latter. As upon a charge of burglary, there may be a conviction for a larceny, and an acquittal of the nocturnal entry. So, upon an indictment for murder, there may be a verdict of manslaughter, and robbery may be reduced to simple larceny, and a battery into an assault.

The objection is ingeniously worded, was very ably argued, and, we may add, with a clear view and knowledge of what the law is upon such a subject, and how the plaintiff's case must be brought under it, to make the defendant responsible on this action for false imprisonment. But it substitutes an imputed error in the finding of the court for the original subject matter of its jurisdiction, seeking to make the Marshal answerable for his mere ministerial execution of a sentence, which the court passed, the Secretary of the Navy approved, and which the President of the United States, as constitutional Commander-in-Chief of the Army and Navy of the United States, directed the Marshal to execute, by receiving the prisoner and convict, Dynes, from the naval officer then having him in custody, to transfer him to the Penitentiary, in accordance with the sentence which the court had passed upon him. And this upon the principle, that where a court has no jurisdiction over the subject matter, it tries and assumes it; or where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered coram non judice, that trespass for false imprisonment is the proper remedy, where the liberty of the citizen has been restrained by process of the court, or by the execution of its judgment. Such is the law in either case, in respect to the court, which acts without having jurisdiction over the subject matter; or which, having jurisdiction, disregards the rules of proceeding enjoined by the law for its exercise, so as to render the case coram non judice. Cole's case, 1 W. Jones, 170; Davison v. Gill, 1 East, 64; Smith v. Bouchier, 2 Str. 993; Martin v. Marshall, Hob. 63; Weaver v. Clifford, 2 Bulst. 64; 2 Wils. 385. In both cases, the law is, that an officer executing the process of a court which has acted without jurisdiction over the subject matter becomes a trespasser, it being better for the peace of society, and its interests of every kind, that the responsibility of determining whether the court has or has not jurisdiction should be upon the officer, than that a void writ should be executed. This court so far back as the year 1806, said, in the case of Wise v. Withers, 3 Cranch, 331, p. 337 of that case, "It follows, from this opinion, that a court-martial has no 81*] jurisdiction over a justice of the *peace as a militiaman; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers."

2 Brown, 124; 10 Cranch, 69; Mark, 118; 8 T. R. 424; 4 Mass. 234.

I add two cases from the 2d of Horace Gray's reports of the Supreme Judicial Federal Court of Massachusetts, furnished me by Mr. Justice Campbell, of Piper v. Pearson, 2 Gray, 120; Clark and Whipple v. May and Kent, 2 Gray, 410.

But the case in hand is not one of a court without jurisdiction over the subject matter, or that of one which has neglected the forms and rules of procedure enjoined for the exercise of jurisdiction. It was regularly convened; its forms of procedure were strictly observed, as they are directed to be by the Statute; and if its sentence be a deviation from it, which we do not admit, it is not absolutely void. Whatever the sentence is, or may have been, as it was not a trial by court martial taking place out of the United States, it could not have been carried into execution but by the confirmation of the President, had it extended to loss of life, or in cases not extending to loss of life, as this did not, but by the confirmation of the Secretary of the Navy, who ordered the court. And if a sentence be so confirmed, it becomes final, and must be executed, unless the President pardons the offender. It is in the nature of an appeal to the officer ordering the court, who is made by the law the arbiter of the legality and propriety of the court's sentence. When confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or one in which, having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the Statute for its exercise. In such cases, as has just been said, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury.

Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed upon a proper suit to give a party redress, who has been injured by a void process or void judgment. In England, it has been done by the civil courts, ever since the passage of the 1 Mutiny Act of William and Mary, ch. 5, 3d April, 1689. And it must have been with *a direct reference to what [*82 the law was in England, that this court said, in Wise v. Withers, 3 Cranch, 337, that in such a case "the court and the officers are all trespassers." When we speak of proceedings in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but of a disregard of the essentials required by the Statute under which the court has been convened, to try and to punish an offender for an imputed violation of the law.

Courts-martial derive their jurisdiction and are regulated with us, by an Act of Congress, in which the crimes which may be committed, the manner of charging the accused, and of trial,

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and the punishments which may be inflicted, are either expressed in terms, or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that the Legislature meant to subject to punishment one of a minor degree of a kindred character, which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial. And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the Rules for the Government of the Navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts-martial, and the offenses of which the different courts-martial have cognizance. With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court-martial has no jurisdiction over the subject matter of the charge it has 83*] been convened *to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the courts jurisdiction, and give him redress.

Harman v. Tappenden, 1 East, 555; as to ministerial officers, Case of the Marshalsea, 10 Coke, 76; Moravia v. Sloper, Willes R. 30; Parton v. Williams, B. & A. 330; and as to justices of the peace, by Ld. Tenterden, in Basten v. Carew, 3 B. & C. 653; Mills v. Collett, 6 Bing. 85.

Such is the law of England. By the Mutiny Acts courts-martial have been created, with authority to try those who are a part of the army or navy for breaches of military or naval duty. It has been repeatedly determined that the sentences of those courts are conclusive in any action brought in the courts of common law. But the courts of common law will examine whether courts-martial have exceeded the jurisdiction given them, though it is said, "not, however, after the sentence has been ratified and carried into execution."

Grant v. Gould, 2 H. Bl. 69; The Ship Bounty, or Rex v. Suddis, 1 East, 306; case of Stratford cited in 1 East, 306; Mann v. Owen, 9 B. & C. 595; Matter of Poe, 5 Barn. & Adol. 681, on a motion for a prohibition. A judge, or any person acting by authority as such, where he has over the subject matter, and over the person, a general jurisdiction, which he has not exceeded, will not be liable to have his judgment examined in an action brought against himself; but if jurisdiction be wanting over the subject matter, and over the person, such judgment would be examinable.

Hamond v. Howell, 1 Mod. 184; Garnett v. Ferrand, 6 B. & C. 611; Mostyn v. Fabrigas, 1 Cowp. 161; Bonham's case, 8 Co. 107; Groenvelt v. Burwell, 1 Ld. Raym. 454, by Holt, Ch. J., 1 Ld. Raym. 467; Lumley v. Quaree, 2 Ld. Raym. 767; Basten v. Carew, 3 B. & C. 649.

The preceding cited cases relate to judges of record. As to judges not of record, ecclesiastical judges, Ackerly v. Parkinson, 3 M. & S. 411. Commissioners of court of bequests, Aldridge v. Haines, 2 B. & Ad. 395. As to returning officer of election, Ashby v. White, 2 Ld. Raym. 941; Cullen v. Morris, 2 Stark. 577.

In this case, all of us think that the court which tried Dynes had jurisdiction over the subject matter of the charge against him; that the sentence of the court against him was not forbidden by law; and that, having been approved by the Secretary of the Navy, as a fair deduction from the 17th article of the Act of April 23d, 1800, and that Dynes having been brought to Washington as a prisoner by the direction of the Secretary, that the President of the United States, as Constitutional Commander-in-Chief of the Army and Navy, and in virtue of his *constitutional obligation, [*84 that "He shall take care that the laws be faithfully executed," violated no law in directing the Marshal to receive the prisoner Dynes from the officer commanding the United States steamer, Engineer, for the purpose of transferring him to the Penitentiary of the District of Columbia; and, consequently, that the Marshal is not answerable in this action of trespass and false imprisonment.

We affirm the judgment of the Circuit Court.

Dissenting Mr. Justice McLean.

J. M. MATTINGLY and Sarah Ann, His Wife, Appts.,
v.
JOHN H. BOYD, Admr. of David H. Boyd, Deceased.

(See S. C. 20 How. 128-133.)

Limitations in Tennessee—assumpsit barred in three years—new promise—Virginia attachment law—garnishee, when must pay interest—allowed for expenses and services.

The settled law of Tennessee is, that where an agent obtain money of his principal, and converts it to his use, and is not sued until three years elapse, the remedy by assumpsit is barred.

Where the statute commences to run, it runs on, unless there is a new promise within three years next before suit is brought; and an acknowledgment by the defendant of an actual subsisting debt due to the plaintiff within the three years is deemed equivalent to new promise.

As, by the Virginia Attachment Law, the court might require surety of the garnishee to restrain him from paying the money in his hands to his

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creditor, pending the attachment suit, or order it to be paid the attaching creditor, on his giving surety to refund if the suit was decided against him, it follows that the fund was in custody of the law, and that the garnishee could not be sued a second time.

As a general rule, a garnishee is not bound to pay interest, because he is liable to be called on to pay at all times. But here he used the money as his own. As this was an appropriation of the money, and a manifest breach of trust, he was bound to account with interest.

The garnishee, in accounting, is entitled to a credit for his own expenses and services.

Argued Jan. 15, 1858. Decided Feb. 1, 1858.

THE bill in this case was filed in the Circuit Court of the United States for the District of West Tennessee, by Sarah Ann Thorp, since married to Mattingly, to recover a certain legacy with interest due thereon.

The court below entered a decree dismissing the bill, and the complainants brought the case here on appeal.

Mr. Conway Robinson, for the appellants, contended:

1. If, when this suit was brought, Bylen had been alive and a citizen of Tennessee and a party defendant, the plaintiff would not have been barred from proceeding against him by the Statute of 21 Jac. 1, ch. 16, sec. 3, or by the Tennessee Statute of 1715 taken from it, or by any other Statute of that State. 1. Because by the appointment of Bylen as guardian an express trust was created, and the Statute of Limitations is no bar in the case of such express trust.

Pinkerton v. Walker and Wife, 3 Hayw. 221; Bryant v. Puckett, 3 Hayw. 252; Rinson v. Ivey, 1 Yerg. 297; Armstrong v. Campbell, 3 Yerg. 201; McDonald v. McDonald, 8 Yerg. 148; Smart and Wife v. Waterhouse, 10 Yerg. 104; Porter v. Porter, 3 Humph. 586. 2. Because the Statute of 1715 does not bar actions of debt generally, but those only which are brought for arrearages for rent. Kirkman v. Hamilton, 6 Pet. 23; Tisdale v. Munroe, 3 Yerg. 322; and even if the plaintiff come within the 5th section, he comes within the disabilities provided by the 9th section. 3. Because no Statute of Limitations in force in Tennessee bars an action on a specialty; neither such as Bylen gave when he qualified as guardian, nor such as was taken under the decrees of the Court of Chancery at Richmond (Lawrence v. Beidleman, 7 Yerg. 107; Hay v. Lea, 8 Yerg. 89; Rice v. Alley, 1 Sneed, 52); and even if there were any Statute of Tennessee prescribing a certain term of years within which an action must be commenced on such a bond as that, the defendant does not show that such term of years has elapsed since the plaintiff married or attained the age of twenty-one years.

II. Supposing the plaintiff has a right to maintain a suit against Bylen or his representatives for the money mentioned in said bond and the interest thereof, the right of action of Bylen against David H. Boyd for the money received by the latter as agent, would not be barred by the time which has elapsed since Boyd received the money. For whether the attachment was right or wrong, Boyd claimed to hold and was allowed to hold the money pending the attachment, and is bound to answer for it when the attachment was terminated.

III. Seeing that if the plaintiff was to have a decree against Bylen, the latter would be entitled to a decree against Boyd; the proper course of equity is to decree immediately for the plaintiffs against the administrator of Boyd, the party ultimately responsible.

Garnett v. Macon, 6 Call, Va. 349, and other cases cited in 2 Rob. Pr. 395–398, old ed.

IV. The decree should be for $1,112.82, with costs from October 26, 1826, and the costs of this suit.

No counsel appeared for the appellee:

Mr. Justice Catron delivered the opinion of the court:

Spencer Roane devised to his granddaughter, Sarah Ann Roane, $1,000. She was a minor, residing in Kentucky; and Joseph N. Bylen, her stepfather, was her guardian. Bylen sued Roane's executors for the money, and recovered it as guardian. David H. Boyd acted as the agent of Bylen, and received the money in Virginia, and held it as agent. Fayette Roane, the father of Sarah Ann, owed William H. Roane, of Richmond, Virginia, a thousand dollars. Bylen was Fayette Roane's executor; and William H. sued out a subpœna and filed an attaching creditor's bill in the Superior Court of Chancery at Lynchburg, against Bylen and others, to which David H. Boyd was a party defendant. The main purpose of the bill was, to restrain the money held by Boyd for Bylen as guardian, in Boyd's hands, until Roane could obtain a decree against Bylen, and enforce payment from Boyd as the debtor of Bylen.

Roane's restraining order was sued out and executed on Boyd the 10th day of October, 1827.

May 4, 1829, Boyd answered the bill, and admitted that he had received $1,112 as agent of Bylen, guardian of Sarah Ann Roane, on a power of attorney, "which money he intended to pay over to Bylen as guardian, until inhibited by the process of the court."

The suit lingered on the rules at Lynchburg till July 4, 1853, the restraining order being in full force from 1827 to 1853. In the meantime, Boyd had removed to Tennessee, and died there on the 25th of August, 1851; and about two months thereafter, John H. Boyd, the defendant to this suit, administered on David H. Boyd's estate; and on the 5th of September, 1853, this suit was brought. The main defense set up is, the Acts of Limitation barring actions in Tennessee. The suit was brought within two years after John H. Boyd administered, and therefore the Act barring suits against administrators does not apply; and the only question is, whether the suit is barred by the general law barring actions founded on simple contracts, if not sued for within three years next after the cause of action accrued.

*The settled law of Tennessee is, that [*131 where an agent obtains money of his principal, and converts it to his use, and is not sued until three years elapse, the remedy by assumpsit is barred.

McGinnis v. Jack and Cocke, Mart. & Yerg. 361; Hawkins v. Walker, 4 Yerg. 188.

It is also settled in Tennessee, that where the Statute commences to run, it runs on, unless there is a new promise within three years next before suit is brought; and an acknowledgment

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by the defendant of an actual subsisting debt due to the plaintiff within the three years is deemed equivalent to new promise, as the law raises a promise to pay on the acknowledgment.

Russel, Adm'r, v. Gas, Mart. & Yerg. 270.

This acknowledgment was made by Boyd, in 1829 by his answer, filed in the Superior Chancery Court at Lynchburg. Had Bylen sued him at law, and the Act of Limitations been pleaded, the statement in Boyd's answer would have been a good replication.

The question then comes to this, whether Bylen, as guardian, or Sarah Ann Roane, after she became of age, had cause of action against Boyd whilst the suit at Lynchburg was pending. The Act of 1819 (Virginia Revised Code, 474) in substance provides, that where a suit in chancery is prosecuted against a defendant who is out of the State, and against a defendant within the State, who has in his hands effects of, or is indebted to, the absent defendant, the court may make an order, and require surety, if it shall appear necessary to restrain the defendant within the State from paying the debt by him owing to the absent defendant; or the court may order such debt to be paid to the attaching creditor, upon his giving sufficient security for the return of the money to such person, and in such manner as the court shall afterwards direct.

The Act also provides how the absent defendant shall be notified by publication; and if he does not appear, the court may hear the plaintiff's proofs of the justice of his demand, and may proceed to take the bill for confessed, and to decree thereon as to the court may seem proper, and enforce due execution of the decree.

The court did not require security from Boyd to have the money forthcoming according to a decree that might be subsequently made; but set the cause down for hearing against him, leaving the money in his hands.

Bylen never answered, but urged Boyd by letters to employ counsel and defend the suit, and to send him the money if the bill was dismissed; and thus the matter stood until 1853, when the suit abated by William H. Roane's death.

As, by the Virginia Attachment Law, the 132*] court might require *surety of the garnishee, to restrain him from paying the money in his hands to his creditor, pending the attachment suit, or order it to be paid the attaching creditor, on his giving surety to refund if the suit was decided against him, it follows that the fund was in custody of the law, and that the garnishee could not be sued a second time; so that, in this case, if Bylen, or Miss Roane, had sued Boyd pending the attachment suit, he or she could have pleaded in abatement the former suit pending, to the same effect as if he had been twice sued by Bylen. This is plainly inferable from the face of the Statute; and the position is supported by adudged cases both in England and in this country.

Brook v. Smith, 1 Salk, 280; Embree and Collins v. Hanna, 5 Johns. 101; Irvine v. The Lumberman's Bank, 2 Watts & S. 208. The same rule was recognized by this court in the case of Wallace v. McConnell, 13 Pet. 151. Mr. Drake, in his well considered treatise on attachment (section 720), has stated the practice in different States, to which book we refer.

We are of opinion that Boyd's holding was not adverse until the suit in Virginia was ended; and second, that neither Bylen, as guardian, nor Sarah Ann Roane, after she became of age, had cause of action against Boyd for retaining the money, whilst the suit was pending, and therefore the Act of Limitations is no defense.

The next question is, whether Boyd is bound to pay interest on the fund. As a general rule, a garnishee is not bound to pay interest, because he is liable to be called on to pay at all times. 11 S. & R. 188; Drake, Pr. 725; 1 Washington, Va. 149.

But here the bill alleges that he used the money as his own; and the proof is, that in the latter part of November, 1826, he received the money as agent of Bylen, and immediately loaned it to George Boyd, his father, who was in failing circumstances; and shortly thereafter became insolvent. As this was an appropriation of the money, and a manifest breach of trust, David H. Boyd was bound to account with interest.

The bill only claims interest from the time the attachment process was served, up to the time of David H. Boyd's death; we therefore order that interest be calculated from the 23d of October, 1827, to the 25th of August, 1851, these being the dates from and to which interest is claimed.

In June, 1826, David H. Boyd forwarded an account to Bylen for the money he had expended for the latter, in prosecuting the suit, at Richmond, against Spencer Roane's executors, including $100 for his trouble in attending to the business.

*The amount claimed is $216.39. We [*133 think this charge is reasonable, and order it to be deducted from the principal sum sued for, which is $1,112.33, and leaves $896.44 due of principal, on which interest after the rate of six per cent. per annum will be calculated, from the 23d day of October, 1827, up the 25th day of August, 1851, to be levied of the goods and chattels of the estate of David H. Boyd in the hands of his administrator, John H. Boyd, the respondent, to be administered.

It is further ordered, that the decree of the Circuit Court for the District of West Tennessee, dismissing the bill, be reversed, and that the cause be remanded to said court, for further proceedings therein.

JOHN H. LYON, Plff. in Er.,
v.
JOHN BERTRAM, Alexander H. Twombly and Edwin Lamson.

(See S. C. 20 How. 149-156.)

Warranty, when purchaser may rescind for breach of—when may bring cross-action—invalid plea—who may be joined as plaintiffs.

Where an article is warranted and the warranty is not complied with, a purchaser who has received and paid for and used a portion of the article, and derived a benefit from it, cannot then rescind the contract.

NOTE.—Right of buyer to retain goods and defeat action for price on discovering that goods do not comply with requirements of contract—see note, 4 L. R. A. N. S. 1167.

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He may receive it and bring a cross-action for the breach of the warranty.

He may, without bringing a cross-action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price.

A plea cannot be sustained, which rests for its validity upon a supposed state of facts which may not exist. The plea must be an answer to any case which may be legally established under the declaration.

If the plaintiffs are parties jointly interested in the subject of the action, and in the claim for relief, it is quite immaterial in what proportions they may be concerned.

Argued Jan. 20, 1858. Decided Feb. 8, 1858.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Messrs. Neilson, Poe and Robert J. Brent, for plaintiff in error:

The vendee is always entitled to a fair trial of an article purchased with a warranty, and if the article is damaged or lost in such trial, the vendee is not to be prejudiced, nor is the vendor to be benefited in his misrepresentation by any loss which may result from such trial or temporary use of the thing warranted.

Long on Sales, 223; Lorymer v. Smith, 1 B. & C. 1; Street v. Blay, 2 B. & Ad. 456.

Where an entire contract is made, and a part of the goods are delivered and retained, and the vendor fails to deliver the residue, then the vendee owes the value of the part received, and the vendor may recover for that part; thus showing the severability of the entire contract, or rather the implied new contract quoad the part retained by the vendee.

Shipton v. Cassan, 5 B. & C. 378; Oxendale v. Wetherell, 9 B. & C. 386; Read v. Rann, 10 B. & C. 439; Bowker v. Hoyt, 18 Pick. 555; Robinson v. Noble, 8 Pet. 181; Pratt v. Carroll, 8 Cranch, 471.

These cases establish the liability of the defendant for the fifty barrels received, if they had not been paid for; but how can the defaulting party recover for the residue? The general rule is fully admitted, that the party rescinding the contract must return what he retained; but there is an exception where it is the fault of the vendor, and the vendee, after knowledge of the breach of contract, does all he can to rescind.

Masson v. Bovet, 1 Den. 69.

It has always been held that acts done by the purchaser before he was apprised of a breach of the vendor's contract, cannot be relied on as a waiver of the purchaser's rights.

Clements v. Smith, 9 Gill. 156; Ijams v. Hoffman, 1 Md. 497; Sides v. Helleary, 6 H. & J. 86.

Mr. W. P. Fessenden, for defendant in error:

The contract is entire, constituting a sale of the cargo of the Ork, vesting the property in the purchaser, and entitling him to claim delivery of the whole cargo on complying with the terms of the contract.

Sto. on Con. 4th ed. secs. 23-24; Clark v. Baker, 5 Met. 453; Shields v. Pettee, 2 Sand. 262; 12 Johns. 165.

It was an executed contract; nothing remained to be done on the part of the vendor.

Street v. Blay, 2 B. & Ad. 462; Dixon v. Yates, 5 B. & Ad. 340; Tarling v. Baxter, 6 B. & C. 360; Dorr v. Fisher, 1 Cush. 271.

The facts show a delivery in part, and that the plaintiff had fully complied with the terms of the contract on his part.

If the description "Haxall" is material, then it is an express warranty.

Seixas v. Woods, 2 Cai. 48; 9 Met. 83; 3 Rawle, 23; Shepherd v. Kane, 7 E. C. L. 82; 5 B. & Ad. 240.

The purchaser must rely on his warranty, and cannot rescind.

Thornton v. Wynn, 12 Wheat. 183.

But whether the warranty is express or implied, the purchaser cannot accept in part and reject as to the residue.

Chaplin v. Rogers, 1 East, 193; Hunt v. Silk, 5 East, 449; 2 Hill, 288.

If, then, a purchaser has unwittingly accepted a part and would rescind, he must restore that part within a reasonable time. If he has disabled himself to do so, he cannot rescind.

Miner v. Bradley, 22 Pick. 457.

The right of recovery under the warranty prevents hardship in the application of the doctrine we contend for, and serves to do complete justice between the parties.

8 Wend. 115; 5 Hill, 63; 22 Pick. [17.

Mr. Justice Campbell delivered the opinion of the court:

This suit was commenced by the defendants in error, to recover the price for a cargo of flour bargained and sold to the plaintiff in error, in the City of San Francisco. The judgment of the Circuit Court was rendered upon a special verdict in favor of the plaintiffs in that court. The verdict finds that on the 13th January, 1853, the plaintiffs and Flint, Peabody & Co., were jointly the owners of a cargo of flour, consisting of 2,000 barrels branded, and which were in fact Gallego. then being on the barque Ork, lying at a public wharf in San Francisco, and composing its entire cargo of flour, which inspected 1,771 barrels superfine, and 229 bad.

The firm of Flint, Peabody & Co., as agents and part owners, on the day aforesaid, concluded the following agreement with the defendant:

San Francisco, January 13, 1853.

*Sold this day to Joseph H. Lyon, [151 Esq., a cargo of Haxall flour, now on board the barque Ork, lying in this harbour, being about two thousand barrels, on the following terms and conditions, viz.: Joseph H. Lyon, Esq., agrees to pay Messrs. Flint, Peabody & Co., thirty dollars per barrel for such as shall inspect superfine, and twenty-seven dollars per barrel for such as shall inspect bad; payment to be made as it may be delivered, and to be received and paid for on or before the expiration of three weeks from date.

If Messrs. Flint, Peabody & Co. elect, they can land and store the flour at the expiration of one week, or so much as may remain on board at that time, Mr. Lyon paying storage and drayage expenses. J. H. Lyon.

Flint, Peabody & Co.

On the 25th January, 1853, the defendant applied to Flint, Peabody & Co. for fifty barrels of flour, so purchased by him, by a written order, as follows:

San Francisco, January 25, 1853.

Messrs. Flint, Peabody & Co. will please deliver to Mr. William R. Gorham, or bearer, fifty barrels of flour, out of the lot purchased from the ship Ork, and oblige J. H. Lyon."

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Paying them there for the contract price, amounting to the sum of $1,500, and received from Flint, Peabody & Co. the following order:

"San Francisco, January 25, 1853.

Captain of Barque Ork: Please deliver the bearer fifty barrels superfine flour and oblige.

Flint, Peabody & Co."

Fifty barrels of Gallego flour, inspecting superfine, being part of said cargo of flour on board the barque Ork, was delivered from the barque to William R. Gorham, a baker, to whom the defendant had sold and transferred the delivery order and the said flour. When the order was made for William R. Gorham, the defendant represented that the flour was Haxall. On the 29th January, 1853, the defendant sold to Dunne & Co. fifty barrels of flour, which he represented to be Haxall, and gave the following order, bearing date on that day:

"Messrs. Grey & Doane will please deliver Messrs. Dunne & Co. fifty barrels Haxall flour from Ork. J. H. Lyon."

The said Dunne & Co., on discovering that 152*] the flour was not *Haxall, but Gallego, refused to take it, and so notified the defendant. On the 31st of January, 1853, the defendant made further application for 100 barrels of flour, being part of the flour so purchased as aforesaid, and gave his check on his bankers for the price, and received the following delivery order from Flint, Peabody & Co., bearing that date:

"Capt. Hutchings, Barque Ork: Please deliver to J. H. Lyon, or to the order of Grey & Doane, one hundred barrels superfine flour, and oblige, etc."

The check was not paid on presentation. Upon the refusal of Dunne & Co. to take the flour, the defendant, on learning the fact, notified the plaintiffs that he would not take the flour, and countermanded the payment of the check he had given for the one hundred barrels last mentioned.

On the 3d of February, 1853, the plaintiffs informed the defendant that they were prepared to deliver the remainder of the cargo, and requested the defendant to receive it. And subsequently, on the same day, they addressed him a note, in which they advised him they would sell the flour on the 5th February, at public auction, for his account, and would hold him responsible for the difference there might be in the net proceeds of the proposed sale and the contract price, and for charges and expenses, he (Lyon) having declined to take the flour under the contract. All the flour on the barque was of the brand known as Gallego, and the barrels were branded Gallego in printed characters from two to two and one half inches in length, on both heads. In the opinion of some experts, there existed no difference in the quality or price of the flour, of either brand (Haxall and Gallego), each inspecting superfine; but in the opinion of other experts, there was a difference, some preferring the one brand and some the other.

Subsequently to the sale, and up to and including the 28th January, 1853, Gallego and Haxall flour had advanced to $35 per barrel in San Francisco; and between that and the 5th of February the price of both declined to $18 per barrel. On the 5th of February the plaintiffs caused the remainder of the cargo to be sold at public auction, according to their notice to the defendant, for his account, and at a great reduction of price. The verdict does not find any fact to impugn the fairness of this sale. Before this suit was commenced, Flint, Peabody & Co. assigned their interest in this suit to the plaintiffs, of which the defendant had notice.

The verdict is silent in reference to the negotiations that preceded the contract, and does not inform us whether the *cargo was at [*153 any time visible to the defendant; nor does it discriminate with exactness the qualities of Haxall and Gallego flour, or affirm that there is any specific difference between them.

It is evident, from the verdict, that the error in the description of the cargo did not bear on the substance, or on any substantial quality of the subject of the sale. The subject of the sale was a cargo of flour of about 2,000 barrels, on board of a vessel lying at a wharf in the city; of a quality to be ascertained by an inspection; and from that inspection, and not from the brand, the price was to be ascertained. The brands Haxall and Gallego are understood to refer to different mills in Richmond, Virginia, at which flour is manufactured. The verdict sufficiently determines that the difference between them in the market at San Francisco is inappreciable, at least by the mass of purchasers and consumers. The case clearly does not belong to that class in which the subject matter of the contract was of a nature wholly different from that concerning which the parties to the contract made their engagements. The brand on the exterior of the barrels of flour was certainly not of the substance of the contract.

Young v. Cole, 3 Bing. N. C. 724; Gompertz v. Bartlett, 2 Ell. & B. 849; 19 Vt. 202.

The defendant does not resist the fulfillment of his agreement for any fraud; nor does the verdict impute any mala fides to the plaintiffs.

The case rests upon these facts. There was a sale of a cargo of flour at a price dependent upon the fact whether the component parts inspected superfine or bad, which was described as of one brand, but which proved to be of another. There was no material difference in the credit of the brands, and the market price of the flour was but little affected by the question whether the brand was of the one or the other mill.

A portion of the flour has been delivered to, and paid for, and consumed by, the defendant. He made no offer to return this flour. The flour remained in the Ork from the 13th of January till the 31st of January, subject to the exigencies of the contract. During that period, there was no complaint on the part of the defendant. From the 28th of January till the 5th of February, when the refusal to accept the remainder of the flour and the sale of it on account took place, the price of flour was steadily declining.

It may be admitted that the description of the flour as Haxall imported a warranty that it was manufactured at mills which used that brand; and that the purchaser would have been entitled to recover the amount of difference in the value of that and an inferior brand.

*Powell v. Horton, 2 Bing. N. C. 668; [*154 Henshaw v. Robins, 9 Metc. 83.

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But it cannot be admitted that the purchaser was entitled to abandon this contract.

In the note to Cutter v. Powell, in 2 Smith's Lead. Cases, 1, the annotator says: "It is settled, by Street v. Blay, 2 B. & Ad. 456, and Poulton v. Lattimore, 9 B. & C. 259, where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue. 1. He may refuse to receive the article at all. 2. He may receive it, and bring a cross-action for the breach of the warranty. 3. He may, without bringing a cross-action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price." The annotator proceeds to say, "that it was once thought, and, indeed, laid down by Lord Eldon, in Curtis v. Hannay, 3 Esp. 83, that he might, on discovering the breach of warranty, rescind the contract, return the chattel, and, if he had paid the price, recover it back. This doctrine, which was opposed to Weston v. Downes, 1 Doug. 23, is overruled by Street v. Blay, 2 B. & Ad. 456, and Gompertz v. Denton, 1 Cromp. & M. 207; and it is clear that, though the non-compliance with the warranty will justify him in refusing to receive the chattel, it will not justify him in returning it, and suing to recover back the price."

The second and third propositions of this learned author are indisputable, and have received the sanction of this court. Thornton v. Wynn, 12 Wheat. 183, as modified by Withers v. Greene, 9 How. S. C. 213. The first proposition, concerning the right of the purchaser to reject the article because it varies from the warranty, is an open question. In Dawson v. Collis, 10 C. B. 527 (70 Eng. C. L.), the judges dissent from it. The Chief Justice expressed his favor for the conclusion, "that the buyer has no right to repudiate the article," because it did not correspond to the warranty; and Creswell, Justice, said: "Where the rule is of an individual and specific thing, the vendee can only defend himself, altogether, against an action for not accepting it, if the thing be utterly worthless, as in Poulton v. Lattimore; or, in part, by giving the breach of warranty in evidence in reduction of damages." And this corresponds with the conclusions of this court in the case of Thornton v. Wynn, 12 Wheat. 183, where very similar language is used.

But while the first proposition of the note in the Leading Cases is a matter of dispute, there is none in respect to the conclusion that the purchaser who has received and used the article, and derived a benefit from it, cannot then rescind the contract. This principle is stated in Hunt v. Silk, 5 East, 449, in which Lord Ellenborough says: "Where a contract is to 155*] *be rescinded at all, it must be rescinded in toto, and the parties put in statu quo." And, "if the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of. The parties cannot be put in statu quo." In Perley v. Balch, 23 Pick. 283, the same principle is applied to contracts of sale of chattels. The court say: "The purchaser cannot rescind the contract, and yet retain any portion of the consideration. The only exception is, where the property is entirely worthless to both parties. The purchasers cannot derive any benefit from the purchase, and yet rescind the contract. It must be nullified in toto or not at all. It cannot be rescinded in part and enforced in part." In Barnett v. Stanton, 2 Ala. 183, the court say: "A contract cannot be rescinded without mutual consent, when circumstances have been so altered by a part execution that the parties cannot be put in statu quo; for if it be rescinded at all, it must be rescinded in toto." To the same effect is Christy v. Cummins, 3 McLean, 386; 2 Hill N. Y. 288, per Ch. J. Nelson; Kase v. John, 10 Watts, 107. In Thornton v. Wynn, 12 Wheat. 183, this court say: "That if the sale of a chattel be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return in a reasonable time."

If the verdict had found that the defendant had sustained any damage from the difference in the brands on the flour, the price would have been diminished accordingly; and so the defendant might have been indemnified upon an action commenced by himself, alleging a breach of the contract. But, without considering whether he could refuse to accept any portion of the flour for the variance from the letter of his contract, we decide that he lost this power when he applied to have, paid for, and sold the parcels, on the 25th and 31st of January, 1853.

The defendant pleaded that the several causes of action in the complaint mentioned did not accrue within two years before the commencement of the suit. The Code of California provides, that "an action upon any contract, obligation, or liability, founded upon an instrument of writing, except those mentioned in a preceding section, shall be brought within three years, and within two years if founded upon a contract, obligation, or liability, not in writing, except in actions on an open *account, [*156 for goods, wares and merchandises, and for any article charged in a store account. The plea of the defendant does not allege that the cause of action is founded upon a contract, obligation, or liability, not in writing, nor show that it falls within the limitation of two years, as pleaded. The complaint is framed so as to admit evidence of a contract in writing quite as well as an oral contract, and the evidence shows this action is founded on a written contract. The plea should have contained an averment that the cause of action was not in writing, with such other averments as to show that the bar of the statute pleaded was applicable.

A plea cannot be sustained, which rests for its validity upon a supposed state of facts which may not exist. The plea must be an answer to any case which may be legally established under the declaration. Winston v. The Trustees' University, etc. etc. 1 Ala. 124.

It was objected that the proof shows that the assignment by Flint, Peabody & Co. was made to the plaintiffs in the suit, and that the declaration alleges that they assigned their interest in the claim to John Bertram, one of the plain-

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tiffs. The Code of California requires that actions shall be prosecuted in the name of the real party in interest, and that all parties having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. The plaintiffs are shown to be the parties jointly interested in the subject of the action, and in the claim for relief. It is quite immaterial in what proportions they may be concerned. Their case is substantially established, when their joint interest is shown, and the error in respect to the degree of the interest of the several parties is not such a variance as will be considered.

Judgment affirmed.

EDWIN M. CHAFFEE, Trustee of Horace H. Day, Plff. in Er.,
v.
NATHANIEL HAYWARD;
and
HORACE H. DAY, Plff. in Er.,
v.
NATHANIEL HAYWARD.

(See S. C. 20 How. 208-216.)

Jurisdiction of person, only obtained by personal service—not by attachment of property—even in patent cases.

Jurisdiction of the person of a defendant (who is an inhabitant of another State), can only be obtained, in a civil action, by service of process on his person, within the district where the suit is instituted.

No jurisdiction can be acquired by attaching property of a non-resident defendant, pursuant to a state attachment law.

The United States courts are vested with power to execute the laws respecting inventors and patented inventions; but where suits are to be brought is left to the general law, to wit: to the 11th section of the Judiciary Act, which requires personal service of process, within the district where the suit is brought, if the defendant be an inhabitant of another State.

Argued Jan. 27, 1858. Decided Feb. 8, 1858.

THESE suits were brought in the Circuit Court of the United States for the District of Rhode Island, by the plaintiff in error, for the recovery of damages for the alleged infringement of a certain patent. The defendant pleaded to the jurisdiction of the court, that he was not a resident of the District of Rhode Island, and that he was not served with process within the said district. The plaintiff demurred, and the court overruled the demurrer and dismissed the case for want of jurisdiction. The plaintiff thereupon sued out this writ of error.

Messrs. T. A. Jenckes and R. H. Gillet, for plaintiff in error:

The Circuit Courts have jurisdiction over the subject matter of these suits, without reference to the residence of the parties. The question, therefore, is, whether the defendant was rightfully brought within the jurisdiction of the Circuit Court for the District of Rhode Island, by the attachment of his real and personal estate in that district, without personal service of the process upon him.

1. The Circuit Court for the District of Rhode Island having jurisdiction of the subject matter, may issue its process in the same form, and the process itself may be served in the same manner as process issuing from the Supreme Court of that State for any cause of action within its common law jurisdiction.

Process Act of May 8, 1792, sec. 2, Stat. at L. 1, 276.

The form of the writs in these cases and the mode of proceedings to bring the defendant before the court, were strictly in accordance with the law of Rhode Island.

Public Laws of R. I. Dig. 1844, pp. 110-113, 115.

The statute law of Rhode Island regulating attachments on original writ, was the same in 1789 as in 1855.

See Dig. 1767, p. 12; Dig. 1798, p. 201.

In all the Statutes authorizing attachments of personal property, the same provision is found which is contained in the Dig. 1844, p. 113, sec. 3; "When an attachment is made in manner aforesaid, the same shall be sufficient to bring the cause to trial." Neither in the case of attachment of personal property, nor of real estate (p. 115, sec. 11) is there any provision made for personal service on the defendant. In the case of personal estate, a copy of the writ must be left at the defendant's usual place of abode (p. 113, sec. 3), and in the case of real estate, with the person in possession of the land and with the clerk of the town where the land lies (p. 115, sec. 11). Such service (sec. 3, p. 113) is expressly declared sufficient to bring the cause to trial. In case of real estate, the execution runs against the property attached (sec. 11, p. 115).

2. The 11th section of the Judiciary Act of 1789 does not prohibit the taking of jurisdiction over this cause.

Picquet v. Swan, 5 Mass. 561; Richmond v. Dreyfous, 1 Sumn. 131; Toland v. Sprague, 12 Pet. 300.

The case of Day v. The Newark India Rubber Manufacturing Co. 1 Blatchf. 628, was rightfully decided, inasmuch as the mode of proceeding adopted in the commencement of that suit had not been adopted by the Circuit Court of New York.

It is submitted that the Circuit Court in Rhode Island takes jurisdiction of cases under the Patent Laws, in the manner that the Supreme Court of that State takes jurisdiction of any transitory action.

An objection to this view taken by Mr. Justice Story in Picquet v. Swan, 5 Mass. 561, is that the Process Act was not intended to enlarge the jurisdiction of the Circuit Courts as defined by the Judiciary Act. This objection is not tenable in a patent cause, because the jurisdiction of the court is enlarged by the Patent Laws, and the Process Acts are to be applied for the purpose of carrying into effect the jurisdiction so conferred, as well as that founded on citizenship.

3. This is a case of attachment of specific property, real and personal, which by the Rhode Island Statute at the date of the Process Act is made a sufficient service to bring the cause to trial, and therein differs from all the cases decided under the 11th Section of the Judiciary Act, which were cases of foreign at-

NOTE.—Appearance cures defects in service of process and its non-service, except want of jurisdiction of subject matter. See note to Knox v. Summers, 2 L. ed. U. S. 510.

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tachment. In Picquet v. Swan, 5 Mass. 561, there was an attempt to attach the real estate of the defendant, but this attempted service was declared by Judge Story "defective and nugatory." The Statute of Rhode Island, in effect, declares that a defendant is to be found in that State, for the purposes of the jurisdiction of its courts by his visible, personal and real property, which can be seized and levied on by the sheriff. The decisions of the courts of the United States, in cases where the jurisdiction rests exclusively on citizenship, declare that a defendant is not "found" in a district where one of his debtors resides. There is no conflict in maintaining both propositions.

Messrs. Charles S. Bradley and Joseph S. Pitman, for defendants in error.

The defendant in error contends that the judgment of the Circuit Court of Rhode Island was correct and should be affirmed, relying upon the following points:

1. No civil suit can be brought in the Circuit Court against the defendant in any district whereof he is not an inhabitant, or is not found at the date of the alleged service of the writ.

Judiciary Act of 1789, sec. 11, Stat. at L. Vol. 1, p. 79; Hollingsworth v. Adams, 2 Dall. 396; Pollard v. Dwight, 4 Cranch, 424; Picquet v. Swan, 5 Mason, 35-48, 50; Richmond v. Dreyfous, 1 Sumn. 131, 2; Harrison v. Rowan et ux., 1 Pet. C. C. 489; Toland v. Sprague, 12 Pet. 300, 328, 330; Com. and R. R. B'k of Vicksburg v. Slocomb, 14 Pet. 60; Levy v. Fitzpatrick, 15 Pet. 171; Louisville R. R. Co. v. Letson, 2 How. 556; Herndon v. Ridgeway, 17 How. 424; Sadlier v. Fallon, 2 Curt. 579, 581.

The law has been equally well settled in relation to service of process in patent suits.

Horace H. Day v. The Newark India Rubber Manufacturing Co. 1 Blatchf. 629; Saddler v. Hudson, 2 Curt. 6.

2. But irrespective of the plea, there is apparent on the record itself, in the writ and the return of the Marshal thereon, sufficient ground to warrant the court below in dismissing this case. It was not necessary that the marshal should have made return that the defendant had no known place of abode in this district; yet, having done so, and also made return that the body of the defendant could not be found in the district, the parties are bound by the return and the facts it sets forth.

Lessee of Walden v. Craig's Heirs, 14 Pet. 152; Cutler v. Rae, 7 How. 731; Scott v. Sandford, 19 How. 401.

Mr. Justice Catron, delivered the opinion of the court:

The question of law decided below, and which we are called on to revise, arises on the following facts: On the 22d day of October, 1855, the plaintiff in error sued out a writ in the Circuit Court of the United States for the Rhode Island District, against Nathaniel Hayward, styling him as "of Colchester, in the State of Connecticut, commorant of Providence, in the State of Rhode Island," for the recovery of damages alleged to have been sustained by the plaintiff in error, by reason of an alleged infringement of a patent right claimed by said plaintiff.

On the same day, the Marshal of the Rhode Island District made return on the writ, that "for want of the body of the within defendant to be by me found within my district, I have attached," etc. (enumerating certain real estate lying in the City of Providence, in the State of Rhode Island), and a still further return of having made further service of the writ, by attaching all the personal estate of the defendant in the India rubber factory of Hartshorn & Co., and in the store or warehouse No. 7, Dorrance Street stores, etc., and "have left true and attested copies of this writ, with my doings thereon, with the City Clerk of the City of Providence, and with John Sweet and William E. Himes, they being in possession of the premises, the defendant having no known place of abode within my district."

At the November Term of the court, a declaration was filed, *containing the allega- [*215 tions of citizenship of the plaintiff and defendant, and that the defendant was commorant of Providence, as in the writ; and at the same term the defendant, in his own proper person, pleaded to the jurisdiction of the court, that he was at the time of the pretended service of the writ, and is an inhabitant of the District of Connecticut, and not an inhabitant of the District of Rhode Island, nor was he at the time of the pretended service of the writ within the District of Rhode Island; praying the judgment of the court, whether it can or will take cognizance of the action against him.

To this plea the plaintiff, by his attorney, filed a general demurrer, on which the cause was heard, and at the June Term the court overruled the demurrer and dismissed the case for want of jurisdiction; upon which the plaintiff sued out a writ of error.

By the 11th section of the Judiciary Act of 1789, it is provided, "That no civil suit in a circuit or district court shall be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

It has been several times held by this court as the true construction of the foregoing section, that jurisdiction of the person of a defendant (who is an inhabitant of another State), can only be obtained, in a civil action, by service of process on his person, within the district where the suit is instituted; and that no jurisdiction can be acquired by attaching property of a non-resident defendant, pursuant to a state attachment law. The doctrine announced to this effect, in the case of Toland v. Sprague, in 1838 (13 Pet. 327), has been uniformly followed since, both by this court and at the circuits.

15 Pet. 171; 17 How. 424.

It is insisted, however, for the plaintiff, that these rulings were had in cases arising where the jurisdiction depended on citizenship; whereas, here the suit is founded on an Act of Congress conferring jurisdiction on the Circuit Courts of the United States in suits by inventors against those who infringe their letters patent, including all cases, both at law and in equity, arising under the patent laws, without regard of citizenship of the parties or the amount in controversy, and therefore the 11th section of the Judiciary Act does not apply, but the Process Acts of the State where the

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suit is brought must govern; and that the Act of Congress of May 8th, 1792, so declares.

The 2d section of that Act provides, that the forms and modes of proceeding in suits at common law shall be the same as are now used in the Federal Courts, respectively, pursuant 216*] *to the Act of 1789, ch. 21, known as the Process Act of that year.

This Act (sec. 2) declares, that until further provision shall be made, and except where by this Act "or other Statutes of the United States is otherwise provided," the forms of writs and executions, and modes of process in suits at common law, shall be the same in each State, respectively, as are now used or allowed in the Supreme Court of the same. This was to be the mode of process, unless provision had been made by Congress; and, to the extent that Congress had provided, the State laws should not operate.

Now, the only Statute of the United States then existing, regulating practice, was the Judiciary Act of 1789 (ch. 20), which is above recited. The 11th section is excepted out of and stands unaffected by the subsequent Process Acts, and is as applicable in this case as it was to those where jurisdiction depended on citizenship. It applies in its terms to all civil suits; it makes no exception, nor can the courts of justice make any.

The judicial power extends to all cases in law and equity arising under the Constitution and laws of the United States, and it is pursuant to this clause of the Constitution that the United States Courts are vested with power to execute the laws respecting inventors and patented inventions; but where suits are to be brought is left to the general law, to wit: to the 11th sec. of the Judiciary Act, which requires personal service of process, within the district where the suit is brought, if the defendant be an inhabitant of another State.

This case, and that of Day against Hayward, depend on the same grounds of jurisdiction, and were both correctly decided in the Circuit Court; and the judgment in each is affirmed.

45*] *ROBERT HUDGINS and Rebecca P. Hudgins, Executrix of Albert G. Hudgins, Deceased,

v.

WYNDHAM KEMP, Assignee in Bankruptcy of John L. Hudgins.

(See S. C. 20 How. 45-53.)

Judgment sustained, on question of fraud—fraudulent grantee, not permitted to redeem on paying creditors—exceptions to report not taken below, not heard on appeal.

Judgment of the court below sustained on the question of fraud, on the facts.

Court below did not err in ordering a sale of the property fraudulently conveyed without having first ascertained the debts of the bankrupt, or permitting the fraudulent grantee to redeem on paying them.

Exceptions not taken in the court below, to the report of the master, will not be heard on appeal.

Argued Dec. 30, 1857. Decided Feb. 10, 1857.

THE bill in this case was filed in the Circuit Court of the United States for the Eastern District of Virginia, by the assignee in bankruptcy of John L. Hudgins, against the appellants, to set aside a certain conveyance, charged to have been made by said Hudgins in fraud of his creditors.

The court below entered a decree in favor of the complainant, declaring said conveyance fraudulent and void as against creditors. The case is now here on appeal.

A further statement appears in the opinion of the court.

Messrs. James Lyons and Reverdy Johnson, for appellant:

The appellants insist that the decree is erroneous and ought to be reversed, because,

I. There is no proof of any fraud upon the part of Robert Hudgins, but on the contrary, the proof is clear and unquestioned that he paid the cash price which his deed calls for, to John L. Hudgins, which, with the charges upon the property, amounted to its full value. Neither is there any proof of fraud in this transaction by John L. Hudgins.

II. There is an abortive attempt at such proof. But if it were shown by the clearest proof that John L. Hudgins had acted with the most covinous and fraudulent design in making his conveyance, that design would not affect Robert Hudgins, unless it was shown that Robert Hudgins participated in it, or at least had knowledge of it.

III. Because a sale of property for valuable consideration, even by an insolvent, is not in fact or law a fraud upon any creditor who is merely a creditor at large, the fraud, if any be committed, consisting in the concealment or misapplication of the money arising from the sale; and no purpose was manifested or even entertained to defraud any judgment creditor, because the deed upon its face conveyed the property subject to the rights of the judgment creditor.

IV. Whether the deed was void as to creditors or not, it was good between the parties to it, and no decree should have been rendered vacating the deed and directing a sale of the property, until an account had been taken of the debts for the purpose of ascertaining whether there were any unpaid and recoverable; and if, upon the report of such account, it appeared that there were such debts, the defendant, Robert Hudgins, had a right to redeem his land by paying them, or so much of the land might then have been sold as would satisfy them. It was error to sell the whole land without first ascertaining that there were debts sufficient to absorb it, and without allowing the defendant the privilege of redeeming it.

V. Because the judgment creditors had no right to do more than extend the lands, unless it was shown, as it was not, that the profits in a reasonable time extinguish the debts. But they had no right, because by proof of their debts before the commissioner, the lien of the judgment was extinguished.

VI. It was error to charge Robert Hudgins with rents and profits prior to the filing of the bill against him. Up to that time he held and claimed property as his own, as a purchaser for valuable consideration, and the utmost that the plaintiff could claim of him would be the right of a judgment creditor, and his right to rents and profits is never extended retroactively

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beyond the filing of the bill; and in this case the error and injustice of the rule which has been applied to the defendant, is most remarkable and obvious. The plaintiff charges that the conveyance to the defendant was fraudulent, and therefore he claims the right to recover of him the rent of the property in one case, and the profits in another, upon the ground that he has actually enjoyed the property in the one case and received the profits in the other; and yet the plaintiff has taken testimony that the defendant did not occupy the property for which rent is charged, but John L. Hudgins did, and that is relied upon as evidence of the fraud. Now, it cannot be true that he did not occupy it, and therefore merely pretended to purchase it, and therefore has been guilty of a fraud, and yet he did occupy it, and therefore is not guilty of a fraud; yet the decree practically affirms both.

And in respect to the profits. The defendant is charged with profits which there is no proof that he received.

VII. The plaintiff is seeking to recover debts, if he has any right at all, which were due primarily by Thomas Hudgins, for which John L. Hudgins was security. Thomas Hudgins, by the deed of the ——— day of ———, conveyed a large amount of property to trustees for the benefit of those creditors, giving them priority over other creditors who are also secured by the said conveyance. The creditors accepted the conveyance and took under it. The court should have required them to account for the property conveyed by that deed before it authorized them to take the property of John L. Hudgins, if the property in question was his; and still more, before it authorized them to take the property from another who claimed it as purchaser for valuable consideration, and certainly held it by a title valid against John L. Hudgins.

The property thus conveyed may have been sufficient to satisfy all the debts, and they may have been paid; the answers express the belief that they have been; an account of the trust fund only could determine the point. By accepting the deed and taking under it, the creditors assumed the responsibility of fairly accounting for the property conveyed; they cannot sue, or hold subject to their use, the property of Thomas Hudgins, and yet claim that of John L. Hudgins or his vendor for the same debts.

VIII. The decree, which is final, takes no notice of the rights of Robert Hudgins as against John L. Hudgins, and makes no provision for the restitution to him of the surplus which might remain of the proceeds of the sales of the property after satisfying the debts; although there may be such surplus, and if there shall be, Robert Hudgins is certainly entitled to it, because his title, if not good against the creditors of John L. Hudgins, is good against everyone else.

IX. The court did not pass upon the exceptions to the depositions, and therefore admitted the testimony excepted to.

The following authorities are also relied upon:

Shirley v. Long, 6 Rand. 735; Davis v. Turner, 4 Gratt. 422; Blow v. Maynard, 2 Leigh, 29; Fones v. Rice, 9 Gratt. 568; Ex parte Christy, 3 How. 292; Phettiplace v. Sayles, 4 Mass. 312; Hopkirk v. Randolph, 2 Brock. 132; Randall v. Phillips, 3 Mass. 378; Gregg v. Sayre, 8 Pet. 244; Clough v. Thompson, 7 Gratt. 26; Dorr v. Shaw, 4 Johns. Ch. 17; Burton v. Smith, 13 Pet. 464; 1 Sto. Eq. 364; 1 Sto. Eq. 588.

Messrs. Conway Robinson and John L. Patton for appellee:

Appellee's Points and Authorities in support of them.

1. The decree is right and ought to be affirmed. The deed from Robert Hudgins to John L. Hudgins was contrived of fraud with intent to defraud the creditors of the said John L. Hudgins of their lawful debts, and was therefore properly set aside in toto, under the Virginia Act, in 1 R. C. 1819, p. 372, c. 101, sec. 2; Chamberlayne etc. v. Temple, 2 Rand. 395; Garland v. Rives, 4 Rand. 282; Shirley v. Long, 6 Rand. 735, and other cases cited in 1 Rob. Pr. old ed. 512, 554; and under the Bankrupt Act of 1841.

Sands v. Codwise, 4 Johns. 559, also 582 to 600; Codwise v. Gelston, 10 Johns. 517; Arnold, v. Maynard, 2 Story, 352; Hutchins v. Taylor, 5 Law Rep. 289; Cornwell's Appeal, 7 Watts & S. 311; McAllister v. Richards, 6 Pa. St. 133.

For the assignee is not only vested by the law with all the rights of the bankrupt, but with the rights of the creditor also. He may set aside a fraudulent conveyance of the bankrupt, which the bankrupt himself could not do.

McLean v. Lafayette Bank, 3 McLean, 189, 587; McLean v. Meline, 3 McLean, 199; McLean v. Johnson 3 McLean, 202; Everett v. Stone, 3 Story, 456; Peckham v. Burrows, 3 Story, 544; Freeman v. Deming, 3 Sandf. Ch. 332; Shawhan v. Wherritt, 7 How. 627; Buckingham v. McLean, 13 How. 170.

2. There is no error as to the rents and profits. An account of rents and profits was decreed from the time of the Act of Bankruptcy in Sands v. Codwise, 4 Johns. 589, 600. On the same principle it was proper here to decree rents and profits from the filing of the petition; for the "Act of Bankruptcy in England is tantamount to a filing of the petition under our Statutes."

McLean v. Meline, 3 McLean, 200.

The pendency of the petition is constructive notice thereof to the grantee in the deed.

Morse v. Godfrey, 3 Story, 391.

If there was before that time a right in Robert Hudgins to let the avails or annual income be expended at his discretion, without responsibility to any one, there could be no such right afterwards.

4 Johns. 588.

Under the voluntary system, the assignee derives as much right to rents and profits from the petition and decree, as he derives under the involuntary system from the Act of Bankruptcy and the decree.

3. Even if the decree of the Circuit Court were set aside, there should be a decree against Robert Hudgins for the purchase money remaining unpaid at the time of the bankrupt's petition, and the land held subject thereto, as well as to the liens of the judgment creditors of John L. Hudgins.

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Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Virginia.

The bill was filed in the court below by the assignee in bankruptcy of John L. Hudgins, against Robert Hudgins and others, to set aside the conveyance of a large real estate charged to have been made by the bankrupt to the said Robert, in fraud of his creditors and of the Bankrupt Law of the 19th August, 1841. The deed of conveyance purports to have been executed on the 21st February, 1842, but was not recorded till the 8th August following; and conveyed, for the alleged consideration of $5,000, three tracts of land—one tract of 100 acres, one of 900, and another of 70 acres—being, in the aggregate, 1,070 acres, situate in the County of Mathews, State of Virginia. The bankrupt's place of residence was upon one of the tracts. The deed of conveyance contained a clause that the lands should be subject to any judgments that then bound them by operation of law. J. L. Hudgins, the grantor, was heavily in debt at the time of the execution of the deed, and judgments to a large amount were soon after recovered against him. Executions were issued upon these judgments, and the defendant endeavored, by various ways and contrivances, to conceal his person and property from the reach of them. This was in the spring and summer of 1842.

On the 17th February, 1843, J. L. Hudgins presented his petition to the District Court for the benefit of the Bankrupt Act, annexing thereto a schedule of his debts and property—the debts exceeding $12,000; property none, except a contingent interest in a deed of trust by T. Hudgins, for the benefit of creditors. On the 20th May, 1843, the petitioner was declared a bankrupt, and on the 19th September following, an order was made, providing for the creditors to show cause, on a given day, why the petitioner should not have granted to him a certificate of discharge from all his debts. The creditors appeared, and resisted the discharge. Much testimony was taken on their behalf, tending to establish the fraudulent transactions of the bankrupt with Robert Hudgins and others, which are now relied upon to set aside the deed in question. The opposition to granting the discharge resulted in the District Court adjourning several questions of law and fact to the Circuit Court, for its decision. What disposition was made of them in that court, we are not advised.

51* *The defendant, Robert Hudgins, in order to prove the payment of the purchase money of the lands conveyed in the deed of the 21st February, introduced two receipts from J. L. Hudgins—one for $3,055, dated 6th August, 1844; the other, 12th August, same year, for $1,425—and proved the execution of the same by witnesses, who counted the money and saw it paid.

The several tracts of land conveyed were worth, as testified to by witnesses, over $10,000, double the amount of the purchase money. The possession and occupation of the same, subsequent to the sale, seems not to have been changed. Indeed, J. L. Hudgins, in his receipt of the payment of the $1,425, 12th August, 1844, describes the land as being the same as that upon which he resides, and has resided for years. He and his sons have cultivated and improved the arable land, cut and sold timber from the woodland, since the sale to the defendant, Robert, the same as before, the latter apparently exercising no control or acts of ownership over the property.

In the fore part of July, 1842, some four months after the alleged conveyance, J. L. Hudgins made application to certain individuals to borrow a considerable sum of money, to relieve himself from judgments and executions then pressing upon him, and proposed giving a deed of these same lands, in trust to the lenders, as security for the loan. The writings were prepared with a view to carry into effect this arrangement, and the defendant was present, assenting to it, without disclosing that a conveyance had already been made to him.

A good deal of other evidence was given in the case, bearing more or less upon the question of fraud, which it is not material to recite, and which will be found in the record.

The court below, on the 18th May, 1848, decreed that the deed of J. L. Hudgins, the bankrupt, to Robert, his brother, of the 21st February, was fraudulent and void as against creditors, and appointed the assignee in bankruptcy a receiver, to take possession of the property, and directed that a master should take an account of the rents and profits from the petition in bankruptcy to the time when the receiver took possession. The master subsequently reported the amount at the sum of $2,320.26, and on the 27th June, 1855, a final decree was entered. The cause is now before this court on an appeal from this decree.

It was scarcely denied on the argument, and, indeed, could not be, that J. L. Hudgins, the bankrupt, had been guilty of a fraudulent contrivance to hinder and defraud his creditors on the execution of the conveyance in question; but it has been strongly urged that Robert, the grantee, was not privy to *the fraud, [*52 and hence was a bona fide purchaser for a valuable consideration. We shall not, therefore, deem it material to refer to any portion of the mass of evidence in the case, except so far as it bears upon the connection of the grantee with this question of fraud.

The answer of the defendant to the bill is not very satisfactory. The bill charges that the deed, though it bears date 21st February, 1842, was really executed on or about the 2d of July following, the time it was put on record; and that it was antedated in pursuance of the fraudulent purpose charged against the parties. The answer does not notice or deny this allegation. Again; the bill charges that the deed was not delivered at the time it bears date; nor, in fact, delivered at all to the grantee in any other way than the putting of it on record by the grantor himself. This charge is not noticed or denied; neither is the allegation denied, that the grantee remained in the possession and enjoyment of the property after the conveyance, the same as before. And this averment, besides being thus virtually admitted, is fully established by the proofs in the case.

The consideration or purchase money agreed to be given for the three tracts of land con-

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veyed, was less than one half the value, as proved by uncontradicted testimony. The deed contained a clause, that the lands should be subject to any judgments that were then a lien upon them; and it was urged, on the argument, that these judgments should be taken into the account, on fixing the amount of the purchase money. But the answer is, that it does not appear, from any evidence in the case, that judgments existed against J. L. Hudgins at the date of the deed. We have examined the proofs attentively, and find none; nor have any been referred to in the briefs of the counsel. It also appears that Robert, the grantee, some four months after the date of his deed, and when the title to the land in question was in him, if the conveyance had been really made at its date, was present, and participated in a negotiation for a loan of money to J. L. Hudgins, and which was to be secured by a deed from him to these very lands, in trust, to the persons advancing the money.

The conduct of the defendant, Robert, in this instance, furnishes the foundation for a strong inference, either that the deed had not then been executed and delivered, or, if it had been, that the grantee held it for the use and benefit of J. L. Hudgins, the grantor. In either view, the fact affords a well founded suspicion of the bona fides of the transaction between the parties.

In respect to the payment of the purchase 53*] money, of which *very formal proofs have been given of the principal part of it, the effect in support of the conveyance is very much impaired by the fact that J. L. Hudgins, in the schedule of his estate annexed to this petition in bankruptcy, 23d February, 1843, takes no notice of this indebtedness to him, by Robert, the grantee, and the truth of the schedule is verified under oath. This was a year and two days after the date of the deed, and when the purchase money was unpaid, if the facts are true, as insisted by both the parties subsequently, upon the question of payment. They now admit this did not take place till August, 1844. No attempt has been made to account for or reconcile this inconsistency, if not worse, on the part of J. L. Hudgins. Without pursuing the examination of the proofs in the case further, we simply say, that after the fullest consideration of the facts in the case, we are satisfied with the conclusion arrived at by the court below upon this question.

But it is insisted that, admitting the conveyance to be void as it respects the creditors of J. L. Hudgins, the court below erred in ordering a sale of the property, without having first ascertained the debts of the bankrupt, and permitting the grantee in the deed to redeem on paying them, or directing only so much of the land to be sold as would be sufficient to pay the debts.

The answer to this is, that the defendant, Robert Hudgins, made no offer to pay the debts on ascertaining the amount, and, for aught that appears, the whole of the property will be no more than sufficient to pay the liabilities of the bankrupt. If there should, by chance, be any surplus, it belongs to the court in bankruptcy to dispose of it. Whether it should go to the bankrupt or to his grantee, will be for that court to determine.

It is also insisted, that the court below erred in decreeing the rents and profits of the lands in controversy against the defendant, Robert Hudgins, for the reasons that it is not shown that he was in the possession and enjoyment of the same; and also, that the court erred in decreeing these rents and profits from the filing of the petition in bankruptcy, instead of from the decree declaring J. L. Hudgins a bankrupt.

The short answer to each of these objections is, that no such exceptions were taken to the report of the master, and are, therefore, not properly before us. That was the time and place to have presented these questions, and the omission precludes any question here on the matter.

The decree of the court below, affirmed.

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*ELLIOTT W. HUDGINS and John L. [*54
Hudgins, Appellants,
v.
WYNDHAM KEMP, Assignee in Bankruptcy of John L. Hudgins.

(See S. C. 20 How. 54, 55.)

Exceptions not taken in the court below to the master's report, cannot be noticed in this court.

Argued Dec. 30, 1857. Decided Feb. 10, 1858.

THE bill in this case was filed in the Circuit Court of the United States for the Eastern District of Virginia, by the assignee in bankruptcy of John L. Hudgins against the appellants, to set aside certain conveyances by said bankrupt to his son, charged to have been made in fraud of creditors. The court below, by its decree sustained one of the deeds in question, and declared the other fraudulent and void as against creditors.

The defendants brought the case here on appeal.

A further statement appears in the opinion of the court. See, also, the preceding case, which is similar to this, both depending upon substantially the same evidence.

Messrs. **James Lyons** and **Reverdy Johnson**, for appellants.

Messrs. **Conway Robinson** and **John M. Patton**, for appellee.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Virginia.

The bill was filed by the assignee of the bankrupt, J. L. Hudgins, as in the preceding case, against E. W. Hudgins, a son, to set aside two deeds of conveyance of lands, as executed and delivered by the bankrupt to hinder and delay creditors; one dated 6th September, 1839, conveying 300 acres lying in the County of York; the other dated 1st March, 1842, conveying by estimation, 700 acres, in the same county—the latter for consideration of $3,000. This deed was made a few days after the one set aside in the case of the assignee against Robert Hudgins. The case depends upon substantially the same evidence. Portions of it, tending to connect this defendant with the conduct of the

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grantor, in conveying away his property in fraud of his creditors, as respects the deed of the 1st March, 1842, are, if possible, somewhat stronger than that in the preceding case.

The court, on the 18th May, 1843, decreed that the deed was fraudulent and void, and that the assignee in bankruptcy take possession of the property as a receiver; and further, that the deed of the 6th September, 1839, was not made in fraud of creditors, but was valid as against the complainant. The court also directed an account of the rents and profits, from the time of the petition in bankruptcy to the time of the receiver taking possession. The master subsequently reported rents and profits to the amount of $659.72; and on the 27th June, 1855, a final decree was entered.

The court decreed that the defendant, E. W. Hudgins, pay to the complainant $659.72, with interest from 2d June, 1848; and that, if the proceeds of the property directed to be sold, in the case of the plaintiff against Robert Hudgins and others, should not be sufficient to satisfy the debts proved against the bankrupt, then the plaintiff is authorized to sell the lands in question, as particularly specified and directed in the said decree.

55*] *The only question arising on the master's report in this case, and the decree in pursuance thereof, is, that the rents and profits should not have been charged prior to the decree in bankruptcy. The answer to this objection is, that no such exception was taken to the report, and cannot, therefore, be noticed here. The case, in all its essential parts, falls within the views presented in the preceding one of this plaintiff against Robert Hudgins and others, and must abide the like result.

The decree of the court below is affirmed.

CHARLES McMICKEN, Appellant,
v.
FRANKLIN PERIN.

(See S. C. 20 How. 133–135.)

Appeal—order to enforce decree, not a final decree.

Where a decree of the Circuit Court is affirmed on appeal to this court, and the cause remanded to the Circuit Court to be carried into effect, an order for attachment by the Circuit Court against defendant to enforce the original decree, is not a final decree on which an appeal can be sustained.

Argued Feb. 5, 1858. Decided Feb. 10, 1858.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

This case was here on appeal from the Circuit Court of the United States for the Eastern District of Louisiana, at the December Term, 1855 (18 How. 508). When the mandate of this court was filed in the court below, Perin showed to the court a tender on his part of $8,755, and its deposit in court in satisfaction of the decree, and the refusal of McMicken to convey the premises in question. An attachment was ordered to issue by the court, to compel the defendant to execute a conveyance, as directed by the decree. From this order the defendant took this appeal.

A further statement appears in the opinion.

On motion to dismiss.

Messrs. Smiley and Taylor, for appellee:

The very question now brought to the notice of the court was decided in the case of Watson v. Thomas, Litt. Sel. Cas. (6 Litt.) 248, in which the court declared that "no appeal or writ of error will lie from the decision of the court, on an attachment to enforce the execution of a deed decreed to be executed. To the same effect is the case of Carr v. Hoxie, 13 Pet. 462. Such, also, is the jurisprudence of Louisiana.

Lovelace v. Taylor, 6 Rob. (La.) 93.

There is nothing in the case of Perkins v. Forniquet opposed to the principle now relied upon. In that case the Circuit Court misunderstood and misconstrued the mandate of this court, and executed it in a manner obviously not contemplated by the decree.

It is, therefore, respectfully submitted that this appeal should be dismissed.

Messrs. Gillet and Black, for appellant.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the Circuit Court for the Eastern District of Louisiana.

The defendant, Perin, in the year 1848, being desirous of purchasing the interests the Fletchers had in a plantation, with *the im- [*134 provements thereon, situated in the Parish of East Baton Rouge, in the State of Louisiana, applied to Charles McMicken, a relation of his, living in Cincinnati, Ohio, to loan him $5,000 for the purchase, which he agreed to do; and in order to secure McMicken, it was agreed that he should take the title in his own name and trust, on condition that Perin should pay him the money advanced. And it appears that, under various pretenses, McMicken sought to hold the plantation as his property.

A bill was filed by Perin for a specific execution of the contract, by a conveyance to him on the payment of the $5,000 borrowed.

And after various proceedings were had and testimony examined, the court decreed that Perin, within six months, shall pay McMicken the sum of $7,266.30, with interest thereon at the rate of eight per cent., from the date until paid; and on the payment thereof, that McMicken shall convey to Perin the undivided three fourths part of the plantation aforesaid, in the Parish of East Baton Rouge. Subsequently, the time for the payment of the money was extended three months. But this order was afterwards annulled, and an appeal to the Supreme Court from the decree was granted.

And afterwards, at the January Term, 1857, on filing the mandate of the Supreme Court of the United States, affirming the decree of the Circuit Court, and upon showing that a tender had been made of the sum of money specified in said decree, and the interest thereon, by said Perin to said McMicken, according to the terms of the decree, to wit: the sum of $8,755, which sum has been deposited in this court in satisfaction of said decree by Perin, and upon filing the affidavit of Perin that McMicken refuses to convey the premises directed by said decree, the deed being herewith filed, it is therefore ordered that said defendant, Charles McMicken, do show cause, on Saturday, the 17th instant, at 10 o'clock A. M., why an attachment should not issue to enforce compliance with said decree.

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On the same day the mandate was entered, and prior to its entry it was proved, by the affidavit of Perin, that a tender of the above sum was made to McMicken, which he refused.

In answer to the rule to show cause why an attachment should not issue against him, various reasons were assigned, all of which were overruled by the court, and an attachment was ordered to issue to compel the defendant to execute a conveyance, as directed by the decree; and, further, that the defendant should pay the costs of the rule. From this decision the defendant prayed an appeal to the Supreme Court, 135*] which *was allowed, and on which bond was given. This is the appeal now before us, and which a motion is made to dismiss.

By the appeal from the former decree, the time within which the money was required to be paid was necessarily suspended. But that decree having been affirmed by the Supreme Court, and remanded to the Circuit Court to be carried into effect, nothing further was required to be done. The tender and deposit of the money in court was all that Perin was required to do, to authorize the court to attach McMicken for a contempt, in refusing to make the conveyance. This involved no new question or decision, but was the ordinary means of enforcing the original decree. In no sense was this a final decree on which an appeal could be sustained. It is, in effect, the same as ordering an execution on a judgment at law, which had been affirmed on error, and remanded for execution to the Circuit Court. It has been held that an order of sale in execution of an original decree is not a final decree, on which an appeal will lie.

Keene v. Warren, 13 Pet. 459.

There are cases in which a second appeal may be taken, but it must be founded on a procedure subsequent to the original decree, and in a matter not concluded by it.

This appeal is dismissed, at the costs of appellant.

ANN C. SMITH, Use of Caleb Cushing, Plff. in Er.,
v.
THE CORPORATION OF WASHINGTON.

(See S. C. 20 How. 135-149.)

Repair of streets in Washington—leveling same—power of City Corporation—liability for damages.

The City Corporation of Washington has the trust confided to them, and the duty imposed upon them, not only of opening the streets, but of keeping them in repair.

Streets cannot be opened and kept in repair, or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit.

If the duty imposed on the Corporation requires this to be done, the power must be co-extensive with the duty.

The Corporation has authority to change the level or grade, in order to keep the street in repair.

Having performed this trust according to the best of their judgment and discretion, on land dedicated to public use for the purposes of a highway, they have not acted unlawfully or wrongfully, and are, consequently, not liable to damages where they have committed no wrong, but have fulfilled a duty imposed on them by law as agents of the public.

Argued Jan. 19, 1858. Decided Feb. 10, 1858.

IN ERROR to the Circuit Court of the United States for the District of Columbia.

This was an action on the case brought in the Circuit Court of the District of Columbia, by the plaintiff in error, to recover damages alleged to have resulted from the second regrading of a certain street in the City of Washington. On the trial below, it appeared that the street was graded and graveled in front of plaintiff's premises in 1832, under and by virtue of Acts of the Corporation; and that it was regraded under an Act of the Corporation of Aug. 21, 1851, and then again regraded under the Act passed by the Corporation on Sept. 12, of the same year.

It was insisted by said plaintiff that neither of the said regrades was authorized by the Act of Congress conferring corporate powers upon the City of Washington, without making compensation to those injured by it.

The defendants insisted that they had the right to regrade, whether it produced individual injury or not, unless from the evidence the jury should find the change was made "wantonly, willfully and maliciously."

Evidence tending to show that the defendant's acts were not bona fide, was rejected by the court.

The cause was tried by jury, who, under instructions by the court, found a verdict for the defendant. Plaintiff brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Messrs. C. Cushing and R. H. Gillet, for plaintiff in error:

First. The plaintiff had a right to give evidence tending to question the bona fides of the defendants in making the regrades.

The evidence clearly tended to show, if it was not conclusive, that the defendants applied a different rule in other parts of the City from that which they enforced upon the plaintiff. The evidence offered raised a presumption against the defendants, and it rested with them to repel it by other evidence, if they could. It prejudiced the plaintiff to reject it altogether, and therefore the exception ought to be sustained.

Second. That the first establishment of a grade raises a presumption that such grade was the proper one, and to justify a change the defendants were bound to show a change of circumstances, and the occurrence of a new and further necessity, to justify a regrading.

After the grading of 1831 or 1832, which was proved to be a proper grade by the acts of the defendants, as well as by witnesses, it was incumbent upon the defendants to show some reason for a regrade other than their neglect in letting the street get out of repair. They offered none of a material character. They ordered the regrade by the Act of August 11th, 1851, without any substantial or plausible reason. It was the exercise of power without any reasonable cause.

The regrading under the Act of 12th of September, 1851, is wholly without a pretense

NOTE.—Municipal liability to abutting owner for changing grade of street—see note, 14 L.R.A. 371.

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of excuse. They had fixed the grade and graveled the street; neither the elements nor any other cause had changed it, or proved it unsuitable. There was no change of circumstances, and no occurrene of any new or further necessity for a change of what they had made as good and sufficient. It was a wanton exercise of power without any assignable good motive. It laid the foundation for the assumption that the defendants did not act in good faith. It raised that presumption, and it rested upon them to repel it, which they did not attempt.

Third. The payment of damages to a portion of those injured residing in Franklin Row, authorized the presumption that the defendants did not act in good faith.

The defendants as a Corporation derive their powers under the 7th and 8th sections of the Act of 1820.

3 U. S. S. 586, 587.

There is no power conferred upon them to make gratuities; to do so would be a wanton violation of duty. They cannot assume that they thus acted in paying Ratcliffe $425 towards his loss. This was an acknowledgment that they had acted wrongfully in the cutting down, and were liable for the injury.

Fourth. The condition in which the defendants left the street for a long time, raised a presumption against the good faith of their acts.

Fifth. The court erred in instructing the jury that the plaintiff could not recover without providing that the change in the street was made "wantonly, willfully and maliciously."

Under the instruction, the issue framed by the pleadings was changed. The declaration charged that the defendants had injured her property without authority of law, and the plea denied the allegation. The parties went to trial upon that issue. The court on the trial made a different one, and directed the jury that they must find three other charges against the defendants before the plaintiff could recover:

1st. That the defendants had acted wantonly—that is, wholly without regard to restraints or consequences.

2d. That they acted wilfully—that is, obstinately and stubbornly wrong, not yielding to reason; but by design and with the purpose of doing injury.

3d. That they acted maliciously—that is, with extreme enmity of heart; with malevolence, and with a disposition to injure the plaintiff without cause—with unprovoked malignity or spite. A malicious injury has been defined to be: "An injury committed out of spite or ill will against another; an injury committed wantonly, willfully and without cause."

2 Burrell, L. Dic. 698; 1 Chit. Gen'l Pr. 136.

Wantonness is defined by Bouvier, 2 vol. L. Dic. 640, as "A licentious act by one man towards the person of another, without regard to his rights."

In changing the issue by the charge of the court, the plaintiff sustained an injury; and the judgment ought to be set aside, and a new trial ordered.

Sixth. The defendants had no lawful authority to cut down the street in front of the plaintiff's house so as to injure her property, without her consent, without making her compensation.

It is a fundamental rule of law, that artificial bodies, like corporations, can exercise no power except such as is expressly conferred upon them.

Head v. Providence Ins. Co., 2 Cranch, 127; Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326.

"The only power conferred upon the Corporation of Washington on this subject, is found in the 7th sec. of the Act of May 15, 1820, 3 U. S. L. 5, 687, and is in these words:

The said Corporation shall have full power and authority to . . . erect and repair bridges; to open and keep in repair streets, avenues, lanes, alleys, drains and sewers, agreeably to the plan of the City, to supply the City with water," etc.

This provision recognizes the known historical fact, that at an early day there was prepared and adopted a plan of the City of Washington, wherein the streets, alleys, lanes, etc., were drawn, and the grade of the streets and avenues above tide water accurately laid down.

The grades having been previously established, the power conferred in relation to streets and avenues, was "to open and keep in repair," and not to grade. The intention of Congress was to authorize the City Government to carry into effect the plan of the engineers who laid out the City, and of General Washington who approved it.

The charter does authorize the City "to cause new alleys to be opened through the squares, and to extend those already laid out upon the application of the owners of more than one half of the property in such squares." Sec. 8, p. 587.

But this can only be done by paying those injured the losses they sustain, which is to be collected of those whose property shall be benefitted, as equity and justice require. This provision in relation to lanes, shows that Congress did not intend to arm the City with the power of injuring the property of individuals, without requiring it to make just compensation.

This law is entirely different from the Georgetown Act construed in Goszler v. The Corporation of Georgetown, 6 Wheat. 593. The Legislature conferred upon the Corporation of Georgetown, "full power and authority to make such by-laws and ordinances for the graduation and leveling of the streets, lanes and alleys within the jurisdiction of the same town, as they may judge necessary for the benefit thereof."

In the present case there being no express power to grade the streets, it is claimed that the authority to open streets not only confers that power, but that it continues and may be exercised without limit, except upon proof of malice. But the power to open is not a continuing power, because when once opened a street cannot be opened again. The power to repair does not include that of establishing a new grade. That term means simply to restore what has been injured, to its original condition. Bouvier, 2 L. Dic. 447, says, that "repairs" means "that work which is done to an estate to keep it in good order."

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It is clear that when a street is once opened, it cannot be regraded under the power to open; and that under the authority to repair, nothing can be done but to restore it to its original condition.

But if the power to open authorized the grading when it was once exercised, the power would be exhausted and could not be exercised a second time.

Mr. J. M. Carlisle, for defendant in error:

The granting and refusing of instructions to the jury by the court below, all proceeded upon the following propositions, which will be maintained here, to wit:

I. The Corporation of Washington had power under its charter to regrade these streets. Its power in this respect is a continuing power, to be exercised toties quoties, as the public convenience may require.

Goszler v. The Corporation of Georgetown, 6 Wheat. 593; Act of Assembly of Md. 1797, ch. 56, sec. 6; Van Ness v. The United States and Corporation of Washington, 4 Pet. 280; Charter of 1820, 3 Stat. at L. 587.

II. The Corporation had no power, even by an express ordinance or contract, in any form to bind itself not to change or alter the grade of a street, even if such grade should be, by the same ordinance or contract, or in any other manner established. And it follows, of course, that there can be no implied contract such as imputed to the Corporation in the premises. The plaintiff could not have acquired any right, by convention, grant, prescription, or contract, express or implied, to have the old grade of the street maintained.

This follows from the preceding point, and is sustained by the same reason and authorities.

III. The case made by the plaintiff in error is one of mere damnun absque injuria. It shows no invasion of any right, but simply a damage resulting from the bona fide and careful exercise of a lawful authority for the public good. The supposed right of the plaintiff, of the invasion of which she complains, is a right ex jure naturæ to build a house on the top of a hill in the midst of a city, and to require the city to conform perpetually to her convenience, at the expense of the convenience of everybody else; a right to keep a nuisance; to insist on an impracticable grade of a public street; to destroy the value of all the surrounding lots of ground, in order that she may have more convenient access to the house so built. But if in any case such right ex jure naturæ could be maintained, certainly it does not exist in the City of Washington, where all titles to city lots are held from a common source, and subject to common conditions and liabilities; the original proprietors having conveyed their lands to trustees, "to be laid out for a federal city, with such streets, etc., as the President of the United States, for the time being, should approve."

Burch, Dig. 331; 4 Pet. 283.

The plaintiff was simply the owner of a city lot as such.

That no action lies in such case, results from the fact that no injury, no violation of her right has occurred.

Governor v. Meredith, 4 D. & E. 794; Lansing v. Smith, 8 Cow. 146; Wilson v. The Mayor, etc., 1 Den. 595; Woodfolk v. Nashville Co. 1 Am. Law Reg. 550—by the Sup. Ct. of Tenn.; St. Louis v. Gurno, 12 Mo. 418; Green v. Borough of Reading, 9 Watts, 382; O'Connor v. Pittsburgh, 18 Penn. 187; Commissioners v. Withers, 29 Miss. 37.

Numerous other authorities might be cited to the same effect.

Mr. Justice Grier delivered the opinion of the court:

The declaration in this case alleges, in substance, that the plaintiff is owner of a lot in the City of Washington, fronting on K. Street; that this street was opened in front of her lot in the year 1831, and became a traveled street; that a wall had been erected in front of the lot, to protect it; that shade trees had been planted in front of it; that a sidewalk had been laid; "that defendants unlawfully, wrongfully and injuriously" cut down the shade trees, took down the wall, removed the pavement, and dug down the street in front of the premises, thereby obstructing and injuring the ingress and egress to the plaintiff's lot and the buildings thereon—injuring their value, depriving her of the shade and ornament of the trees, and compelling her to pay large sums of money to enable her to use and occupy her house.

It must be observed that the gravamen of this case is not a trespass on the property of the plaintiff, or the taking down a wall or removing shade trees thereon; nor the erection of a nuisance on the public highway; nor a willful, malicious, or oppressive abuse of authority, in order to injure the plaintiff. *But the [*147 declaration charges that these acts of defendants, in reducing the level of the street, removing trees, payment, etc., were done "unlawfully, wrongfully and injuriously."

On the pleadings and evidence in the case, the only questions of law that did or could arise on it were—

1st. Whether the Corporation, defendant, had power to change the grade of the street, or acted "unlawfully and wrongfully" in so doing; and,

2d. If the act was lawful, were the defendants bound to compensate the plaintiff for the injurious consequences to her property?

1. First, then, as to the authority of the Corporation.

It is unnecessary, in the consideration of this point, to recur to the early history of the foundation of the City of Washington; suffice to say, the land was originally conveyed to trustees, "to be laid out as a federal city, with such streets, etc., as the President shall approve." It has been so laid out, and the streets dedicated to the public. As in all other cities and towns, the legal title to the public streets is vested in the sovereign, as trustee for the public; and consequently in this District they can be regulated only by Congress, directly, or by such individuals or corporations as are authorized by Congress.

The Act to incorporate the City of Washington, passed May 15th, 1820, among other specific powers and duties enumerated in the 7th section, has the following: "To open and

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keep in repair, streets, avenues, lanes, alleys, etc., etc., agreeably to the plan of the City."

It has been contended that this power "to open and keep in repair" does not include the power to alter the grade or change the level of the land on which the streets, by the plan of the City, are laid out.

But we think such a construction of this clause of the charter is entirely too narrow, and cannot be supported as consonant either with the letter or spirit of the Statute. It is the evident intention and policy of this Statute to commit to this Corporation, as a municipal organ to government, whose members are chosen by the citizens, the care, supervision, and general regulation of the streets, as in other cities and boroughs.

Where sums of money have been specially voted by Congress for the improvement of the City, it is usual to order it to be expended under the supervision of the President. But no inference can be drawn from such legislation, that Congress intended to retain the whole police and regulation of the streets to itself, so as to require a special act to alter the grade of a street, or that the President, in addition to his other duties, has imposed on him that of Street Commissioner of Washington. 148*] *The City Corporation has the trust confided to them, and the duty imposed upon them, not only of opening the streets of Washington, but of "keeping them in repair."

Streets cannot be opened and kept in repair or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or, in other words, the road must be "graded" or "reduced to a certain degree of ascent or descent;" which is the proper definition of the verb "to grade." If the duty imposed on the Corporation requires this to be done, the power must be co-extensive with the duty. If charged with neglect of their duty, as public officers bound to keep the streets in repair, it would not be a sufficient excuse to allege that the fences and obstructions are removed, and therefore the street is "opened," or that it has been kept in as good "repair" as it was found.

A court of quarter sessions would probably not receive a defense founded on such astute philological criticism of the terms of the Statute. Nor could the allegation be admitted, that having once fixed a grade, which is now found improper and insufficient, the Corporation has exhausted its power, and has no authority to change the level or grade, in order to keep the street in repair. As the duty is a continuing one, so is the power necessary to perform it.

2. Having performed this trust, confided to them by the law, according to the best of their judgment and discretion, without exceeding the jurisdiction and authority vested in them as agents of the public, and on land dedicated to public use for the purposes of a highway, they have not acted "unlawfully or wrongfully," as charged in the declaration. They have not trespassed on the plaintiff's property, nor erected a nuisance injurious to it, and are, consequently, not liable to damages where they have committed no wrong, but have fulfilled a duty imposed on them by law as agents of the public. The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of defendants is not "unlawful or wrongful," they are not bound to make any recompense. It is what the law styles "damnum absque injuria." Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of that of the public.

The law on this subject is well settled, both in England and this country. The cases are too numerous for quotation; a reference to one or two more immediately applicable to the questions arising in this case will be sufficient.

*In Callender v. Marsh, 1 Pick. 417, the [*149 defendant, as surveyor of the highways, was charged with digging down a street in Boston, so as to lay bare the foundations of plaintiff's house, and endanger its falling. The authority under which he acted was given by a Statute which required "that all highways, townways, etc., should be kept in repair and amended from time to time, that the same may be safe and convenient for travelers." "This very general and exclusive authority," say the court, "would seem to include everything which may be needed towards making the ways perfect and complete, either by leveling them where they are uneven and difficult of ascent, or raising them where they should be sunken and miry." It was held, also, that the law does not give a right to compensation for an indirect or consequential damage or expense, resulting from a right use of property belonging to the public.

In Green v. The Borough of Reading, 9 Watts, 382, the defendants, by virtue of the authority to "improve and repair," graded the street in front of plaintiff's house five feet higher than it had been before, and it was held that the Corporation was not liable to an action for any consequential injury to plaintiff's property, by reason of such improvement or change of grade in the public street.

In the case of O'Connor v. Pittsburg, 18 Pa. 187, a church had been built according to the direction of the City Regulator, and by a grade established in 1829. Afterwards, in pursuance of an ordinance, the grade of the street was reduced seventeen feet; the church had to be taken down and rebuilt on a lower foundation, at a damage of $4,000. The authority given to the City was "to improve, repair and keep in order the streets," etc.

The court say: "We had this case reargued, in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only in Pennsylvania, but by every decision in the sister States, except one."

We are of opinion, therefore, that the instructions given by the court below on these points were correct, and affirm their judgment.

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THE COMMERCIAL BANK OF MANCHESTER, Compt. and Appt.,
v.
HENRY S. BUCKNER.

(See S. C. 20 How. 108-125.)

Exclusive jurisdiction, in bankruptcy, of District Court—no other court can annul discharge as to parties to proceedings—Circuit Courts cannot.

The Bankrupt Law has given to the District Court a plenary and exclusive jurisdiction in all matters and proceedings in bankruptcy.

No other court can annul the decree of the bankrupt's discharge, either partially, for the benefit of a particular creditor, or wholly, to deprive the bankrupt of its operation, as to those who were parties to the decree of the discharge, who proved their debts, and who have taken a dividend from his estate.

The Circuit Courts of the United States have not jurisdiction to annul or vacate the discharge and certificate in bankruptcy obtained in the District Court, upon imputations of fraud done in contemplation of bankruptcy by the bankrupt; or to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, who had assented to the bankrupt's discharge and certificate, and who has taken a dividend out of the bankrupt's estate.

Argued, Jan. 15, 1858. Decided, Feb. 15, 1858.

THE bill in this case was filed in the Circuit Court of the United States for the Eastern District of Louisiana, by the appellant against the appellee, a discharged bankrupt, to recover about $150,000.

The bill charges fraud in obtaining the discharge in bankruptcy, by reason of various concealments and transfers of property made in contemplation thereof.

The defendant demurred. The court below sustained the demurrer and entered a decree dismissing the bill. From this decree the complaint took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. L. Madison Day, for appellant.

The charges of fraud, all of which are unconditionally admitted by the demurrer to be true—11 Wheat. 171; 3 Pet. 36; 6 How. 118; 2 J. J. Marsh. 405; 18 Conn. 431; 2 Gilman, 387—are sufficient to invalidate the discharge of bankruptcy.

5 U. S. Stat. at L. 442; Caryl v. Russell, 13 N. Y. 194; Buckingham v. McLean, 13 How. 151; 3 McL. 197, 203, 628; Bell v. Leggett, 7 N. Y. 179; Gassett v. Morse, 21 Vt. 629; Brereton v. Hull, 1 Den. 75; Beekman v. Wilson, 9 Met. 439; Coates v. Blush, 1 Cush. 564.

2. The equity side of the Circuit Court has jurisdiction of the cause. The Bank is alleged to be a Corporation by the laws of Mississippi, and located in said State, and the defendant to be a citizen of Louisiana. This was sufficient.

Marshall v. B. & O. R. R. Co. 16 How. 314; Louisville R. R. v. Letson, 2 How. 497.

The equity jurisdiction of the Federal Courts is the same in nature and extent in all the States, and is entirely independent of the local law of any State. It is no objection to their jurisdiction that there is a remedy under the local law.

3. Pet. 215; Bean v. Smith, 2 Mas. 252; Harrison v. Rowan, 4 Wash. C. C. 205; U. S. v. Myers, 2 Brock. 525; 4 Wash. C. C. 354; Dodge v. Woolsey, 18 How. 347.

A court of equity will interfere and remove a party from the operation and effect of a judgment, when there is any fact which shows it to be against justice or good conscience to allow the party to avail himself of the same.

2 Green, N. J. ch. 520; 1 Johns. Ch. 402; 3 Johns. Ch. 280; 6 Johns. Ch. 235; 19 Ohio, 448; 2 J. J. Marsh. 405; 2 Cow. 193; 20 Conn. 544; 7 Cranch, 336; 2 Kern. 165; 2 Ves. Jr. 135.

It is competent for any court to treat the discharge and certificate under the Bankrupt Act, when interposed as a barrier to prevent a recovery on a pre-existing demand, as null and void, whenever fraud is shown.

5 U. S. Stat. 443; 8 Ired. 142; 8 Ala. 848; 11 Humph. 289; 3 Cranch, 300; 25 Vt. 339; 5 Binn. 247.

All Acts into which fraud enters, are nullities.

Neither a bona fide debt nor an actual advance of money will sustain a security infected with fraud. Per Sandford, Chancellor, 2 Sandf. Ch. 631.

In the case of Downer v. Rowell, 25 Vt. 339, the Supreme Court of Vermont, in construing the Bankrupt Act, says: "The Statute in effect declares, that in case the discharge and certificate were superinduced by fraud, they may be impeached on that ground, as being null and void."

And if a judgment is null and void, it is the same thing as though it had never been rendered, and is "unavailable for any purpose," (per Thompson, Ch. J. in Borden v. Fitch, 15 Johns. 140; 11 Sm. & Mar. 464; 11 La. 533; 11 Eng. Ch. 448, 449), and may be collaterally disallowed and disregarded.

Slocum v. Wheeler, 1 Conn. 429, 449; 6 How. (Miss.) 285; 8 Sm. & Mar. 519.

Such being the law, then, there can be no ground for saying that the discharge and certificate should have been annulled by a direct action, instituted for that purpose, in the Bankrupt Court. 2 Kerman, 166; 8 Ala. 855-864.

Indeed, it has been held by high authority that the District Court never had any jurisdiction to entertain such a proceeding.

Mabry v. Herndon, 8 Ala. 855.

But if it could be shown or was conceded that the Bankrupt Act gave such jurisdiction to that court, yet as the Act has been unconditionally repealed, with no saving clause in the repealing Act, except for the purpose of finally completing and determining causes then pending, the District Court is clearly without any jurisdiction for such a purpose.

4 Seld. 265; see, also, Dwarris on Stat. 676; Miller's case, 1 Wm. Bl. 451; 4 Yeates, 394; 5 Cranch, 281; 11 Pick. 350, 373; 1 Hill, 324; 5 Blackf. 195; 15 Conn. 242; 4 Humph. 427; 4 Seld. 265-269.

No action of nullity then was, or could by any possibility be, necessary to entitle the complainants to recover either at law or in equity, on their original demands.

Nor was it at all necessary to apply to the District Court for leave to impeach the discharge and certificate.

8 Ired. 142; 8 Ala. 864.

In Simms v. Slacum, 3 Cranch, 300, 307,

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Chief Justice Marshall says: "When the person who has committed the fraud attempts to avail himself of the Act, so as to discharge himself from a previously existing obligation, or to acquire a benefit, the judgment thus obtained is declared void as to that purpose.

And in Mabry v. Herndon, 8 Ala. 856, 857, Chief Justice Collier also, in an elaborate opinion, said: "Thus we see, that although the Statute contemplated a boon to the debtor, viz.: a release from indebtedness, it exacted on his part perfect integrity, in yielding up everything that was liable for his debts.

See, also, Mitf. Eq. Pl. 239.

The Supreme Court of Tennessee, in the case of Gupton v. Connor, 11 Humph. 289, well says: "If the fraud appear pending his suit against his creditors, no decree of discharge could be made. If it appear afterwards, its effect is to annul and destroy the discharge and certificate, as though they had never been obtained."

And in Cogburn v. Spence, 15 Ala. 553, 554, the Supreme Court of Alabama very truly remarks: "The Bankrupt Act does not intend, nor in any manner undertake to restrain a creditor who has a cause of action against a bankrupt from suing him, although the bankrupt may have obtained his final certificate of discharge. It only gives the bankrupt a complete defense against the cause of action when sued. The creditor may, however, sue on his demand; otherwise he could not dispute the bona fides of the certificate, and the bankrupt must rely on his certificate in bar of the suit."

Chancellor Desaussure, too, in Lowe v. Blake, 3 Desaus. 269, 270, in relation to an insolvent discharge, uses this strong and forcible language: "That in case there was any fraud or concealment in obtaining this discharge, this court is not bound to give effect to the discharge obtained in any other court."

See, also, Card v. Walbridge, 18 Ohio, 411, 423; Alcott v. Avery, 1 Barb. Ch. 347, 352; 9 Ga. 9-14.

The Statute of Limitations, as well as lapse of time, is not a bar, as the Statute in equity in cases of fraud only begins to run, from discovery.

2 Sto. Eq. sec. 521; Ang. Lim. 188; 20 Johns. 45, 576. 582; 19 Conn. 421; 10 Wheat. 174; 2 Sumn. 491; 1 Wood. & M. 111; 8 Watts, 401.

The 5th section of the Bankrupt Act is not a bar to a suit where a party proves his claim and takes a dividend without knowledge that the discharge was fraudulently obtained. Throughout the entire Act there is one principle paramount to all others, and that principle is good faith and honesty on the part of the bankrupt. A statute should be construed to effect as nearly as possible the design of the law-makers, as evinced by the whole Act.

7 How. 622; 19 How. 194; 16 La. 268.

A party who has perpetrated a fraud under a statute, can obtain no protection under such statute, however general its language.

2 Green, N. J. ch. 523; 15 Ohio, 666; 15 Mass. 519.

In Crocker v. Stone, 7 Cush. 341, it was held that no discharge in insolvency was valid, even as against a creditor who proves his claim and is himself the assignee, unless the discharge is obtained in strict conformity to law.

See, also, 4 Cush. 529; 13 Met. 63; 11 Cush. 311; 3 McL. 631.

As to fraudulent bankrupts and those who designedly violate the principles of the Bankrupt Court, the Statute may properly be liberally construed in favor of creditors.

9 Met. 438; 20 Conn. 394.

On every principle of justice, then, and the weight of authority, we hold that the 5th section is not a bar and protection to the fraudulent bankrupt, in cases of subsequently discovered fraud.

Messrs. J. A. Bayard and J. P. Benjamin, for appellee:

Points and Authorities.

1. The District Court has exclusive jurisdiction to impeach the decree of discharge in bankruptcy, or recall the certificate. It may adjourn any point arising in any case in bankruptcy to the Circuit Court, but the latter has no jurisdiction of an original bill to annul or avoid the decree of the District Court as prayed for in this suit, though the Circuit Court would, as well as a State Court, have jurisdiction to inquire into the validity of the discharge, if pleaded in bar and impeached for fraud, or its effect, if a subsequent express promise of payment by the bankrupt were alleged.

The bankrupt proceedings are in the nature of proceedings in rem and not subject to collateral inquiry in another than the court which decreed the discharge.

Bankrupt Law of 1841, secs. 4 and 6, 5 Stat. 444; Shawhan v. Wherritt, 7 How. 643; N. Am. Ins. Co. v. Graham, 5 Sand. 197.

The cause of action stated in the bill consisted of twelve promissory notes and one bill of exchange, all of which were due six months before the defendant filed his petition in bankruptcy, and eleven months before the decree of discharge in his favor. The relief prayed, is that this decree and the certificate of discharge may be declared and adjudged void, and the defendant enjoined from setting up his discharge in bankruptcy, as against the rights of complainant.

To this relief, or any portion of it, the defendant objects that the complainant has full and perfect remedy at law as in equity, and that the cause of action is a merely legal claim, on which the complainant might have sued at any time since the maturity of the notes, more than 13 years before the bill was filed.

It is not alleged that any suit at law was ever brought on any of said evidences of debt against the defendant, or that defendant has ever threatened to plead his discharge in bankruptcy if suit were brought. Nor would a court of equity be entitled to this jurisdiction, even if the discharge had actually been pleaded in bar to an action at law.

Judiciary Act 1789, sec. 16; Ex-parte Dodson, 1 Buck. 225.

On the face of the bill the action is barred by the Statute of Limitations, and the defendant may take advantage of it by demurring.

R. I. v. Mass. 15 Pet. 272; Scott v. Eagle Fire Ins. Co. 7 Paige, 198; Hoare v. Peck, 6 Sim. 51.

Nor do the averments of fraud in the bill suffice to take the case out of the Statute of

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Limitations. With the exception of fraud in the cause of action, or cases of trust of exclusive equity jurisdiction, the Statute of Limitations is a bar in equity equally as at law.

15 Pet. 272; 9 How. 522; 13 Pet. 61; 20 Johns. 33; 4 Cush. 208; 1 Cow. 356; 21 Pa. State, 52.

The present is a case where it is merely alleged that the defendant fraudulently acquired a defense.

Mr. Justice Wayne delivered the opinion of the court:

The decision which we are about to give would not be satisfactory, unless it shall be preceded by a statement of the facts of the case as they are disclosed by the pleadings. We shall adopt that which was given by the counsel who argued the cause, with but little alteration or addition.

The appellants allege, in their bill, that during the years 1841 and 1842, the defendant, Henry S. Buckner, together with M. B. Hamer, who died in April, 1842, and Frederick Stanton, were partners in trade, doing commercial business in New Orleans, under the firm of Buckner, Stanton & Co., Buckner being the resident partner there; and in Natchez under the firm of Stanton, Buckner & Co., Stanton conducting it; and at Yazoo City under the firm of M. B. Hamer & Co., Hamer being the resident partner at that place. The three firms were distinct and separate, and kept their books and accounts accordingly. It is alleged that the three firms and the three members of them became hopelessly insolvent in the year 1841, and that they continued to transact business together until Hamer's death; that after his death the two survivors carried on the business of the three firms until their bankruptcy. On the 21st July, 1842, Stanton filed his petition in the United States District Court for the Southern District of Mississippi, both individually and as a member of the three firms, was decreed a bankrupt on the 8th November, 1842, and received his certificate of discharge on the 21st February, 1843. On the 18th July, 1842, Buckner made a similar application to the District Court in New Orleans, was decreed a bankrupt on the 5th September, 1842, and received his certificate of discharge on the 5th December, 1842.

It is also said that their applications for their discharges in bankruptcy were made by Buckner and Stanton in concert, with a view to future business.

It appears at the time of these applications 114*] they were indebted* to the appellants in the sum of $49,020.14, besides interest, on twelve promissory notes and on one bill of exchange, all which had become due in January, 1842. Three of them were payable on or before the 6th January, 1839; three others on the 3d April, 1839; four on or before the 3d March, 1841; and the last in the month of January, 1842, six months before Buckner filed his petition in bankruptcy. Buckner acknowledged the indebtment in his schedule filed with his petition in bankruptcy. The complainants proved a portion of their claim in the bankruptcy proceedings of Stanton. It is admitted that they received a small dividend from the assets of the firm; but they aver they did so in ignorance of the frauds upon the Bankrupt Law, committed by Buckner and Stanton, of which they knew nothing until the year 1853, when they discovered the frauds. And they further allege that they would not have proved their claim, nor have received a dividend, if they had known the frauds; and they assert that the certificates of discharge are null and void, by reason of the frauds.

It is then stated in the bill that the three firms had existed before 1837, in which year they suspended payment, but that they never recovered from their embarrassments, though they had resumed business. It is again alleged that their affairs were hopeless in 1841, and that executions on judgments obtained against Stanton as a member of the firm were in that year returned nulla bona.

That all the indebtment of the firms which made them insolvent was due prior to the 1st March, 1842, at which time the frauds began. That then, Buckner and Stanton had agreed that they would take the benefit of the Bankrupt Law, and, in contemplation of doing so, committed the fraud stated in the bill.

Twelve different charges of fraud are specified, all of them being payments to preferred creditors, in fraud of the general creditors—contrary to the provisions of the Act of the 19th August, 1841. No charge of any other fraud is made, except a transfer of some property in New Orleans, upon the understanding that Buckner was to have the right to redeem it on payment of the debt, and that the arrangement had secured for him an ultimate profit, in fraud of creditors. They also say, that it was because of the fraud of Buckner and Stanton in concealing a knowledge of the facts from them, that they were induced to believe the discharges valid; and so they did not proceed to enforce their claims at law or in equity, but that they had found them out only within two years. How or from what source they had made the discovery they do not state distinctly, though to support the charge they file an exhibit of *notes discounted for [*115 Stanton, Buckner & Co., by the Commercial Bank of Natchez, which were applied to their credit, and a list of protested notes of Stanton, Buckner & Co., taken up by them in May, 1842—two months before Stanton filed his petition in bankruptcy. Two letters from Stanton to Stephen Duncan—one of them dated at Natchez, on the 14th August, 1842, and the other on the 14th September, 1842—are made exhibits; both relate to the affairs of the firm, and to particular transactions of them, which the appellants allege were frauds committed by Stanton and Buckner, in giving preferences to certain creditors, in contemplation of bankruptcy. And they further declare, that since the bankruptcy of Stanton and Buckner, the books of Stanton, Buckner & Co., had, by some means, passed into the possession of Buckner; that if produced, the fraudulent preferences which had been made would be shown, and that they would also disclose other fraudulent preferences made by Stanton for himself and the firm of Stanton, Buckner & Co., in the spring and summer of 1842, in contemplation of bankruptcy.

The bill is closed with a prayer that the first decree of the District Court, discharging Buckner, should be declared void and of no validity, as far as the rights of the complainants, as

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set forth in the bill could be affected by it, and that Buckner should be perpetually enjoined from setting it up against their rights; and that Buckner should be adjudged to pay them the original sum due by him, with interest thereon; to which is added a prayer for general relief.

The defendant demurred to the bill, and for causes of demurrer, says:

I. That the said complainants have not, by their said bill, made such a case as entitles this court to entertain jurisdiction of this cause under the Constitution and laws of the United States.

II. That the said complainants have not, by the said bill, made such a case as entitles this court to entertain jurisdiction, or grant relief in equity; the remedy of complainants, if any they have, being at law, and not in equity.

III. That the said complainants having, by their own showing in said bill, made proof of their claims, and received dividends thereon, in the bankruptcy proceedings which resulted in the discharge of this defendant, are not permitted by the law to impeach the validity of said discharge in manner and form as sought by said bill; and having been parties and privies to the judgment of discharge in favor of this defendant, are forever precluded in law from contesting the validity and effect of 116*] *said judgment, on any such grounds as are alleged in said bill.

IV. That the said complainants have not, by the said bill, alleged any cause sufficient in law to authorize this court to set aside the decree of discharge in bankruptcy in favor of this defendant, rendered by the District Court of the United States, as set forth in said bill.

V. That the said complainants, by the allegations of said bill, show that the claims held by them, if they ever were due to them by this defendant, have become discharged by lapse of time, and barred by the Statute of Prescription and Limitation.

VI. That the said complainants, by the allegations of said bill, show such laches as by the principles and rules of equity deprives them of any right to claim relief or remedy in this court.

VII. That the said complainants have not, by the showing contained in their said bill, made out a case entitling them to relief either at law or in equity.

Wherefore this respondent demands the judgment of this honorable court, whether he shall be compelled to make any other or further answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in his behalf sustained.

(Signed)
Benjamin, Bradford & Finney,
Solicitors.

I certify that, in my opinion, the foregoing demurrer is well founded in point of law.

(Signed) J. T. Benjamin,
of Counsel.

Henry S. Buckner, being duly sworn, deposes that the foregoing demurrer is not interposed for delay.

(Signed) Henry S. Buckner.

Sworn to and subscribed before me, this 1st of October, 1855.

(Signed) J. W. Gurley, Commissioner.

The stating part of the bill of the complainants, their prayer for relief, and the demurrer of the defendant, suggest that our first point of inquiry in this case should be into the power of the Circuit Courts of the United States to entertain an original bill, to annul or vacate a decree discharging a bankrupt, either in whole or in part, for any of those frauds upon the Act of the 1st August, 1841, which would prevent the bankrupt from receiving a discharge. No such jurisdiction is given by the Act to the Circuit Courts. The jurisdiction of these courts *under the Act, exists in three [*117 cases: First, when a question has been adjourned into a circuit by the District Court, under the 6th section of the Act. Second, by appeal, as that is given, under the 4th section, to the bankrupt, when a majority of his creditors in number and value, who shall have proved their debts, shall file their written dissent from his discharge. Third, the jurisdiction given to the Circuit Courts by the 8th section, in suits by an assignee of the bankrupt, against any person claiming an adverse interest, or by such person against the assignee for property, or rights of property, transferable to or vested in the assignee under the Act. If we cannot find such a jurisdiction in the Circuit Courts in the Act of 1st August, 1841, it is in vain to look for it elsewhere, for the purposes for which this bill has been brought.

The inquiry then must be, if the Circuit Court has jurisdiction to annul the decree of the discharge given to the bankrupt by the District Court, for frauds upon that Act, which would have prevented him from receiving a discharge and certificate. In other words, has not the District Court of the United States, in which the bankrupt's discharge was given, and that court only, the power to inquire into frauds upon the Act discovered after the bankrupt has received his discharge, with a view to annul it, and to give to his creditors, who have proved their debts, the benefit of the property he may have concealed, or the preferences he may have given, or transfers of property he may have made in contemplation of bankruptcy? It seems to us that the jurisdiction given by the 8th section of the Bankrupt Act to the District Court is plenary and exclusive for such a purpose. The words of the 6th section are: "That the District Court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this Act, and any other Act which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily in the nature of summary proceedings or equity, and for this purpose the said District Court shall be deemed always open. And the District Judge may adjourn any point or question arising in any case of bankruptcy into the Circuit Court for the district, in his discretion to be there heard and determined, and for this purpose the Circuit Court of such district shall be deemed always open. The jurisdiction hereby conferred on the District Court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or re-

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moved; to all cases and controversies between 118*] such *assignee and the bankrupt; and to all acts, matters, and things, to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt, and other remedial process, to the same extent the Circuit Courts may here do in a suit pending therein in equity. And it shall be the duty of the District Court, in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules and regulations and forms shall be subject to be altered, added to, revised, or annulled, by the Circuit Court of the same district, and other rules and regulations and forms be substituted therefor."

Our reflections upon this section as a whole, and particularly upon that clause or sentence of it which extends the jurisdiction of the court to all controversies between the bankrupt and a creditor, who shall claim any debt or demand under the bankruptcy—to all cases between creditors and the assignee of the estate, whether the latter continues in office or has been removed, and to all controversies between the assignee and the bankrupt—have brought us to the conclusion that it was meant to give jurisdiction to the District Court, either at the suit of the assignee or of the creditor, just in such a controversy as the complainants have made by their bill; with the power in the court, in a suit of either the assignee or the creditor, or both combined, to inquire into the fraudulent preferences alleged to have been given by the bankrupt in contemplation of bankruptcy; and when they shall have been satisfactorily proved, to revoke the decree of discharge which had been given to him, to prevent it thereafter from being pleaded as a bar to any suit which may be brought against him for any demand which was provable under the Act. Or the assignee alone may sue the bankrupt and his accomplices in the District Court, for any preferences he may have given to creditors in contemplation of bankruptcy, to recover the amount of such preferences, as a part of the bankrupt's estate for distribution among his creditors who have proved their debts under the Act, and with the additional object of revoking the bankrupt's discharge by a decree of the court. In either suit for the latter purpose, the assignees and the creditors who have proved their debts under the Act, may be the parties on the one side, and the bankrupt and those who conspired with him to commit the fraud upon the Act, should be made parties on the other. If it be intended only to recover the 119*] amounts of fraudulent *preferences, as a part of the bankrupt's estate, the assignee may sue the bankrupt and those who have received them, or the latter alone, giving to the bankrupt prior reasonable notice, specifying in writing the fraud or concealment which it is the object of the suit to investigate, so that he may be present at the trial to defend himself; or to petition the court to be made a party defendant to the suit, for the same purpose. And in such a case, the jurisdiction of the District Court should be exercised summarily, in the nature of summary proceedings in equity, such being the direction in the 6th section of the Act, for all proceedings in bankruptcy under it.

These conclusions are verified into unquestionable certainty, by considering in connection other parts of the bankrupt bill.

By the 3d section of it, the property of the bankrupt, of every kind whatever, from the time of his dicharge, by mere operation of law, is deemed to be devested out of him, and becomes vested by force of the decree in the assignee who may be appointed for the benefit of such of the bankrupt's creditors who have come in and proved their debts, for the purpose of becoming distributees equally of the bankrupt's estate, to the exclusion of all creditors who have not done so. Then, by the 2d section, the amount of preferences which may have been given in contemplation of bankruptcy, are declared to be a part of the bankrupt's estate. It is the duty of the assignee to sue for them, and the bankrupt who has made them, when they have been proved, cannot be allowed a discharge under the provisions of the Act. And that this disability to receive a discharge was meant to apply prospectively to preferences which might be given, and retroactively to such as had been given in contemplation of bankruptcy, or to such preferences, whether given before the decree of discharge or after it, is manifest from the whole language of the 4th section, particularly that part which makes a bona fide surrender by the bankrupt of all his property and rights of property, for the benefit of his creditors, one of the prerequisites of his being discharged from all his debts; and declares, that if the bankrupt shall be guilty of any fraud or willful concealment of his property or rights of property, or shall have preferred any of his creditors, contrary to the provisions of the Act; or, if he admits a false and fictitious debt against his estate, that he shall not be entitled to such discharge or certificate. Further, the 5th section declares, that no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt, which, while it excludes such a creditor from bringing a suit at law or in *equity in any other court for [*120 his original debt, which had been proved against the bankrupt, cannot be construed to mean that he could not resort to the District Court, which had been deceived into granting the discharge, for the purpose of investigating the frauds which may have been committed by the bankrupt before a discharge had been granted to him, but not discovered until afterwards; and for the further purpose of obtaining from the District Court an annulment of the discharge which had been obtained from it by perjury and fraud. In this we do not differ from the counsel for the complainants, for much of his argument was intended to show that the creditors of a bankrupt are not without a remedy for frauds committed by him, but not discovered until after he had received his certificate of discharge. That was the case of Haxton v. Corse, 2 Barb. Ch. 507, decided by Chancellor Walworth. The Chancellor's lan-

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guage is, that he could not conclude, "notwithstanding the general language contained in the 5th section of the Act, that the creditors who come in and prove their debts shall not be allowed to maintain any suit at law or in equity therefor, and that the law-makers did not intend that the proving of debts by creditors should be an absolute abandonment of all claim against the future acquisitions of their debtor, if his charge was refused, or if it was void for any of the frauds specified in the Act." We admit the principle, that creditors so circumstanced have a remedy, but not that they may use it in any suit at law or in equity in the Circuit Court. The Bankrupt Law has given to the District Court a plenary and exclusive jurisdiction in all matters and proceedings in bankruptcy. We say plenary and exclusive jurisdiction in the District Court. This court has said so in Shawhan et al. v. Wherritt, 7 How. 643. Besides, on the authority of the same case, we say, as all the proceedings in all cases in bankruptcy are made matters of record by the 13th section, that a party to one of them cannot be permitted to impeach it collaterally in another suit in another court, brought by him there to recover from the bankrupt his original debt, whilst he continues to occupy his relation to the assignee and the bankrupt, under the discharge of the latter, as one of the creditor distributees of his estate. The District Court, has by the Act, plenary and exclusive jurisdiction of the matter, and no other court can annul the decree of the bankrupt's discharge, either partially, for the benefit of a particular creditor, or wholly, to deprive the bankrupt of its operation.

This we say with direct reference to the parties in this suit, who were parties to the decree of bankrupt's discharge, who proved their debts, and who have taken a dividend 121*] from *his estate. We do not mean to say anything of the Circuit Court's jurisdiction in a suit brought by a creditor who had not come in and proved his debt, and who is not a party to the decree in bankruptcy. These are points which will no doubt be well considered by counsel before a suit shall be brought; directly in connection with the power given to such a creditor to impeach the discharge, when the bankrupt shall plead it in bar of a suit. But the manner of bringing such a suit by such a creditor, how, when, or in what court, it should be brought, we shall not decide until such a case shall be brought regularly here for adjudication.

We will now consider another point in the case necessarily arising from the frame of the bill, which was argued by the counsel for the complainants, with some earnestness. It is, whether the Circuit Court had jurisdiction of the subject matter of the bill, on account of the frauds alleged against the defendant.

The complainants, in their bill, state minutely the original indebtment of the bankrupt to them, particularize the fraudulent preferences he had given to other creditors in contemplation of bankruptcy, admit that they were parties to the bankrupt's discharge, and had taken a dividend; and then they ask for the intervention of the Circuit Court in equity, to set aside the bankrupt's discharge as to them, because it had jurisdiction in cases of fraud; and that it would adjudge, that the defendants shall pay to them their original debt, with interest, on account of their ignorance of the frauds of which they complain, until within two years before they brought their bill. And for the same cause they say, that they had not brought their action at law upon their original cause of the defendant's indebtment.

The bill of the complainants, then, is a suit to recover from the defendant the debt which they had proved in bankruptcy. It has generally been thought, and has been frequently decided judiciously, that the 5th section of the Bankrupt Act was a bar to a suit where a party proves his claim and takes a dividend. In England, though such suits were attempted in the earlier administration of her bankrupt laws, such an action would not be thought of now for a moment. The words of our Statute are, "and no creditor or other person coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." How, then, can it be, that a creditor, coming in and proving his debt and receiving a dividend, can be *allowed to sue the bankrupt for it [*122 afterwards, either at law or in equity, when it is declared, in positive and unmistakable words, that if the creditor, before proving his debt, had commenced an action for it, or had obtained a judgment for it, he shall be deemed to have surrendered it, and to have waived all right of action and suit, either in law or in equity, against such bankrupt, for the debt which he has proved? It cannot be done; and the disability of such a creditor to sue the bankrupt is in perfect harmony with every other part of the Statute of the 19th August, 1841, and with all the rights of creditors which are meant to be secured by it.

Moreover, the exclusion of such a creditor to sue the bankrupt, is sustained by all of the decisions in the courts of England upon the statutes of bankruptcy.

Lord Hardwicke said, in Ex parte Groome, 1 Atk. 119—when such a right was claimed by a creditor upon a similar provision in the Statute of George II. chap. 30, sec. 7 (by no means so expressive as that just cited from the Act of the 19th August, 1841): "I think that the privilege of creditors to come in, and of bankrupts to be discharged from debts, is co-extensive and commensurate and very equitable, for it would otherwise make an irregularity among the creditors; for a creditor whose debt was due before the taking out of the commission shall, perhaps, have more than five shillings in the pound; and the creditor whose debt was not due till a second distribution, shall come in and have as much as the other creditor, and likewise have a remedy open to him for the rest against the bankrupt." Therefore a creditor shall not prove his debt, receive a dividend, and proceed afterwards in an action at law against the bankrupt. In such cases in England, the creditor is put to his election whether he will come in and prove his debt, or pursue his remedy at law. With us, he has the same privilege. In Ex parte Goodwin, 1 Atk. 152, Lord

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Hardwicke said: "This court will not suffer a petitioning creditor to arrest a bankrupt, and for this reason—because a commission of bankruptcy is considered both as an action and an execution in the first instance; and after the petitioning creditor had laid hold of all the bankrupt's effects, it would be a great absurdity for the same person to be permitted to arrest him likewise." In regard to the creditor having made an election, his Lordship ruled, in Ex parte Ward, 1 Atk. 153, that a petitioning creditor determines his election by taking out a commission, and cannot sue the bankrupt at law, though for a debt distinct from what he proved.

In Ex parte Ward, 1 Atk. 153, it was also ruled that a petitioning creditor's right of election does not exist after the bankrupt has received his certificate; and when the creditor 123*] has *already proceeded at law, he is not at liberty to come in and prove his debt under the commission, without relinquishing his proceedings at law, unless by order of the great seal, for the purpose of giving his assent or dissent to the certificate. In Capot, ex parte, 1 Atk. 219, Lord Hardwicke declared, "it was by no means to be done that a creditor was to receive a proportionable benefit under the commission, and still pursue the bankrupt's person at law;" and he would not permit the creditor, in that case, who had proceeded at law after he had received two dividends, to assent to or dissent from the bankrupt's certificate until he had refunded the dividends he had taken under the commission. In Lindsay's case, 1 Atk. 220, he petitioned to be discharged from a commitment at the suit of his creditor Henkle, who had proved his debt. The Lord Chancellor said the creditor must either waive his proof under the commission, or make his election to proceed under it; but, notwithstanding, if he elects to proceed at law, he may still assent or dissent to the certificate.

In Dorvillier's case, 1 Atk. 221, his creditor had proved a debt for £800 under the commission, and being the majority in value of all the creditors, had chosen himself assignee, as he had the right to do under the statute. He brought an action at law for the debt which he had proved against the bankrupt. The bankrupt petitioned that his creditor should make his election to proceed under the commission or to proceed at law. The Lord Chancellor doubted whether, by choosing himself assignee, was not making an election; but upon the creditor's having elected to proceed at law, he discharged him as a creditor under the commission, but still allowed him to assent or dissent to the bankrupt's certificate.

In Aylett v. Harford & Richards, bail of Lowe, 2 W. Black. 1317, the creditor had proved his debt under the commission, and had voted in the choice for assignees, and had subsequently made an agreement with the bankrupt that he should keep open his hotel for business. The bankrupt absconded. The creditor brought an action against the bail of the bankrupt, contending that, as Lowe had absconded, he had forfeited the protection of his commission, and that the bail was to follow the fate of his principal. De Grey, Ch. J., refused to fix the bail, and said, there are some instances in which the Court of Chancery permits a creditor to do certain acts, such as proving his debt and voting for assignees, without binding him to come under the commission and renounce his legal remedy. But the plaintiff has gone much further, especially by the transaction of the 25th of August. He has made his election, has acquiesced under the commission, and he shall *not, on a subsequent unforeseen [*124 event, at the distance of twelve months, desert the commission, and come on the bail by surprise. Wright, ex parte, 2 Ves. Jr. 9; 2 Bro. C. C. 114.

These citations, then, show how the comprehensive equity of Lord Hardwicke, upon an indefinite Statute of George II., anticipated the more perfect legislation of 49 George III. ch. 121, sec. 14, and that of 6 George IV. ch. 16, sec. 59, upon the same subject.

The first provides, "that after the 29th June, 1809, it shall not be lawful for any creditor, who has or shall have brought any action or instituted any suit against any bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission for any purpose whatever, or to have the claim of debt entered upon the proceedings under such commission, without relinquishing such action, a suit, and all benefit from the same; and that the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed by him." The Statute of George IV. is, "that no creditor who has brought an action or instituted a suit for a demand arising prior to the bankruptcy, or which might have been proved, shall prove a debt or enter a claim for it, without relinquishing such action or suit, and all benefit from the same, the proving a debt or entering a claim to be deemed an election." Our Statute is as comprehensive as either of those, and was taken from them, though not expressed in the same words. Indeed, the three are an embodiment of the decisions of the courts which were made from Lord Hardwicke's time in the administration of the Bankrupt Law; and the construction of the English statutes in their courts since has been in conformity with the earlier decisions.

In Adames v. Bridger, 8 Bing. 314, in an action of debt upon a bond, in which a rule nisi had been obtained to stay proceedings commenced in 1831, it appeared by an affidavit that the defendant had been a bankrupt in 1816, and that the plaintiff had elected to prove under the commission sued out at that time. Tindall, Ch. J., ruled that the plaintiff, having proved under a commission of bankruptcy in 1818, was estopped to sue for the same debts after the passing of 6 George IV. ch. 16, though that repeals 49 George III. ch. 121, and makes proof of a debt on election not to sue. The Chief Justice added, the fallacy in the argument is in considering the election to prove as an incomplete act. It was a complete act to effect a discontinuance, and after such a lapse of time the rule must be discharged *with [*125 costs. In some of its features, that case is not unlike that which we have been considering.

Joseph, ex parte, 18 Ves. 340, establishes the same principle; also Dickson, ex parte, 1 Rose,

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98; Bostock case, 1 Deacon & Chit., the same. A like interpretation has been given to the 5th section of the Act of 19th August, 1841, by Chief Justice Taney, in 31 Me. 192, in the case of Humphrey v. Swett, and by Mr. Justice Hardy, in the case of Buckner & Stanton v. Calcote, in 28 Miss. 432. Both are able constructions of the Statute of the 19th August, 1841, from the Statute itself, and they command our entire assent.

Our conclusions in this case are, that the Circuit Courts of the United States have not jurisdiction to annul or vacate the discharge and certificate in bankruptcy obtained in the District Court, upon imputations of fraud done in contemplation of bankruptcy by the bankrupt; or to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, who had assented to the bankrupt's discharge and certificate, and who has taken a dividend out of the bankrupt's estate. These conclusions relieve the case of all difficulty, and make it unnecessary for us to discuss any of the other points which were made by counsel on either side of the argument.

We add a word more. It was frequently urged in the argument, by the counsel for the complainants, that the demurrer of the defendant was a confession of the frauds alleged in the bill and that, therefore, the Circuit Court had jurisdiction to give relief.

Our view of that demurrer is different. It is only a confession of all facts well pleaded, but in this bill none were so; the power of the court to give relief, and of the complaints to bring a suit, either at law or in equity, for the original debt which they had proved in bankruptcy, having been mistaken.

The dismission of the bill by the court below, is affirmed.

Mr. Justice Nelson concurs in the result of the opinion of the court in this case.

WILLIAM S. HUNGERFORD, Appt.,
v.
JOHN SIGERSON.
(See S. C. 20 How. 156-161.)

Equity will not aid, if defense at law is neglected—but will if such defense is prevented by accident or fraud.

Where a party has failed to make a proper defense at law, through negligence, equity will not aid him.

If by accident or fraud such a defense has been prevented, a court of equity may grant relief.

Argued Jan. 21, 1858. Decided Feb. 15, 1858.

THE bill in this case was filed in the District Court of the United States for the District of Wisconsin, by the appellant, for an accounting, and an injunction to prevent the collection of a greater sum upon a certain judgment than should be found actually due on such accounting.

The defendant demurred. The court sustained the demurrer, and entered a decree dismissing the bill. From this decree the complainant appealed to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Jos. H. Bradley and A. H. Lawrence, for appellant:

The bill is very inartificially drawn. On its face it is a bill for an account of numerous transactions between the parties, spread over a considerable time, in which, according to the statement of the bill, the defendant admitted the general balance in his favor did not exceed $5,000, while the complainant avers, and his averment is to be taken as true, it did not exceed $4,275.

It further appears that complainant, trusting to the fiduciary relation which had so long subsisted between himself and defendant, lent him his note for $10,000 on certain express and implicit confidences, that he would neither part with it nor press him for payment; that the complainant, in violation of this contract and trust, sued him at law and recovered judgment for the full amount.

Although the facts are not distinctly averred, it also appears that the circumstances under which the note in controversy was given were known to the parties only, and therefore the complainant could have no defense at law.

There are, then, three grounds on which the jurisdiction of this court is to be sustained.

First. Complicated accounts between the parties.

Second. The breach of the trust with which the said note was clothed.

Third. The want of remedy in the common law court.

If a bill shows a state of facts well pleaded, which would entitle the complainant either to a discovery or relief, the demurrer must be overruled.

Livingston v. Story, 9 Pet. 658.

And they are well pleaded, if they are material and stated in terms which may be deemed reasonably certain in their import.

Sto. Eq. Pl. sec. 452, note 1.

There had been no settlement of accounts between the parties, and the balance owed was uncertain; this note was for twice as much as was claimed by the defendant, and the complainant was not to be sued upon it. Yet he sued and recovered judgment for the whole amount. Equity has jurisdiction to relieve.

Gainsborough v. Gifford, 2 P. Wms. 424.

The defendant thus gained an undue advantage. It is against conscience that he should use that advantage thus improperly gained, and that gives jurisdiction to restrain the proceedings at law.

Eden on Inj. ch. 2, p. 3.

He could not have availed himself of the defenses, because the court of law could neither give adequate relief by account nor compel a discovery of the facts of that mutual understanding, under which the note was given, as these facts were from their nature private, and therefore known only to the parties.

Bateman v. Willoe, 1 Sch. & Lef. 204; Marine Ins. Co. v. Hodgson, 7 Cranch, 332.

Messrs. C. Cushing and R. H. Gillet, for appellee:

NOTE.—When a judgment at law will be enjoined by a bill in equity.

See note to Davis v. Tileston, 12 L. ed. U. S. 366.

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1. A court of equity has no jurisdiction where the party has had a full remedy at law.

Except under some special statute, no court of equity can entertain jurisdiction without the complainant averring that he has no remedy at law. In this case the bill was filed in the District Court of the United States, under the powers conferred by the Judiciary Act. The 16th section of this Act provides, "that suits in equity shall not be sustained in either of the courts of the United States, in cases where plain, adequate and complete remedy may be had at law."

See Gordon v. Hobart, 2 Sumn. 401; Baker v. Biddle, 1 Baldw. 405.

The omission of the party to avail himself of his defense at law, cannot confer jurisdiction.

Second. Where a party failed to defend a suit at law, equity will not relieve, except when the defense was not available at law, or where he was prevented by fraud, accident or wrongful act of the other party, without any negligence or fault on his part.

This proposition is in the very words of the Court of Appeals of New York, in Vilas v. Jones, 1 N. Y. 274, 281, 282.

It is supported by a long current of decisions.

More v. Bagley, 1 Breese, 60; Cowan v. Price, 1 Bibb, 173; Williams v. Lee, 3 Atk. 224; Winthrop's case, 3 Desaus. 310, p. 324; Bateman v. Willoe, 1 Sch. & L. 201, 204; Lansing v. Eddy, 1 Johns. Ch. 49; Simpson v. Hart, 1 Johns. Ch. 98; Barker v. Elkins, 1 Johns. Ch. 465; Wood v. Wood, 5 Paige, 598; Post v. Boardman, 10 Paige, 580; Perrine v. Striker, 7 Paige, 598; Thompson v. Berry, 3 Johns. Ch. 395; S. C. 17 Johns. 436; Penny v. Martin, 4 Johns. Ch. 566; McVickar v. Wolcott, 4 Johns. 510; Green v. Dodge, 6 Ham. Ohio, 80; Bartholomew v. Yaw, 9 Paige, 165; Minturn v. The Farmers' Loan and Trust Co. 3 N. Y. 498.

These cases abundantly settle the point above laid down. If the note in question was given for $10,000, when only four or five thousand were really due, it cannot be questioned that there was a good defense at law to so much as was not equitably due.

1. If there was a defense, it was a legal one, and would have been available at law; and this is not denied in the bill.

2. The bill does not aver that complainant was unable to prove his defense in the action of law. But if he could not prove it without a discovery, he was bound to file a bill for such discovery, so as to use the answer upon the trial.

3. There is no allegation in the bill that a misrepresentation was made, or fraud practiced upon complainant by Sigerson, which prevented his making his defense.

4. No excuse whatever is offered for not making his defense in the suit at law, except that his counsel told him that he had no defense to the note. He does not state that this advice was given pending the suit at law, and the expression used clearly indicates that it was not. But however that may be, it is clear that his defense was a legal one and available at law if it existed. A court of equity cannot relieve *him.*

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the District Court for the District of Wisconsin.

In his bill, the complainant states that prior to the 1st of December, 1851, he had numerous business transactions with the defendant, who had made advances of money to him on divers occasions, and payments had been made to him by the complainant. In a conversation in relation to their accounts, the defendant admitted the complainant was indebted to him only in about the sum of $4,200; and on that day the defendant proposed to the complainant that he should execute to the defendant a promissory note for the sum of $10,000, payable one day after date, which we wished to use as a collateral security on which to raise money; and he agreed not to sell or dispose of the same, or urge the complainant for the payment of the note, but would indulge him until he could make collections. And having unlimited confidence in the defendant, and feeling under many obligations to him for his various acts of kindness, the complainant made and delivered to the defendant on the 1st of *Decem- [*161 ber, 1851, a note of hand for $10,000, payable one day after date, to the order of John Sigerson, for value received, without defalcation or discount, negotiable and payable at the Bank of the State of Missouri. And the complainant avers that the note was given under the circumstances and for the consideration stated, and on no other or different account; that since the date first above stated, he and the defendant have had no dealings whatever.

And the complainant alleges that on the 10th of August, 1852, the defendant caused a suit to be brought against him on the above note, and on the 11th of January, 1854, a judgment was recovered for $11,258.33 and costs. And the complainant says the judgment is unjust, in so far as it exceeds in amount the sum of $4,275 and interest.

And the complainant prays the defendant may be enjoined from collecting such part of the judgment as exceeds the sum he owes to the defendant, and this sum he offers to pay. Numerous interrogatories to the defendant are stated in the bill, designed to show the money transactions between them, and the amount due by the complainant to the defendant.

A demurrer was filed to the bill, which, on argument, was sustained, and the bill dismissed at the costs of the complainant, on which an appeal was allowed.

The subject matter of this controversy arises out of mutual dealings between the parties, and the consideration on which the note stated in the pleadings was given. There is no allegation in the bill that adequate relief could not be had at law. There is no charge of fraud, or that the note had been assigned contrary to the agreement; nor that, by the contrivance or unfairness of the defendant, a remedy was not had at law; nor is there anything in the bill from which the court can infer a discovery is necessary to reach the justice of the case.

Where a party has failed to make a proper defense at law through negligence, equity will not aid him. If by accident or fraud such a defense has been prevented, a court of equity may grant relief.

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When the decree below was pronounced on the demurrer, the complainant, by application to the court, might have asked leave to amend his bill, which the court, as a matter of course, would have allowed. But he prayed an appeal to this court, resting his whole case on the bill. And as it contains no averments authorizing relief in equity, none can be given.

The decree of the District Court is affirmed.

162*] *WM. B. GRANT et al. Libts. and Appts.,
v.
CORNELIUS POILLON et al.

(See S. C. 20 How. 162-169.)

Admiralty jurisdiction limited to maritime contracts—none of matters of account.

The jurisdiction of Courts of Admiralty is limited in matters of contract to those, and to those only, which are maritime.

Such court has no jurisdiction of a libel to recover balance due for freight, where there is a complicated account to adjust between members of a company who were the shippers, and the master was part owner of the ship, and one of the shippers of the freight, and interested as master, consignee and agent.

Argued Jan. 26, 1858. Decided Feb. 15, 1858.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court of the United States for the Southern District of New York, by the appellants, to recover a balance alleged to be due upon a contract of affreightment. The District Court entered a decree dismissing the libel, with costs. The Circuit Court having affirmed this decree, the libelants brought the case here on appeal.

A further statement of the case appears in the opinion of the court.

Mr. C. B. Goodrich, for appellants:

I. The contract which is set forth in the bill of lading, and the services performed under it, appertain to the admiralty and maritime jurisdiction, and the libelants are entitled, prima facie, to its assistance.

II. The libelants, as owners of the ship, have not made any agreement with the owners of the cargo, by which the rights or remedies of the libelants, derived from the contract as set forth in the bill of lading, have been diminished.

III. The agreement which Flitner made with the respondents, does not purport to bind the owners of the ship; Flitner, as master, or as part owner, had no implied authority to bind the ship or its owners to such an agreement, and no express authority to that effect is shown.

IV. Assume that some portion of the freight money would be due to Flitner, upon a statement of account between the owners of the ship; and that Flitner, by agreement with the respondents (to which the ship and its owners were no party), is bound to contribute to the payment of the freight money, and thereupon, to the extent of such contributory share, the respondents have an equity against Flitner to retain his share of the freight money; such equity does not change the character of the contract set forth in the bill of lading, or the rights of the libelants under it, or take away the admiralty and maritime jurisdiction which attached as an incident to the contract, if I may so say, the moment it was entered into and continued when the libel was filed.

(a) The contract into which the owners of the ship entered, is entirely within the admiralty and maritime jurisdiction. If they had made a contract principally appertaining in its subject matter to some other jurisdiction, and only incidentally embracing matters of a maritime character, they might have been obliged to resort to a court of common law or to a court of equity; but not having entered into any such contract, they are not excluded from the admiralty by any equities which the respondents may have against Flitner, by reason of a contract which neither the ship nor its owners are in privity, and which has no connection with the contract evidenced by the bill of lading.

The Pacific, 1 Blatchf. 569; LeCaux v. Eden, Doug. 606.

V. There is no averment in the answer of the respondents, that Flitner has not contributed to them all which he is bound to contribute; it contains no averment that any sum, upon a statement of an account between the owners of the ship, would be due to Flitner from the other part owners. There is no foundation for any subsisting equity in favor of the respondents.

VI. Flitner, as master, in making the contract set forth in the bill of lading, undertook to bind the owners of the ship, including himself as the party on the one side contracting to and with the owners of the cargo, excluding himself as the contracting party on the others.

(b) The libelants have a right to say that the respondents meant to bind themselves in the manner suggested.

Browne on Actions at Law, 133, 134; Robson v. Drummond, 2 B. & Ad. 303; Sims v. Bond, 5 B. & Ad. 389.

(c) The respondents, having received the consideration and benefit of the contract set forth in the bill of lading, which they entered into with Flitner, the agent of the libelants cannot in any manner, or for any purpose, set up a private agreement made by themselves with Flitner, so as to defeat or impair the rights or remedies of the libelants under their bill of lading.

Catts v. Phalen, 2 How. 381; Bradford v. Williams, 4 How. 588; Van Rensselear v. Kearney, 11 How. 326; Curran v. Arkansas, 15 How. 309; Phil. Wil. & Bal. R. R. v. Howard, 13 How. 326; Carver v. Jackson, 4 Pet. 83-87; Com'th v. Heirs of Andre, 3 Pick. 224; The Repulse, 2 W. Rob. 399; Pitt v. Chappelow, 8 M. & W. 615; The Frederick, 1 Dod. Ad. 266; Bacon v. Robertson, 18 How. 480.

(d) The libelants could not have been compelled to make delivery of the cargo without payment of freight; and upon refusal by the respondents to pay, might have had a sale under the admiralty; the respondents, upon an offer to pay freight and the refusal of the libelants to deliver the cargo, might have proceeded

NOTE.—Admiralty jurisdiction of contracts,—see note, 66 L.R.A. 193.

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against the libelants in the admiralty, and the libelants could not have resisted by pleading the private agreement of Flitner with respondents.

VII. The non-joinder of Flitner as party respondent, cannot avail as ground of exception or defense.

(a) It should have been set up by way of exceptive allegation and not in answer.

Reed v. Hussey, Blatchf. & H. 525; 2 Conkl. Adm. 583, 4, 5; Pratt v. Thomas, 1 Ware, 427; Certain Logs of Mahogany, 2 Sumn. 589; Sheppard v. Graves, 14 How. 509; Conard v. The Atlantic Ins. Co. 1 Pet. 386, 450; De Wolf v. Rabaud, 1 Pet. 476, 498; Sims v. Hundley, 6 How. 1; Smith v. Kernochen, 7 How. 198; Evans v. Gee, 11 Pet. 80.

(b) If it may be set up in the answer, it must be regarded as an exceptive allegation; and as such it is insufficient, because it does not show who are the owners or members of the Constellation Lumber Company, or that they are unknown and cannot be described.

(c) Flitner, as master and part owner of the ship, is a proper party libelant; the respondents are estopped by their contract with him as the agent of the libelants, to set up an adverse private interest created by themselves.

Additional cases relied upon by the libelants; Waring v. Clarke, 5 How. 441, Parsons v. Bedford, 3 Pet. 447; The Catharine, 6 Notes of Cas. Supp. 43, 49; Menetone v. Gibbons, 3 D. & E. 267; The Repulse, 5 Notes of Cas. 348, 350, 351; Abb. Ship. 7th Lon. ed. 105, sec. 4; The Lady Campbell, 2 Hagg. 14, note; Willard v. Dorr, 3 Mas. 161, 171; The England, 5 Notes Cas. 173, 174; Coll. on Part. 4 Am. ed. sec. 719; Greenleaf v. Queen, 1 Pet. 149.

Messrs. Chas. Donohue and Owen & Vose, for appellees:

1. Flitner was a proper party respondent in the court below, and until he is made a party, no further proceedings should have been had in the court below; and this was no ground for exception. The only ground for exception to the libel for the cause, is in Admiralty Rule XXXVI. of the Supreme Court. The persons composing the so-called Constellation Lumber Company (of which he was one), being partners, are all liable in solido, and the objection being taken by answer, they cannot proceed until he is made a party defendant.

2. As all the owners owning from a sixty-fourth to a half, cannot act at once, one owner must.

See Story on Partnership, sec. 418.

And his contracts are the contracts of all in the employment of the vessel (Story on Agency, Part. sec. 419), or her repairs. Flitner was not only master, but part owner, acting for all.

3. Supposing Flitner to have only been master, the facts show a ratification of his act and full authority.

4. The libelants, including Flitner, were all partners in the sailing of the vessel.

Abb. Ship. p. 111; Sto. Part. sec. 441, 444, 408.

And notice to one is notice to all.

See Story Partnership, secs. 107, 108.

They were therefore chargeable with notice of this contract when it was made, and have never disapproved of it, if they had the right. They had notice from 22d of Sept. to 12th Nov. before the ship sailed, with one partner acting, and did not attempt to disaffirm.

5. The libelant, Flitner, is liable individually for the whole debt claimed to be due from the respondents to the libelants, as one of the partners of the Constellation Lumber Company, and he could be compelled to pay and be left to his action for a settlement with his copartners. A payment to him, as one of the owners, of the whole debt, would discharge the indebtedness of the Company to the owners of the ship, and leave them to their account for a settlement against him in equity.

Sto. Part. sec. 419.

6. If Flitner is in fact the creditor of his co-owners exclusive of this claim, then, in law such debt due from them to him operates to extinguish the debt to the whole jointly. It nowhere appears that Flitner is in fact their debtor, and most likely he is their creditor. And he now seeks in this way to collect out of his partnership money, not of right payable to him or them.

See Abb. Ship. 130–131, sec. 5; see as to such rights, Sto. Part. sec. 406.

7. The whole of the facts of this case show it to be one of purely equitable cognizance.

The opinion of His Honor, Judge Nelson, on the ground on which he affirmed the decree below, is full and to the point, and presents unanswerable reasons for sustaining the decree.

8. But suppose, as has been and is contended by the libelants, that the bill of lading is entirely independent and distinct from the original contract and has no necessary connection with it, then this cause assumes a phase which would prevent a recovery in any form of action or in any forum.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in admiralty from the Circuit Court for the Southern District of New York.

The libelants, Grant and others, are the sole owners of the ship Constellation, and they bring an action of affreightment, civil and maritime, against the respondents, and allege that William L. Flitner was master of the ship; that the respondents were copartners, under the name of the "Constellation Lumber Company;" and that, on or about the 12th November, 1849, they agreed to ship on board the Constellation, then lying in the port of New York, 230,655 feet of lumber and 29,700 cypress shingles, to be delivered in the port of Valpariso, Sandwich Islands, or San Francisco, unto the abovenamed Flitner, or his assigns, he paying the freight upon the same. The ship proceeded on her voyage, and delivered the lumber and shingles unto the said William L. Flitner, at San Francisco, on or about the ——day of ——, in the year 1850. That there was due for the freight of the lumber, with primage, the sum of $13,944.02, of which sum Flitner paid $11,494.93, which were the net proceeds of the lumber, leaving a balance of $2,449.09 due and unpaid; and it is averred that Flitner, acting as consignee, and in making sale of the lumber, was the agent of the respondents, and a decree

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for the payment of this balance by the respondents is prayed.

The respondents deny that they compose the Company, and that Flitner acted as their agent, etc.; and they say that the lumber was shipped on account of the said vessel and of said Company, the said vessel being interested in said Company, and that the transaction was a partnership one, and not a subject of jurisdiction in this court; that Flitner, named as a libelant, was and is interested, and one of the parties in the "Constellation Lumber Company," and is a proper party respondent herein; that the subject matter of the suit is not within the admiralty or maritime jurisdiction of this court, and of which it has no cognizance.

It was agreed that ten persons named—about the 22d of September, 1849—of whom William L. Flitner was one, constituted the Lumber Company, each individual taking one share, not to exceed in value $500, with the exception of Flitner, who took two shares, and Hicks 168*] and Bailey also *took two. That Flitner was the agent of the Company and the consignee, a commission of five per cent. to be paid to him; that the ship Constellation belonged to the libelants, and that Flitner was master and part owner; that the Lumber Company purchased the cargo, and it was shipped the 12th November, 1849, and a bill of lading was signed by Flitner.

The proof shows that the lumber was sold at San Francisco for the prices stated, and that the proceeds of the sale, after deducting commissions, fell short of paying the freight, the sum named.

The principal question is, whether the case made is within the admiralty jurisdiction. That it would not be within the admiralty jurisdiction in England is clear. In general, contracts upon land, though to be executed on the sea, and contracts at sea, if to be executed on the land, are not cognizable by the English admiralty. There are some exceptions to this rule in that country; but none, it is believed, which affect the question now before us. There are conflicting decisions as to the admiralty jurisdiction in England, and also in this country. It may be difficult, if not impracticable, to state with precision the line of this jurisdiction, but we may approximate it by consulting the decisions of our own courts.

In the case of Willard v. Dorr, 3 Mas. 91, it was held, "no suit for services performed by the master, as a factor, or in any other character than that of master, is cognizable in the admiralty." And again, in Plummer v. Webb, 4 Mas. 380, it was said, "a contract of a special nature is not cognizable in the admiralty merely because the consideration of the contract is maritime. The whole contract must in its essence, be maritime, or for compensation for maritime service." In 11 Peters, 175, The Steamboat Orleans v. Phœbus, it was said the admiralty has no jurisdiction in matters of account between part owners. And further, "the jurisdiction of courts of admiralty, in case of part owners, having unequal interests and shares, is not, and never has been, applied to direct a sale upon any dispute between them as to the trade and navigation of the ship engaged in maritime voyages, properly so called. Ib.

The jurisdiction of courts of admiralty is limited in matters of contract, to those, and to those only, which are maritime. Ib.

An agreement by the master of a vessel to pay wages, may be sued upon in the admiralty; but a stipulation in the same contract to pay a sum of money in case the voyage should be altered or discontinued, can be enforced only at common law. L. Arina v. Manwaring, Bee, 199. The admiralty jurisdiction of the District Courts of the United States, being exclusive, *cannot be extended to cases of law or [*169 equity, cognizable by the Circuit and State courts, under the 11th section of the Judiciary Act. 1 Baldwin, 544.

A contract between two persons, one of whom had chartered a vessel, whereby he was to act as master, and the other as mate of the vessel, and the two were to share equally in the profits of the contemplated voyages, was held not to be within the admiralty jurisdiction. The Crusader, 1 Ware, 437. A distribution cannot be claimed in the admiralty, except by those who have a lien. 1 Pet. Adm. 223.

The Lumber Company was formed to engage in an enterprise of shipping lumber to San Francisco. Twelve shares were taken by the Company, consisting of ten persons, each having one share of the value of $500, and two of them had two shares each, one of them being the master of the vessel. He was also a part owner of the vessel, the consignee of the cargo, and had a right of primage. As part owner of the vessel, he was entitled to his share of freight; and as being a member of the Lumber Company, having two shares in it, he was proportionately liable for the freight. In his capacity as master he was entitled to primage, and as consignee he was also entitled to compensation. Now, this individual, in interest, is both plaintiff and respondent, and has claims in his capacities of master, consignee and agent. The proceeds of the sale of the cargo, after paying commissions, left a balance due for freight of $2,449.09.

Here is a complicated account to adjust, apportioning the loss between the members of the Lumber Company, exacting from them what may be necessary, not only to pay the balance or freight due, but whatever may be required to discharge what may be due to the master as part owner of the ship, as master, consignee or agent, at the same time holding him liable, as having two shares in the Lumber Company. And in an enterprise in which the whole of the capital has been sunk, leaving a large sum due for freight, it would seem that some inquiry might reasonably be made into the conduct of the master in the various capacities in which he acted. And it is probable that, to settle the controversy, a procedure against the members of the Lumber Company may become necessary, to compel them to contribute respectively and equally what may be necessary to meet the exigency. It is clear that the exercise of the powers indicated do not belong to a court of admiralty, but are appropriate to a court of chancery.

The decree of the Circuit Court is affirmed, with costs.

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170*] *JOHN E. HYDE and Jos. H. Oglesby, a Commercial Firm trading under the Name and Style of Hyde & Oglesby, Plffs. in Er.,
v.
HENRY L. STONE.

(See S. C. 20 How. 170-176.)

Jurisdiction of U. S. courts cannot be impaired by state law or practice—admissions of indorser, evidence to charge him—effect of such evidence is question for jury.

The jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.

The decision of the 5th District Court of New Orleans, transferring the suit, commenced by the plaintiff on his bill against the defendants, in that court, and directing it to be cumulated with the proceedings in bankruptcy which were pending in another court of the State, did not disable the plaintiff from commencing a suit in the Circuit Court, nor can it form a proper declinatory exception to its jurisdiction.

A plaintiff may prove, by admissions of a defendant, that all the steps necessary to charge him as an indorser or drawer of a bill of exchange have been taken. Proof of an acknowledgement of his liability to pay the bill, is competent evidence to go to a jury as evidence of notice of dishonor.

The effect of such evidence in the particular case must be determined by the jury, and their decision cannot be reviewed by an appellate court.

Argued Feb. 3, 1858. Decided Feb. 15, 1858.

THIS action was commenced by the plaintiff, Stone, in the Circuit Court of the United States for the Eastern District of Louisiana, upon a bill of exchange and protest, of which the following are copies:

The defendants excepted to the right of the plaintiff to maintain his action against them, on the ground that the court had no jurisdiction and that the matter was res adjudicata.

The case was tried in the Circuit Court upon a statement of facts, which is substantially as follows:

The plaintiff, Stone, began his action on a bill of exchange in the 5th District Court of New Orleans, on March 1, 1853. The defendants filed exceptions to the jurisdiction of the court, upon the ground that they had made a surrender of the property to creditors in the 3d District Court of New Orleans, which surrender has been accepted, and all proceedings stayed against them, and that plaintiff was put upon their schedules as a creditor. The defendants prayed that the suit be transferred and cumulated with the insolvency proceedings in the 3d District Court of New Orleans. The 5th District Court decided that the exceptions be maintained. In the petition filed by the plaintiff in the 5th District Court of New Orleans, it was alleged that H. L. Stone resided in New Orleans, and on the trial of the exceptions it was proved that H. L. Stone was a member of the firm of H. L. Stone & Co., of New Orleans, and that that firm had carried on business in New Orleans during the last eight years, and was composed of H. L. Stone, who was absent from New Orleans during the summer months, and John A. Roberts, who was the resident partner.

On the trial, it was proved that H. L. Stone had always been a resident of Massachusetts.

The bill of exchange sued on was drawn and indorsed by defendants, and protested for non-payment at maturity. The plaintiff performed no act to make himself a party to the insolvency proceedings in the 3d District Court of New Orleans, and no notice of the said proceedings had ever been served on the plaintiff.

The defendants, through error in regard to who was the true legal owner of the bill, placed the same on their schedule of insolvency as a debt due to H. L. Stone & Co., of New Orleans, when, in fact, it was held and owned by H. L. Stone, of Massachusetts.

Judgment was rendered in the Circuit Court for the plaintiff.

The defendants brought the case here on a writ of error.

Mr. J. P. Benjamin, for plaintiff in error:

1. The defendants are discharged from responsibility as drawers and indorsers of the bill by reason of the laches of the holder in failing to give notice of non-payment.

The law of Louisiana on this subject has reference exclusively to protests made by notaries of that State.

Acts of 1855, p. 48.

The protest of a foreign bill of exchange is not legal evidence of any other fact than that of presentment and refusal to pay. A statement by the notary that he put into the post-office a notice of protest to the drawer, is not evidence of the fact.

Even if the law of Louisiana were applicable, the protest shows that it is not such a protest as is alone permitted by that law to be received as proof of notice. It is not signed by two witnesses.

McAfee v. Doremus, 5 How. 53.

2. In the absence of proof of notice, an attempt is made to fasten responsibility on defendants by proof of waiver of notice.

The waiver is said to result from acknowledgment of the debt set forth in the 8th article of the statement of facts.

To this presumption of waiver there are two fatal objections.

The first is, that it is nowhere stated at what date the acknowledgment was made. If the schedule of insolvency was filed before the maturity of the bill (and there is no proof of the contrary), it was still the duty of the insolvents to place the bill on their schedule as a debt due by them.

Bainbridge v. Clay, 3 Martin's N. S. 262; Deslix v. Schmidt, 18 La. 466.

The second is, that an acknowledgment of indebtedness, as a waiver of laches, is confined to cases where the party making the acknowledgment knew of the laches.

Story on Notes, sec. 363, and notes; Story, Bills, sec. 320; Chit. Bills, p. 500, Am. ed. 1842; Thornton v. Wynn, 12 Wheat. 183.

In Louisiana, the doctrine is extremely rigid.

See the cases and principles collected in Hennen's Digest, Verbe, Bills and Notes, XI.

If the court holds that the proof justifies the judgment of the lower court in holding that the defendants received notice, or waived notice of the dishonor of the bill, still the defendants are protected by insolvency proceedings in Louisiana and the plaintiff's acts there.

A creditor or citizen in one State will be bound by the insolvent laws of another State,

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if he voluntarily makes himself a party to the proceedings.

Clay v. Smith, 3 Pet. 411.

The plaintiff has actually made himself a party to the insolvency, and has attained a judgment allowing him to participate in the insolvent fund.

Mr. Miles Taylor, for defendant in error:

1st. The judgment on the exceptions filed in the case in the 3d District Court of New Orleans, in the State of Louisiana, was not a final judgment, and is no bar to any other proceedings on the cause of action set up in the case.

2d. The fact that H. L. Stone, the plaintiff in the court below, was a citizen of Massachusetts, proved on the trial, and that the bill of exchange sued on was bought by him individually and with his personal funds, as shown by the statement of facts agreed to and signed by the parties, gave the Circuit Court of the United States, jurisdiction.

Constitution U. S.

3d. The defendant in error, H. L. Stone, performed no act to make himself a party to the proceedings in insolvency in the 3d District Court of New Orleans.

Statement of Facts, No 7, Record, p. 6.

4th. The plaintiffs in error are legally bound to pay H. L. Stone the amount of the bill of exchange sued on, because, first, legal notice of its protest for non-payment was given them; and second, they acknowledged it to be due and owing by them in their schedule filed in the proceedings in their insolvency.

Shed v. Brett, 1 Pick, 401.

Mr. Justice Campbell delivered the opinion of the court:

The defendant in error instituted his suit in the Circuit Court, as the indorsee of a bill of exchange, payable in Boston, of which the plaintiffs in error were drawers, payees and indorsers, and which bears date at New Orleans.

The defendants answered the petition, and averred that the plaintiff was a citizen of Louisiana, and the said bill of exchange a Louisiana contract, and governed by the law of that State. That the plaintiff resided in Louisiana when the defendants surrendered their property in insolvency in the Third District Court of New Orleans, and to the proceedings therein the plaintiff became a party. That, subsequently thereto, the said plaintiff instituted a suit on the said bill of exchange in the Fifth District Court of that city, and, on an exception filed by the defendants, informing that court of those facts, the same was sustained, and the said suit was transferred to the Third District Court of New Orleans, and made part of the aforesaid insolvent proceedings therein; by which the right of plaintiff to have and maintain this action in the Circuit Court is barred, and the question has become res judicata.

With this exception to the jurisdiction of the court, the defendants filed a general denial of their indebtedness to the plaintiff. The cause was submitted to the Circuit Court upon 174*] *an agreed statement, and judgment was rendered for the plaintiff without the intervention of a jury.

From that statement it appears that the bill was duly protested for non-payment; and the notary in Boston certifies, "I sent notice of the non-payment to the drawers and first indorsers, requiring payment of them, by mail, to the New Orleans on the day of the protest." That the plaintiff has always been a citizen of Massachusetts; that his family resided there, and he had a commercial establishment there; that he is a partner in a commercial establishment at New Orleans, and generally spent a portion of the winter months in that city, and then returned to Massachusetts; and that this bill was purchased in the City of New Orleans, on his own account. It further appears that the plaintiff, before the commencement of this suit, sued the defendant in the Fifth District Court of New Orleans, on this bill; that the defendant appeared and answered that the Fifth District Court had no jurisdiction, because the defendant had made a surrender of his property to his creditors in the Third District Court of New Orleans, which surrender had been accepted, and all proceedings stayed against him; and that the plaintiff was put upon his schedule as a creditor; and he prayed that the suit of the plaintiff be transferred and cumulated with the insolvency proceedings in the Third District Court in New Orleans; that thereupon the Fifth District Court, before the commencement of the present suit, decreed that the exception herein filed be maintained, and the costs paid out of the mass of the property surrendered. It further appears that the plaintiff performed no act to make himself a party to the proceedings in insolvency in the Third District Court, and that no notice of those proceedings had ever been served on him; but that the bill of exchange described in his petition was enumerated among his debts, and the firm of H. L. Stone & Co., of New Orleans, which was supposed to be the holder of the bill, was placed on the schedule among the other creditors of the insolvents.

The question whether a foreign bill of exchange, sold by a merchant in New Orleans to a person who has a commercial house there, but whose domicil is at the place where the bill is payable, and where he resided when the proceedings in insolvency were instituted, is affected by them when he does not make himself a party to those proceedings, is not involved in this case. The defendant did not plead the pendency of those proceedings, or the decree of the Third District Court, as a bar to the present suit, or afford any proper description of them to raise that question. The exception of the defendant is, that certain proceedings pending in the Third District Court were *success- [*175 fully pleaded in the Fifth District Court of New Orleans, as a cause for the removal of a suit commenced by the plaintiffs against the defendants in that court to the other, and that the decision of the Fifth District Court upon that plea ought to preclude the plaintiff from maintaining this suit in the Circuit Court of the United States. But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases, state laws form a rule of decision for the courts of the United States, and

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the forms of proceeding in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 14 Pet. 67; Union Bank v. Jolly, Adm'r, 18 How. 503.

It follows, therefore, that the decision of the Fifth District Court of New Orleans, transferring the suit, commenced by the plaintiff on his bill against the defendants, in that court, and directing it to be cumulated with the proceedings in bankruptcy which were pending in another court of the State, did not disable the plaintiff from commencing a suit in the Circuit Court, nor can it form a proper declinatory exception to its jurisdiction.

The plaintiffs in error object, that the evidence before the Circuit Court did not authorize the court to infer that they had notice of the dishonor of their bill. The notary states that he sent a notice to them, at New Orleans, on the day the protest was made. In addition to this evidence, it is shown that the bill, after its maturity, was enumerated among the debts of the plaintiff in error, on the schedule that was returned to the Third District Court; and that they successfully pleaded their return to the prosecution of a suit by the defendant in error in another court. A plaintiff may prove, by admissions of a defendant, that all the steps necessary to charge him as an indorser or drawer of a bill of exchange have been taken. Proof of a direct or conditional promise to pay after a bill becomes due, or of a partial payment, or of an offer of a composition, or of an acknowledgment of his liability to pay the bill, has been held to be competent evidence to go to a jury, of a regular notice of the dishonor of a bill, and to warrant a jury in presuming that a regular notice had been given. 176*] *Thornton v. Wynn, 12 Wheat. 183; Rogers v. Stevens, 2 T. R. 713; Patterson v. Becher, 6 J. B. Moore, 319; Campbell v. Webster, 2 Com. B. 258; Union Bank v. Grimshaw, 15 La. 321; 3 Mort. N. S. 318. The effect of such evidence in the particular case must be determined by the jury, and their decision cannot be reviewed by an appellate court. In the present case, the matter of fact was submitted to the Circuit Court, and its determination on this subject cannot form the ground of an exception here.

Judgment affirmed.

WM. B. DEAN, Appellant,

v.

NATHAN MASON et al.

(See S. C. 20 How. 198-204.)

Rule of damages for use of patent—motion in court below, or refusal to allow supplemental bill, not reviewable.

NOTE.—Damages for infringement of patents—*see* notes, 13 L. ed. U. S. 824; 51 L.R.A. 801.

The rule of damages for use of patent is, the amount of profits received by the unlawful use of the machine.

A motion to amend, or file an answer after default, is generally addressed to the discretion of the court, which is not subject to the revision of this court.

The motion to dismiss the complainant's bill, upon proof that they had parted with all their interest in the subject matter of the suit, was properly overruled.

The refusal of the Circuit Court to permit a supplemental bill to be filed, was a matter of discretion in the court; and it affords no ground for the reversal of the decree.

Argued Feb. 4, 1858. Decided Feb. 15, 1858.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The bill in this case was filed in the Circuit Court of the United States for the District of Rhode Island, by the appellees, to recover damages for the infringement of a certain patent.

A decree pro confesso was entered against the defendant, and he was perpetually enjoined. The court, on the report of a master, fixed the damages at $2,566.46, "the amount of profits which the defendant, by reasonable diligence, might have derived from the use made by him of such patented machines, and the sales of the products thereof" during the period covered by the suit. The defendant brought the case here on appeal.

A further statement appears in the opinion of the court.

Mr. T. A. Jenckes, for appellant:

1. The rule laid down by the court for the computation of profits, is erroneous. The rule should have been, to take an account of the actual gains and profits of the appellant during the time his machines were in operation.

"In a suit of equity for an injunction and account of profits of a patented machine, the defendant is accountable only for what profits he actually made, not for what, by diligence and skill, he might have received."

Livingston v. Woodworth, 15 How. 546.

2. The court below was in error in refusing leave to the defendant to answer, on the motion made at the June Term, 1853.

The 32d rule of the court contains no limitation of time within which such motion should be made. In a case of this kind, as in all cases when an account is required to be taken, it is obvious that the decree ordering the account, whether it be after hearing or pro confesso, is an interlocutory decree.

Perkins v. Fourniquet, 6 How. 206; 16 How. 82.

In the present case, the law had been settled by this court in favor of the defendant below, and before the cause had reached a final decree, he asked leave to make the facts appear which would entitle him to the benefit of the law, as established by this court, overruling what had been the law of the court below. The refusal of the motion amounted to a denial of justice. The rules prescribed by this court were never intended to work injustice, and the Circuit Courts should construe them liberally, for the purpose of doing justice.

Poultney v. City of Lafayette, 12 Pet. 472; R. I. v. Mass. 14 Pet. 210.

The general principle that an answer will be received after a decree pro confesso, under the

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general orders in English chancery practice, notwithstanding said orders, is sustained by the following authorities:

Smith v. Turner, 1 Vern. 274; Kemp v. Squire, 1 Ves. 205; Ogilvie v. Herne, 13 Ves. 563; Hamilton v. Houghton, 2 Bligh. 170; Taylor v. Salmon, 3 Myl. & C. 109; Daley v. Duggan, 1 Ir. Eq. 311; Cruise v. Shiel, 6 Ir. Eq. 132; Murray v. Byrne, 11 Ir. Eq. 125.

The court below misconstrued the rules prescribed by this court, and specially the 19th and 32d rules. The 19th rule contains no limitation on the 32d rule, and is besides applicable only to final decrees.

Again; the decree which was thus adjudged to have become absolute, was not regularly entered under the 19th rule of the court.

3. The interest of the complainants in this suit was thus terminated before final decree, and no such decree should have been rendered in their favor.

4. The court below was in error in refusing leave for the filing of a supplemental bill in favor of Baker & Smith.

The proposed parties complainant, Baker & Smith, were entitled to the benefit of what had been done, on the title which they had acquired.

Story Eq. Pl. secs. 339, 349, 351; Calv. Part. pp. 99, 100.

The fact that an interlocutory decree had been entered upon Mason's title, did not bar his grantee who had purchased that title. A supplemental bill may be filed as well after as before a decree.

Story, Eq. Pl. sec. 338.

The hearing upon the decree prayed for, would have necessarily led to an inquiry into the propriety of the decree sought to be enforced; and the court below could then have followed the decision of this court in Bloomer v. McQuewan, 14 How. 539, and dismissed the bill, as the Circuit Court in the case of Perkins v. Fourniquet, 6 How. 206, reversed its interlocutory decree after the adverse decision of this court in a similar case.

See Barb. Ch. 3, 63, et seq.

5. These questions are all proper to be discussed on appeal.

An appeal in equity brings up all the questions decided in the court below to the prejudice of the appellant.

Buckingham v. McLean, 13 How. 150.

For these reasons the appellant prays that the decree against him in the court below may be reversed.

Messrs. A. Payne and B. R. Curtis, for the appellees:

As to the motion for leave to answer:

The bill having been filed at the November Term, 1850, and subpœna served Nov. 18th, returnable Jan. 6th, and the defendant having failed to plead answer or demur, as required by the rules of the court, it was properly ordered to be taken for confessed; and upon such confession a decree for an injunction and an account was properly made at the June Term, 1851. After four terms had elapsed, and voluminous and extended proceedings had been had before the master in taking the account, the defendant, for the first time, asked the court to open the decree and allow him to file an answer. We respectfully submit:

I. The decision of the motion to open the decree and allow an answer to be filed, even when made at the proper term, rests in the sound discretion of the Circuit Court, and is not subject to re-examination here.

Wylie v. Coxe, 14 How. 1; The Marine Ins. Co. v. Hodgson, 6 Cranch, 206; U. S. v. Evans, 5 Cranch, 280; Welch v. Mandeville, 7 Cranch, 153.

A reference to the 19th rule for the practice of the Circuit Courts in equity, will show how entirely the allowance or refusal of this motion, if made in time, rests in the discretion of the Circuit Court.

II. If this court could review this decision of the Circuit Court, that decision was clearly right.

The 19th rule expressly declares that "when the bill is taken pro confesso, the court may proceed to a decree at the next ensuing term thereof, and such decree rendered shall be deemed absolute unless the court shall at the same term, set aside the same, or enlarge the time for filing the answer upon cause shown upon motion and affidavit of the defendant."

Instead of moving at the term when the decree was entered, the motion was not made until the fourth term thereafter. The court had no power then to grant it.

The motion to dismiss the bill based upon facts dehors the record, was wholly irregular and could not be allowed.

A transfer of the title by each of the plaintiffs, pendente lite, cannot affect the rights of the defendant.

Eades v. Harris, 1 You. & Coll. Ch. 230.

Certainly it could not do so in this case; for the allegation is that Mason parted with his title in April, 1852, and the account of the profits comes down only to Aug. 29, 1851.

See pp. 56, 101.

In addition to this, if the copy of the agreement of Mason, annexed to the motion and found on pp. 123-125, were admitted to be regularly in the case, it did not devest Mason of his interest; for it was only a conditional license to run ten machines in the City of Providence.

As to the exceptions to the master's report, the first was a general assignment of error in the balance, without specifying any item in the account as erroneous.

Such an exception cannot be sustained.

Story v. Livingston, 13 Pet. 359; Dexter v. Arnold, 2 Sumn. 108; Wilkes v. Rogers, 6 Johns. 566.

The appellant may also attempt to assign error in the interlocutory decree, by which the cause was referred to the master to take an account.

We submit that the appellant cannot now take an objection to that decree.

The 19th rule expressly provides, that a decree founded upon an order taking a bill confessed, shall be absolute at the close of the term at which the decree is entered.

In McMicken v. Perin, 59 U. S. (18 How.) 507, where a bill was taken pro confesso, and, at the same term, a decree of reference was made, it was objected that the master had not allowed to the appellant the amount admitted by the bill to be due to him. But as no exception had been taken to the master's report, this court refused to reverse the decree.

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Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the Circuit Court for the District of Rhode Island.

A bill was filed in this case by Mason et al., claiming to be owners of a territorial right to the exclusive use of the Woodworth patent for planing boards, charging the defendant with using three of the machines in the City of Providence, in violation of the complainant's right. The suit was commenced the first year of the extension of that patent by Congress, and the three machines which were sought to be enjoined were those used during the first extended term of the patent, under a license from its owners. A preliminary injunction was granted.

203*] *At the June Term, 1851, of the Circuit Court, a decree pro confesso was entered against the defendant, and he was perpetually enjoined. The case was referred to a master, to take an account of the profits or income derived by the defendant, or which by reasonable diligence might have been realized by him, from the use made of the three machines.

Exceptions were taken to the first report of the master, and it was referred to him again under the same instructions.

Before the second report of the master, a motion was submitted to the court by the defendant to set aside the decree pro confesso, and for leave to answer the bill on the ground that the Supreme Court in the case of Bloomer v. McQuewan et al. 14 How. 539, had held, in a case similar to this, that the licensee's privilege continued under the extension of patent by Congress, the same as under prior extensions; but the court refused the motion; consequently, the appeal does not bring before us any question under the last extension of the patent.

At the November Term, 1854, the master made his second and final report, in which he stated the sum of $2,566.46 as the amount of profits which the defendant, by reasonable diligence, might have derived from the use made by him of such patented machines, and the sales of the products thereof, during the period covered by the suit.

The decree was entered, on the report of the master, for the estimated amount of profits which the defendant, with reasonable diligence, might have realized; not what, in fact, he did realize. This instruction was erroneous. The rule in such a case is, the amount of profits received by the unlawful use of the machines, as this, in general, is the damage done to the owner of the patent. It takes away the motive of the infringer of patented rights, by requiring him to pay the profits of his labor to the owner of the patent. Generally, this is sufficient to protect the rights of the owner; but where the wrong has been done, under aggravated circumstances, the court has the power, under the Statute, to punish it adequately, by an increase of the damages.

The injury done is measured by the supply of planed boards thrown upon the market, which lessens so much the demand. But, if the liability of an infringer is to be increased by an estimate of the work he might do, with great diligence, he will be more likely to exceed the estimate than fall below it. This policy would increase the evil of the wrong-doer, without benefit to anyone. In Livingston et al. v. Woodworth et al. 15 How. 546, the true rule of damages in such cases is laid down.

It is contended the court erred in refusing leave to the defendant to answer, on the motion made at June Term, 1853.

*A motion to amend, or file an answer [*204 after default, is generally addressed to the discretion of the court. Under some circumstances, the court, for the purposes of justice, will go great lengths in opening a default and allowing a plea to be filed. But this is done or refused by the court, in the exercise of its discretion, which is not subject to the revision of this court.

In the case before us, the motion, to file an answer was not made until after the decree pro confesso had been entered, and a reference made to a master for an account. This was more than three years after the bill was filed. Whether the Circuit Court refused the motion on the ground of delay, or a want of merits in the cause assigned, does not appear; but it is sufficient to say, that on such grounds the decree cannot be reversed.

The motion to dismiss the complainant's bill, upon proof that they had parted with all their interest in the subject matter of the suit, was properly overruled. The allegation is, that Mason parted with his title in April, 1852, and the account of the profits is brought down only to the 29th August, 1851. The right asserted in this action was not affected by the conveyance of Mason to Baker & Smith.

The refusal of the Circuit Court to permit a supplemental bill to be filed by Baker & Smith, was, under the circumstances, a matter of discretion in the court; and it affords no ground for the reversal of the decree. It is not perceived what interest these assignees could have in a suit for an infringement of the patent, before their right accrued; and any attempt to make them parties, with the view to benefit the defendants in the pending suit, was unsustainable.

For the reasons assigned, the decree for damages must be reversed, at the costs of the defendants in error, as founded on an erroneous estimate; and the cause is remanded to the Circuit Court, with instructions to enter a decree for the amount of the profits realized by the defendant from the wrongful use of the patent.

Ex parte IN THE MATTER OF JACOB MUSSINA, and Angela Garcia Lafon DeTarneva et al., Appts.,

v.

RAFAEL GARCIA CAVAZOS and Wife et al.

(See S. C. 20 How. 280-290.)

Appeal, how applied for—part of defendants cannot appeal without summons and severance.

NOTE.—Who may appeal to, or sue out writ of error from, Federal Supreme Court,—see note, 66 L.R.A. 854.

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A party wishing an appeal, should make an application for its allowance in open court, or to the judge at his chambers, and should name his securities.

Less than all the defendants in a joint decree cannot appeal without a summons and severance in the court below.

Argued Feb. 5, 1858. Decided Feb. 15, 1858.

ON MOTION, by the appellants, for a rule of the Honorable John C. Watrous, Judge of the District Court of the United States for the Eastern District of Texas, requiring him to show cause why a peremptory writ of mandamus should not issue, directing him to allow the appeal of the defendants from the final decree rendered against them in the above-entitled cause.

The case is sufficiently stated by the court.

Mr. J. P. Benjamin, for appellants.

Mr. Justice McLean delivered the opinion of the court:

A motion was made at this term for a rule on the District Judge of Texas to show cause why a mandamus should not be issued, commanding him to allow an appeal in the above case. 289*] *This rule was granted on the affidavit of Simon Mussina, as agent for a part of the defendants.

In his answer the Judge says: "I am now ready to allow the appeal, and always have been;" that sometime before the 15th day of January, 1857, Mr. Daniel Atchinson, of Galveston, stated to him, at chambers, that he wished to take an appeal for Jacob Mussina in the above case, and that the Judge inquired whether the time limited for taking appeals had expired, and was informed it had not. The Judge then replied: "Mr. Mussina has a right to an appeal, and I will allow it as a matter of course, when the opposing counsel shall appear, and I will fix the amount of the bond." It is his practice to allow appeals in the presence of the counsel. Mr. Hale, the counsel for the defendants, lives in Galveston, near the place where the court was held, and was daily in court. No application seems to have been made in court on the subject of the appeal; no citation was presented to the District Judge; no bond for his approval. The conversation with Mr. Atchinson, at the chambers of the Judge, respecting the appeal, is all that was said to him on the subject. If it were mentioned in open court, he has no recollection of it.

The Clerk of the court, the Deputy-Clerk, the Crier, the Marshal of the United States and his deputy, who were in attendance on the court, all corroborate, on oath, the statement of the Judge, and say no application was made in open court for the appeal; and no entry on the docket is found of such an application. From the certified copy of the petition for an appeal, it does not appear to have been filed, or that an entry of it was made on the docket.

A party wishing an appeal should make an application for its allowance in open court, or to the Judge at his chambers, and should name his securities. And the bond should be prepared for the approval of the Judge, and the citation for his signature, unless the appeal was prayed in open court and entered upon the record. It appears the decree in question was entered jointly against several defendants, and that an appeal by Patrick C. Shannon only, who was one of the defendants, was taken. Simon Mussina, on whose oath the rule was entered, was agent for Jacob Mussina, Angela Gracia Lafon De Tarneva, who were also defendants, and he desired that these persons might be allowed an appeal, and also the other defendants, so as to remove the case to the Supreme Court. At this time the cause was pending in the Supreme Court, on the appeal taken by Shannon. That appeal was irregular, as less than all the defendants in a joint decree cannot appeal without a summons and severance in the court below. And this was not done on Shannon's appeal.

*The regular mode of proceeding [*290 would have been to dismiss the appeal in this court, pray for another appeal in the court below, and for a summons and severance, so that the defendants desirous of an appeal might take it, without the concurrence of those defendants who were opposed to it. Had the appeal been prayed in open court, and entered upon the record, the Judge below might well have refused it, as the legal steps for its allowance were not taken. Under such circumstances, it was the duty of the Judge to act in the presence of the opposing counsel.

Owings et al. v. Kincannon, 7 Pet. 399; Todd et al. v. Daniel, 16 Pet. 521.

Whether an application might not have been made to this court to correct the irregularity of the appeal, is not before us under the rule for the mandamus.

The writ is refused.

ISAAC M. FISHER, Appt.,

v.

JOHN HALDEMAN, Jacob S. Haldeman, Richard J. Haldeman, and Robert J. Haldeman, Executors of Jacob M. Haldeman, Deceased, and Thomas Chambers, Administrator de bonis non of Thomas Duncan, Deceased.

(See S. C. 20 How. 186-194.)

Pre-emption right in Pennsylvania—governed by laws of that State.

In 1749, by the law of the land, a pre-emption right to islands in the Susquehanna River in Pennsylvania could not be obtained by settlement.

This doctrine has continued to be recognized as settled law in Pennsylvania for half a century. We are bond to acquiesce in and follow their decisions.

Argued Feb. 9, 1858. Decided Feb. 22, 1858.

THE bill in this case was filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, by the appellant, for the recovery of a certain island in the Susque-

NOTE.—Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with State Constitution—To revise decrees of State courts as to construction of state laws. Power of State courts to construe their own statutes.

See note to Jackson v. Lamphire, 7 L. ed. U. S. 679.

It is for State courts to construe their own statutes. Supreme Court will not review decisions except when specially authorized by statute.

See note to Commercial B'k v. Buckingham, 12 L. ed. U. S. 169.

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hanna River, containing about 700 acres, of which he claimed to be the equitable owner.

The court below dismissed the bill, and the complainant brought the case here on appeal.

A further statement appears in the opinion of the court.

Mr. Fisher, for appellant:

The original settlers and improvers of Big Island and their legal and equitable representatives, continued in possession of the Island from 1749 to 1802 under their original titles.

As to legal and equitable effect of such a possession on the title of plaintiff who claims as an assign, see the following cases:

Esling v. Williams, 10 Pa. St. 126; Farr v. Swann, 2 Pa. St. 245.

Thirty years' possession is conclusive of title.

Alexander v. Pendleton, 8 Cranch, 462.

Possession is evidence of title in fee simple.

Woods v. Farmere, 7 Watts, 382; Wallwyn v. Lee, 9 Ves. 31; Railroad v. Erie, 27 Pa. St. 380.

In Pennsylvania, twenty-one years' possession is conclusive.

Strickler v. Todd, 10 Serg. & R. 68.

Limitations. No time will cover a fraud, so long as it remains concealed; for until discovery the title to avoid the transaction does not properly arise.

Cotterell v. Purchase, Cas. t. Talb. 63; Alden v. Gregory, 2 Eden, 280; Morse v. Royal, 12 Ves. 374; Bicknell v. Gough, 3 Atk. 557; Booth v. Warrington, 4 Bro. P. C. 163; Hovenden v. Lord Annesley, 2 Sch. & Lef. 634; Roche v. O'Brien, 1 Ball. & B. 330; Blennerhasset v. Day, 2 Ball. & B. 118; Whatton v. Toon, 5 Madd. 54; Lewin on Trusts, 616.

A tenant is estopped from denying the title of his landlord, and this rule applies to trusts, mortgages, and to every case where one man obtains possession of the land of another by recognizing his title.

Willison v. Watkins, 3 Pet. 43.

Time does not run in favor of the trustee in possession, whose title is consistent in equity with the title of the cestui que trust.

The Claimant, 3 Pet. 52; 7 Johns. Ch. 122.

Settlement Right.

A first settler holds his allowance of land, 300 acres, against the proprietaries, the Commonwealth, and all subsequent settlers and warrantees.

Gilday v. Watson, 2 Serg. & R. 410.

The actual settler has always been a favorite with the courts and Legislature of Pennsylvania.

Emery v. Spencer, 23 Pa. St. 271.

Before the Revolution, a settler was entitled to take and hold 300 acres against proprietaries, warrantees and other settlers. It was an actual personal resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family and continuing from time to time, unless interrupted by the enemy.

Bonnet v. Devebaugh, 3 Binn. 184.

The usage of the Land Office bound the proprietaries to grant the land to actual settlers on the usual and common terms, and should the proprietaries refuse to make the grant, chancery would enforce it.

Bonnet v. Devebaugh, 3 Binn. 184.

The consent of the proprietaries, in whatever was shown, was sufficient to vest an equitable title in a settler which the courts would protect.

Sergeant's Land Law of Pennsylvania, 37.

Messrs. Reverdy Johnson and J. M. Reed, for appellees:

The civil law recognized all rivers as navigable which were really so, and this liberal view was adopted by the founder of Pennsylvania.

Carson v. Blazer, 2 Binn. 475; Fisher v. Carter, 1 Wall. Jr. 70.

This policy was early developed in the instructions given by William Penn before he left England, to three commissioners for the settling of the Colony, in which he said: "Let no islands be disposed of to anybody, but let things remain as they were in that respect till I come."

Hazard's An. 530.

And in after times the proprietaries appropriated them to their own use by special warrants. Thus, from the first settlement of the country these islands were withdrawn from appropriation.

1 Wall. Jr. 70.

In Carson v. Blazer, 2 Binn. 477, decided on June 2, 1810, Chief Justice Tilghman said: "But the common law principle concerning rivers, even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide, and runs several hundred miles through a rich country, and which is navigable, and is actually navigated by large boats.

But there is another objection to the adoption of this principle. The common law gives to each proprietor one half of the river adjoining his shore; and if this doctrine is applied to the Susquehanna, every owner of the bank must own all the islands nearest to that bank; a right never contended for."

William Penn, the proprietor and Governor of Pennsylvania in 1683, in speaking of the new City of Philadelphia, uses this emphatic language:

"The situation is a neck of land, and lieth between two navigable rivers, Delaware and Schuylkill, whereby it hath two fronts on the water—each a mile—and two from river to river. Delaware is a glorious river; but Schuylkill being a hundred miles boatable above the falls, and its course northeast towards the fountain of Susquehanna, that tends to the heart of the Province, and both sides our own, it is like to be a great part of the settlement of this age."

Lowber's Ordinances of the City of Philadelphia, p. 289.

In Hunter v. Howard, 10 S. & R. 245, the court say: "Islands in the great rivers of Pennsylvania, under the Provincial Government were never the subjects of appropriation, either by office right or settlement. The proprietaries appropriated them to their own use by special warrants. The State has pursued the same policy. When the Land Office was opened on April 8, 1785, for the sale of the residue of the waste lands, shortly before purchased from the natives by the State, it is provided, 'That all islands within the bed of the River Susquehanna, and of the east and west branches thereof, and of the rivers Ohio and Alleghany (and Delaware),' are excepted and reserved.

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And the said islands may be sold by special order of the President or Vice-President in council, concerning each of them, by public sale or otherwise, for the best prices that can be gotten for the same (islands), and all occupancy and every survey, claim, or pretense for holding the same islands by any other title, shall be utterly void.'

See 13th section, Act 8th April, 1785, 2 Smith's Laws of Pennsylvania, p. 322.

"It has been modified with respect to islands; but still the legislature kept in view the sale of the islands at a full and fair price by the Act March 6, 1793 (3 Smith's Laws, p. 93), directing the sale of certain islands in the River Susquehanna. Then came the Act of Jan. 27, 1806 (4 Smith's Laws, p. 206), which gives rise to the present controversy directing the sale of the islands in the rivers Delaware, Ohio, and Allegheny. This Act gives the improver the right of pre-emption for three years, and makes special provision how the value shall be ascertained; the officers of the Land Office shall appoint, on application made for the island, three disinterested men, who shall value the same on their oaths, and shall certify the value to the Secretary of the Land Office, who shall thereupon issue a warrant to such applicant, etc. The Act declares that the pre-emption right shall be vested in the actual settler or improver for the term of three years; and that after the expiration of that time, it shall be lawful for the commonwealth to grant such improved island to the first who shall apply for the same subject to the regulations and provisions contained in the Act."

In Shrunk v. Schuylkill Nav. Co. 14 S. & R. p. 71, Chief Justice Tilghman said: "Now, with us it has never been supposed, from the earliest times to the present moment, that the owners of land on the bank had the right of property in the soil to the middle of the river in front of their land; because if they had, they would have a right to the islands also, contrary to universal opinion and practice. These islands have never been open to applicants under the common terms of office, either under the Proprietary or State Government, but have always been sold on special contract and for higher prices than common; whereas the lands on the banks of rivers have always been open to the public on the usual terms and at the usual prices. For a particular account of the manner in which islands have been granted, I refer to the case of Hunter v. Howard, 10 Serg. & R. 243.

"As for the soil over which our great rivers flow, it has never been granted to anyone, either by William Penn or his successors, or the State Government."

In this very case on the common law side of the Circuit Court, reported in 1 Wall. Jr. 69, under the name of Fisher v. Carter, the late Judge Baldwin, one of the very ablest Land lawyers in the State, held on Nov. 8, 1843, that at no time in the history of Pennsylvania, neither before Oct. 13, 1760, nor since, have islands in her great rivers been open to settlement on the same terms with fast land generally. They could be settled only on agreed terms.

The case is worthy of attentive perusal, as all the evidence contained in the present record, with the exception of some immaterial matter, was before the court, passed upon by them, and would have been settled by the jury definitively, except that the plaintiff suffered a nonsuit. Judge Baldwin's tribute to Chief Justice Tilghman, is peculiarly just and appropriate. (p. 83).

"Under the Provincial Government of Pennsylvania, the islands in the great rivers of the State never were the subjects of appropriation."

Johns v. Davidson, 16 Pa. St. 512.

"Islands and proprietary reservations, etc., were never within the general jurisdiction of the Land Office."

Jones v. Tatham, 20 Pa. St. 398; see, also, 1 Smith's Laws, 479; 4 Smith's Laws, 268; Hunter v. Howard, 10 Serg. & R. 245; Rundle v. Canal Co. 1 Wall. Jr. 274; Rundle v. Canal Co. 14 How. 80.

In the verdict and final judgment presented by the appellant in his bill, he shows that all the merits were tried in that case, and that the decision embraced all the equity as well as the law of the case; and when such is the case in Pennsylvania, the ejectment becomes a bill in equity, and one verdict and judgment is final.

Philadelphia v. Davis, 1 Whart. 490; Seitzinger v. Ridgway, 9 Watts, 496; Amick v. Oyler, 25 Pa. St. 506; Lynch v. Cox, 23 Pa. St. 265; Lykens v. Tower, 27 Pa. St. 462.

Mr. Justice Grier delivered the opinion of the court:

The appellant filed his bill in the Circuit Court of the United States for the Eastern District of Pennsylvania, claiming to be the equitable owner of an island on the Susquehanna River, containing about 700 acres, and praying that the respondents may be decreed to surrender to him the possession of the same, to deliver up their deeds and muniments of title, and account for the rents, issues, and profits.

In order to ascertain the questions involved in the case, it will not be necessary to give an abstract of the bill or specify the allegations of the answer. A brief statement of some of the admitted facts and charges of the bill will suffice.

It commences the history of the case with the first charter to and immigration of William Penn, the proprieter of Pennsylvania. But we do not think it necessary to go farther back *than the year 1760. In that year, the [*192 proprietors, claiming that the islands in the Susquehanna and other navigable streams were their private property, had them surveyed and returned as such.

About the year 1798, the persons under whom the complainant claims were found by the agent of the proprietors in possession of the island, and claiming a right, from their long occupancy, to a pre-emption right as settlers. They had occupied parts of the island as far back as 1749 or 1750, some ten years before the proprietors had surveyed it; and though not in possession at that time, had afterwards returned. They were told by the agent for the Penns, that they had no title, and if they wanted a legal title they must purchase from the Penns, and that islands never had been subject to be taken up by settlement as the other proprietary lands. These occupants refused or neglected, or were unable to purchase; and about the year 1800, Thomas Duncan purchased from the agents of the Penns. Finding

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these occupants on the land, he told them they had no title; that islands had never been open to preemption by settlement, and that he was the purchaser from the Penns, of the legal title. He demanded the possession of them, offering to pay them the value of their improvements, and for a release of their claim. They accordingly released their claim, gave up their possession, and received a consideration in money from Mr. Duncan, of about twenty shillings an acre. Mr. Duncan then took possession, and he and those claiming under him have had possession from that day to this, over fifty years.

In Pennsylvania, occupants or settlers on land are never considered as holding adversely to the proprietors, or to the State, their successor. Where the land was subject to preemption in favor of settlers, those who had obtained an equity by virtue of such a settlement or improvement, had a good title as against subsequent purchasers. But until they paid the purchase money, and obtained their patent or deed from the proprietor, no length of possession authorized a presumption of the payment thereof, or of a grant as against the proprietors or State.

In order, therefore, to evade the affect of the release by the occupants, and the surrender of their possession to Mr. Duncan, who held the admitted legal bill, the bill charges:

1. That Edmund Physic and John R. Coats, the agents of the Penns, combined and conspired with Thomas Duncan to defraud the settlers of their title to this island.

2. That this fraud consisted in the assertion that "islands had never been subject to be ap-
193*] propriated as other proprietary *lands, by settlement or location, but were treated as the private property of the Penns, and, as such, sold by special contract only."

3. That the persons in possession, believing such to be the law, surrendered their possession and released their claim, whatever it might be, to Thomas Duncan, for the consideration of twenty shillings an acre, which was much less than the full value of the land.

4. That this representation, with regard to the custom of traditionary law of the Province of Pennsylvania, was not true, and that Mr. Duncan must have known it to be so, and therefore made a false representation of the law to the settlers.

5. That the falsehood of this representation was not discovered till 1822.

6. That suits were then instituted, in which the judgments were against the title of plaintiff, in consequence of erroneous or unjust decisions of the courts.

Without noticing the objections to this bill on account of staleness, and the defense that Haldeman is a purchaser for valuable consideration without notice, it is plain that the whole foundation and superstructure of the case rests on this assumption, to wit: "That in 1749, by the law of the land, a preemption right to islands in the Susquehanna River could be obtained by settlement." If this be not so, the plaintiff's case falls on the ground, and the numerous other objections to this bill need not be noticed.

Now, this is a question of fact depending on the history and traditions of the Province of Pennsylvania, of which the decisions of her own courts are the best evidence, and conclusive on this court. The order of survey of 1760, by which the islands of the Susquehanna, and this among others, were appropriated to the private use of the proprietors, together with the manors reserved, is itself prima facie evidence that the proprietors never considered these islands as open to settlement as other lands. And this inference is fully confirmed by the instructions given by William Penn, before he left England, to the three commissioners for the settling of the Colony, in which he said: "Let no islands be disposed of to anybody, but let things remain as they were, in that respect, till I come." Hazard's An. 530.

The State of Pennsylvania, by what was called the "Devesting Act," assumed, for a certain consideration, all the proprietary rights of the Penns over the Colony, as distinguished from their private rights of property, and pursued the same policy which had been adopted by them as to islands in navigable rivers. The Act of 18th April, 1785, orders islands in the new purchase *to be sold for the best prices [*194 that can be gotten for the same, and declares, "all occupancy and every survey, claim, or pretense for holding the same islands by any other title, shall be utterly void."

The Statute thus recognized and continued the rule as it was found to have existed under the Proprietary Government.

By the common law, fresh-water rivers do not come within the category of navigable rivers, and the riparian owners had a right to all the islands in the river, "ad medium filum aquæ." But such has never been the law in Pennsylvania. In the case of Carson v. Blazer, 2 Binney, 475, this peculiarity of the traditionary law of Pennsylvania, differing from the common law of England, was first recognized by judicial authority. The late Chief Justice Tilghman, speaking of the proprietary, says: "No doubt he retained the entire right to the river, and of everything in the river, in order that he might make such use of it as would be most conducive to the public benefit." And again, in Shrunk v. The Schuylkill Nav. Co. 14 Serg. & R. 79, he remarks: "These islands have never been open to applicants under the common terms of office, either under the proprietary or State Government," and refers with approbation to the case of Hunter v. Howard, 10 Serg. & R. 243, which decides that "from the first settlement of the country, islands in the great rivers of Pennsylvania, under the Provisional Government, were never subjects of appropriation, either by office right or settlement." This doctrine has continued to be recognized as settled law in Pennsylvania for half a century. See Fisher v. Carter, 1 Wall. Jr. 69; Johns v. Davidson, 4 Harris, 516. It is treated as such in the learned work of Judge Sergeant on the Land Laws of Pennsylvania, p. 193. Nor can any case be found in the reports or traditions of the bar, which varies or contradicts this uniform course of decision. It is through these sources alone that this court must seek for a solution of the question; and finding the law so established by the tribunals of the State, we are bound to acquiesce in and follow their decisions.

The decree of the Circuit Court is, therefore, affirmed, with costs.

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HORACE H. DAY, Appellant,
v.
THE UNION INDIA RUBBER COMPANY.

(See S. C. 20 How. 216-218.)

Hartshorn v. Day, ante, affirmed—license to use patent—when defense of fraud too late.

The decision in Hartshorn v. Day affirmed.
Defendant's license stands upon two grounds: authority from Goodyear, the owner, and express recognition of Chaffee, the patentee.
It is too late to set up the defense that agreement was procured by fraud, after the party has carried the agreement into execution.

Argued Feb. 8, 1858. Decided Feb. 22, 1858.

THE bill in this case was filed in the Circuit Court of the United States for the Southern District of New York, by the appellant, as the assignee of Edwin M. Chaffee, against the defendant, for the alleged infringement of a certain patent.

The court below dismissed the bill, and the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

See, also, Hartshorn v. Day, 60 U. S., (19 How.) 211.

Messrs. **Thomas Jenckes** and **Clarence A. Seward** for the appellants.

Messrs. **William Curtis Noyes, George A. Goddard** and **Seth C. Staples**, for the appellees.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York.

The bill was filed in the court below by Day, as assignee of the patent of Edwin M. Chaffee, for a new improvement in preparing and applying India rubber to Cloth, etc., dated the 31st August, 1836, and renewed for seven years from the 31st August, 1850, against the defendants, for an alleged infringement during the running of the renewed term.

The questions involved in the case are substantially the same as those presented and decided in the case of Hartshorn et al. v. Day, at the last term, reported in 19 How. p. 211. That was an action at law, brought by the same plaintiff, upon this patent, against the defendants, who were licensees under Charles Goodyear, for the manufacture of India rubber boots and shoes. The defendants in the present case are licensees under Goodyear, for the manufacture of India rubber cloth for various purposes. In both cases, the right to manufacture the article rested upon the authority of Goodyear to grant the license, as derived from Chaffee, the patentee.

The court held, in the case of Hartshorn et al. v. Day, that under the agreement of the 5th September, 1850, between Chaffee, the patentee, and William Judson, the entire ownership in the patent, legal and equitable, passed to Judson, for the benefit of Goodyear and those holding rights under him, and on that ground decided in favor of the licensees.

Now, in this case the licenses under Goodyear to manufacture cloth of the description claimed are as broad and ample as were those to the defendants in the case just mentioned. Goodyear became the sole owner of the patent of Chaffee as early as 28th June, 1844, and on the 18th July following gave a license to the Naugatuck India Rubber Company, to manufacture cloths, with certain exceptions, under all his patents—those in which he was then interested or in which he might thereafter be interested, issued or to be issued—and also, in all renewals of patents. He also gave a like extensive license, on the 28th of March, 1847, to W. E. & John Rider, for manufacturing of ships' letter and mail bags; and in February of the same year, a similar license to manufacture wearing apparel, etc., to Jonathan Trotter; and on the 1st July, 1848, one to Trotter and W. Rider & Brother, for the manufacture of army and navy equipments, sheet rubber, etc. All these various licenses afterwards became consolidated in the Union *India Rub- [*218
ber Company, the defendants in this suit, and present, therefore, a complete defense to the suit, if Goodyear was the true owner of the Chaffee renewed patent. And this, as we have seen, has already been held in the case of Hartshorn v. Day, 19 How. 211.

Besides, in the agreement of the 5th September, 1850, between Chaffee and Judson, it is expressly stated that the patent was conveyed to the latter, to secure it for the benefit of Goodyear and those holding rights to use it under and in connection with his licenses; and Judson was also directed to hold it for their benefit.

The license of the defendants, therefore, in this case, stands upon two grounds, either of which would seem to constitute a sufficient defense to the suit for infringement: First, authority from Goodyear, the owner of the renewed term of the patent; and second, the express recognition of Chaffee, the patentee, of the right of these parties as licensees of Goodyear to use the improvement. And we may add to these grounds of defense, that upon the interpretation of the court in the case of Hartshorn v. Day, of the several agreements relating to this patent, and especially that of 5th September, 1850, Day took no interest in it under the assignment of Chaffee of 1st July, 1853, he having previous to that time parted with all his interest for the benefit of Goodyear and his licensees.

Some evidence has been given in the case for the purpose of showing that the agreement of 5th September was not sealed at the time of its execution, and that the seal must have been annexed afterwards without any authority. But it is too slight and uncertain to be entitled to any weight.

It has also been insisted that this instrument was procured by fraud from Chaffee, through the contrivance of Judson. But the evidence relied on is very general and unsatisfactory; and besides, it is too late to set up any such ground of defense after Chaffee himself has carried the agreement into execution, and acted under it, receiving its benefits for some three years. And what is remarkable on this point, he is the chief witness to make out the alleged fraud.

It has also been urged that the licensees have not contributed to the fund for paying the expenses of the renewal of the patent. But this

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is a matter in which Chaffee had no interest. He has taken the indemnity of Judson against these expenses. The licensees were never liable to him for them.

Without pursuing the examination further, we are entirely satisfied, for the reasons above stated, that the decree below is right, and should be affirmed.

Aff'g—3 Blatchf. 488.

JOHN McGAVOCK, Plff. in Er.,
v.
PETER W. WOODLIEF.

(See S. C. 20 How. 221-227.)

On writ of error, statement of facts may be drawn and filed nunc pro tunc—broker must complete sale before entitled to commissions.

On a writ of error to this court a statement of facts by the judge may be drawn up and ordered to be filed nunc pro tunc.

Broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions.

Argued Feb. 4, 1858. Decided Feb. 22, 1858.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The petition in this cause was filed in the Circuit Court of the United States for the Eastern District of Louisiana, by the defendant in error, to recover $2,600 alleged to be due him as commissions as a broker.

A jury being waived, the court found for the plaintiff and rendered judgment against the defendant for the amount claimed, with interest and costs. From this decision the defendant prosecutes this writ of error.

A further statement appears in the opinion of the court.

Mr. J. P. Benjamin, for plaintiff in error:

It is admitted that no sale was actually made, and no brokerage due therefor, for actually effecting a sale.

If it were admitted that brokerage could ever be recovered without an actual sale effected (a point which it is unnecessary to discuss under the state of facts existing in this case), it is perfectly clear that the recovery could only be had in a case where the party employing the broker had, through his own fault and caprice, prevented the accomplishment of the condition on which the broker's right to commission depends, to wit; the effecting of a sale. As nothing of this kind appear in this case, it is our confident conclusion that the plaintiff in error has been erroneously condemned in the lower court.

Mr. Miles Taylor, for the defendant in error:

1. There is nothing in the record which can enable the court to reverse the judgment of the court below.

Lathrop v. Judson, 19 How. 69.

2. The plaintiff in error employed the defendant in error, in his capacity of broker, to find a purchaser and to negotiate a sale of his (the plaintiff in error's) plantation, etc., for him. The defendant in error found a purchaser, brought the parties together, and they came to a distinct understanding and agreement to make and complete a sale of the property, and the sale was not completed only through the fault of the plaintiff in error.

3. The right of the defendant in error to the usual commission of brokers in such cases, became perfect when the minds of the parties to the negotiation were brought to a concurrence, and thus the consideration and terms of the contract of sale, with respect to the property to be sold, were agreed upon.

C. C. of La. art. 1797, 1765; Story on Agency, sec. 329; Hammond v. Holiday, 1 Car. & P. 387.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United *States, held by the District [*225 Judge for the Eastern District of Louisiana.

The suit was brought by Woodlief, a broker in the City of New Orleans, against the defendant, to recover the sum of $2,600, as a commission for negotiating the sale of a plantation and slaves.

The petition sets out that on the 16 November, 1855, the defendant employed the plaintiff to procure a purchaser for his sugar plan-

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NOTE.—When a broker, to sell real estate, is entitled to commissions.

One who has employed a broker to sell his real estate can himself sell; and if he does so to a purchaser procured without the aid of the broker, the latter is not entitled to his commission. In order to earn his commissions the broker must be the procuring cause of the sale. Through his agency a customer must be procured ready and willing to enter into a contract upon the employer's terms. Tombs v. Alexander, 101 Mass. 255; Loyd v. Matthews, 51 N. Y. 125; Hungerford v. Hicks, 39 Conn. 259; Journeay v. Tallman, 40 N. Y. Supr. (8 J. & S.), 436.

When the broker opens negotiations but failing to bring the customer to the terms specified, abandons them, and the employer subsequently sells to the same person, at the price fixed, he is not liable to the broker for his commissions. Wylie v. Mar. Nat. B'k. 61 N. Y. 415; Chandler v. Sutton, 5 Daly, 112; Bennett v. Kidder, 5 Daly, 512; Dennis v. Charlick, 6 Hun, 21; Schwartze v. Yearly, 31 Md. 270; Vreeland v. Vetterlein, 33 N. J. Law, 247; Lane v. Albright, 49 Ind. 275.

Where a person observed in passing a house that the leasehold of same was for sale, called at plaintiff's and got a card to view the premises with terms of sale, saw them but concluded the price was too high, and had no further communication with plaintiff, but subsequently renewed negotiation with a friend of owner and purchased at a less price. Held, that there was evidence for a jury that the purchase was made "through the plaintiff's intervention," and consequently that plaintiffs were entitled to commissions. Mansell v. Clements, L. R. 9; C. P. 139; 8 Moaks, Eng. 449.

Where two brokers are employed to sell or exchange property, that one is entitled to commissions who brings the minds of the parties together in effecting an exchange, although the other may have assisted in bringing it about. Smith v. McGovern, 65 N. Y. 574.

A broker procuring a party willing to purchase on the owner's terms and notifying the seller thereof, and of the time and place for the completion of the trade, is entitled to recover his brokerage, even though the seller refuses to perform the contract he offered to make. Hart v. Hoffman, 44 How. Pr. 168; Hague v. O'Connor, 41 How. Pr. 287, 1 Sweeny, 472. See Glentworth v. Luthen, 21 Barb. 145.

A real estate broker, who has procured a purchaser on the vendor's terms, is entitled to the agreed commissions, notwithstanding the failure of the purchaser to perform or the vendor's failure to fully understand the contract, if not caused by the fraud or deception of the broker. Bach v. Emerich, 35 N. Y. Supr. (3 J. & Sp.), 548; or

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tation, situate on the Bayou La Fourche, in the State of Louisiana, and seventy slaves, for the price of $130,000, of which $20,000 was to be paid in cash, and the remainder in five equal annual installments, with interest. That the plaintiff soon thereafter found a purchaser, namely: George M. Long, of the Parish of Carroll, State of Louisiana; and on the 20th November, said Long, with the plaintiff, went to the residence of the defendant, examined the property, and concluded an agreement of purchase according to the terms stated.

The facts set forth in the petition were denied by the defendant, and the cause went down for trial before the court, a jury having been waived, when a judgment was rendered for the plaintiff, for the amount claimed.

The case comes up on a writ of error to this court, upon a statement of facts, by the judge. The issue was tried in the court below, and the judgment rendered on the 24th June, 1856. A motion for a new trial was heard, and denied on the 9th of October following. The writ of error was then prayed for and allowed, and the statement of facts drawn up and ordered to be filed, nunc pro tunc, as of the 24th June, 1856, the day the cause was first tried before the court.

An objection was made on the argument, that this statement of facts could not be noticed, it having been made up after the term in which the cause was tried, and as it did not appear that the court was requested to draw it up at the time of the trial. We are of opinion, that as the judge has drawn up and filed the statement as of the day of the trial, it is but reasonable to presume that he had been so requested at the trial by the counsel for the defendant. We agree that the request must be made at this time, in order to enable the court to notice it in error; but the statement may be drawn up afterwards, as shall be convenient for the judge. This is the settled practice in courts where the proceedings are according to the common law. The bill of exceptions may be settled after, though the exceptions must be taken at the trial.

As to the merits, we are of opinion that there was error in the decision of the court below.

The terms of the sale, as given by the vendor to the plaintiff, *the broker, were sim- [*226 ple and specific—the price of $130,000, $20,000 in cash, and the remainder in five equal annual payments. Long, the purchaser, agreed to these terms, as averred in the petition, and not questioned in the case; and if he had offered and was in a condition to consummate the agreement according to its terms, no doubt the commission would have been earned and the recovery below, right. But when the parties proceeded to the execution of the contract of sale, a change was proposed by Long, the vendee, which, for aught appears upon the facts or in the finding of the judge, was never assented to by the defendant. The change was substantial, and called for a new and distinct agreement before the vendor could be bound. The wife of Long was interposed as the purchaser, the husband being a person of no means or credit. Her means, it appears, consisted of notes given to her by Dr. Bard, for a plantation which she had sold to him; and the greater part of the statement of facts is made up of various negotiations with third parties, by the plaintiff and Long, with a view to turn these notes for the benefit of the defendant, so as to apply them towards payment of the $130,000, the purchase money. This was to be brought about by substituting them in the place of notes which the defendant had given to one Thibodaux, from whom he had purchased his plantation. Thibodaux was willing to receive the notes of Dr. Bard, in lieu of the defendant's if the substitution could be legally made, and he could retain a first mortgage on the plantation and slaves as a security. Whether this security could be given, or was agreed to be given, nowhere appears. $20,000 of these notes of the defendant were, in some way, under the control of a commercial firm, who were indorsers upon them. A difficulty existed in making a substitution for these. No satisfactory arrangement was made in respect to them, and none at all as concerned the sum of $20,000, which was to be paid to the defendant in cash.

The evidence in the case, therefore, neither shows that the defendant agreed to this change of the conditions of sale, nor, if he had, that they could or would have been carried into

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where the purchaser refuses to sign the contract of purchase because of owner's insertion, against broker's objection of the usual forfeiture clause. Beebe v. Ranger, 35 N. Y. Supr. (3 J. & Sp.), 452.

Where two brokers are separately employed to sell same property, and each of them has called attention of same purchaser thereto, the one who afterwards succeeds in effecting a sale is entitled to commissions to the exclusion of the other. Maracella v. Odell, 3 Daly, 123; Dreyer v. Rauch, 42 How. Pr. 22; 3 Daly, 434; 10 Abb. N. S. 343.

In an action by real estate broker for compensation for his services, evidence of defects in the title is irrelevant and inadmissible. Allen v. James, 7 Daly, 13. He is entitled to his commissions though the purchaser is relieved from his purchase by the court on account of a defect of title. Smith v. Mooney, 14 Week, Dig. 237.

He is entitled to his commissions if he is the procuring cause of the sale, by bringing the parties together, though he does not in fact negotiate it, and is not present at the sale. Arnold v. Wood, 13 Week, Dig. 302.

Where a broker procures an offer to be made and advises against it, and subsequently his employer negotiates a sale at an advanced price to same person, broker is not entitled to his commissions upon the sale. White v. Twitchings, 26 Hun, 503.

A real estate broker, acting as such, and not as a middleman, with the knowledge of both parties that he acts for both, cannot recover from either if employed by and entitled to compensation from the other, unless this double employment was disclosed to and assented to by both. Custom among brokers to charge commission to both is inadmissible. Siegel v. Gould, 7 Lans. 177; Ruff v. Sampson, 16 Gray, 398; Watker v. Osgood, 98 Mass. 348; Redfield v. Tegg, 38 N. Y. 212; Coleman v. Garrigues, 18 Barb. 60; Glentworth v. Luthen, 21 Barb. 145; Morrison v. N. Y. & N. H. R. R. Co. 32 Barb. 568; Rice v. Wood, 113 Mass. 133; Farnsworth v. Hemmer, 1 Allen, 494; Raisin v. Clark, 41 Md. 158; Lynch v. Fallon, 11 R. I. 311; Bennett v. Kidder, 5 Daly, 512.

One who is merely employed to bring buyer and seller together and leave them to make their own bargains is a mere middleman, and not within the rule. Balheimer v. Reichardt, 55 How. Pr. 414.

Such brokers may make valid agreements with each of the parties for commissions. Siegel v. Gould, 7 Lans. 177; Rowe v. Stevens, 53 N. Y. 621 Affg. 35 N. Y. Supr. (3 J. & Sp.), 189.

See, also, note to 44 L. R. A. 593 on performance of contract by a real estate broker to find a purchaser or effect an exchange of his principal's property.

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effect by the third persons concerned, nor any evidence of the condition to pay the $20,000 down.

The terms of sale, as we have stated, were very distinct and easily understood; but the terms and conditions of the proposed fulfillment are complicated, confused, involved in doubt and uncertainty, and the fulfillment itself, even upon these conditions, rather conjectural than otherwise.

The learned judge observes, in his statement, "that the court see no reason to doubt that 227*] Long and wife would have been *prepared to comply with the terms of the contract, by meeting the wishes of McGavock (the defendant), in regard to the notes given by him when he purchased the plantation from Thibodaux, even if they were required to pay cash for the amount for which the commercial firm were indorsers, by having discounted a portion of Dr. Bard's obligations." This is an opinion of what might have been effected towards the consummation of the contract of sale, rather than what had been done preparatory, and with a view to the fulfillment, which would have been much more pertinent to the issue in the case. As the terms of sale were explicit, the proposal to fulfill should have been equally so. Nothing should have been left to conjecture or speculation. There should have been as much certainty on the one side of the contract as upon the other. Certainty in the offer to fulfill is as important to the vendor as in the terms of the sale to the vendee, and equally necessary before the vendor can be put in fault. The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions. Then he will be entitled to them; though the vendor refuse to go on and perfect the sale.

Judgment of the court below reversed.

SAMUEL A. WHITE et al., Plffs. in Er.,
v.
ALBERT T. BURNLEY.

(See S. C. 20 How. 235–251.)

Jury question—grant, when not void for excess—evidence necessary to found charge upon—when alien can convey—copy grant, evidence from comparison—when time of limitation begins to run.

Where the court left it to the jury to determine whether the land lay in the empresa of Martin De Leon, there was no error.

Grant is not void, because the surveyor returned an excess in his survey, without any evidence that the grantee participated in the matter.

There must be some evidence on which a charge to the jury is founded; otherwise, it cannot be lawfully given.

An alien friend can convey his lands situate in a foreign Government.

Where a civil law conveyance was made in a notary's book, and a copy furnished to the grantee, as a second original, to let in the copy as evidence, it may be proved by a witness that he had compared it with the original on file on the Notary's book, that it was a true copy, that the Notary was dead and that his handwriting was genuine, that one of the subscribing witnesses to the act of sale was also dead, and that his signature was genuine.

The Texas Act of 1841 section 15, requires suit to be instituted within three years next after the cause of action shall have accrued. Until the land of the plaintiff was trespassed upon, this action of trespass, to try title, could not be maintained.

Argued Jan. 26, 1858. Decided Feb. 22, 1858.

THIS was an action to trespass to try title, brought in the District Court of the United States for the District of Texas, by the defendant in error, to recover a league of land situated in Calhoun County, Texas.

The trial below resulted in a verdict for the plaintiff, for nominal damages and a writ of possession; whereupon the defendants sued out this writ of error.

The proceedings in the court below were very complicated, and it is not deemed necessary to set them out in detail, as those which are material sufficiently appear in the opinion of the court.

Messrs. I. A. & George W. Paschal, John H. Reagan and Thompson, for plaintiffs in error.

This suit was conducted under the Statute of Texas, to try titles. The errors assigned arise upon several bills of exception.

The first goes to the legal effect of the grant upon which the recovery was had. The grant, upon its face, and by calculation of the field notes, calls for "fifty million square varas," which is double the area allowed by the law."

When this grant was offered, the defendants below objected to its admissibility, because upon its face it was null, upon the ground of the excess. When this question was raised, the court heard evidence "as to the law and usage."

The court overruled the objection and admitted the grant.

Second Bill of Exceptions.

When the conveyance from Leonardo Manso to Peter W. Grayson, executed before a notary public in Louisiana, dated April 6, 1836, was offered in evidence, the defendants interposed the following objections to the reading of it:

First. Because it was not executed in accordance with the then existing laws of Texas, in this, to wit:

1. That it did not appear that it was executed before any notary or other officer authorized by law to take and authenticate public instruments.

2. That it did not appear that the foreign notary, before whom it purports to have been passed and executed, made out and delivered to the interested party at the time a testimonio, or second original, as by the then existing law was required.

Second. Because the protocol or first original, should be produced or satisfactorily accounted for before said copy, which is secondary evidence, can be admitted.

Third. Because if any testimonio or second original was ever in fact issued, its absence is not accounted for.

Fourth. Because the showing that the protocol or first original, is in the office of a notary in the Parish of St. Landry, in the State Louisiana, is not satisfactorily accounting for the non-production of the original.

Fifth. Because the Notary's office in the State of Louisiana is not quoad, the original paper, a public office within the meaning of the

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Act of Congress of March 27, 1804, entitled "An Act supplementary to the Act entitled an Act to prescribe the mode in which the public Acts, records, and proceedings in each State shall be authenticated, so as to take effect in every other State."

Sixth. Because the Notary's office in the State of Louisiana is not, quoad the original paper, a public office within the true intent and meaning of the rule of the common law.

Seventh. Because it is not proven in accordance with the rules and principles of the common law.

These objections were all overruled and the document read.

Third Bill of Exceptions.

This raises the question as to the right of the plaintiffs below to use depositions taken de bene esse by the defendants.

Exceptions to the Instructions arising upon the Evidence.

The defendants proved by the official survey, that the grant contained 50,004,190 square varas of land, and not over one labor of marsh and water upon the tract.

The Empresario De Leon had no right to grant the locus in quo, because it was not within the jurisdiction of his empresa, because he, De Leon, had never had the consent of the Federal Executive to his, De Leon, colonizing the coast leagues.

It has been repeatedly ruled by the Supreme Court of Texas, that if the land was beyond the jurisdiction of the granting officer or surveyor; or there was want of authority in the officer making the grant; or of legal qualifications in the colonists; or anything else which shows that the grant is contrary to law, it is null and void.

Mason v. Russell, 1 Tex. 730; affirmed in De Leon v. White, 9 Tex. 603; The State v. De Lesdenier, 7 Tex. 77; in which latter case the principle of Wilcox v. Jackson, 13 Pet. 498; Stoddard v. Chambers, 2 How. 284; Sampeyreac v. The U. S. 7 Pet. 222—which affirm Polk v. Wendall, 5 Wheat. 308—was affirmed.

This doctrine of grants, becoming void because the land granted was generally or specially reserved from such appropriation, or because it was politically beyond the jurisdiction of the granting officer, is not new to this court. In addition to the cases of Wilcox v. Jackson, and Stoddard v. Chambers, already cited, may be mentioned the great case of Porterfield v. Clark, 2 How. 77, in which the doctrine was expressly recognized, that if the land lay within the reserved district, the grant was a nullity.

We think that the facts established beyond question.

1. That De Leon's contracts never gave him the power to colonize or grant land below the San Francisco Rancho; and therefore the locus in quo was beyond his jurisdiction and the grant void.

2. Before De Leon's second or extension contract, Power and Hewitson were given the right to colonize the coast leagues between the Neuces and Lavaca; that to this contract he had the consent of the Federal Executive; and therefore that DeLeon had obtained a decision in his favor, which he did not then. According to the 2d article of the National Colonization Decree, the extension grant could only have been made with reference to Power and Hewitson's previous rights; and therefore there could have been no controversy except as to the position of De Leon's lower line, under his contract of 1824 with the Provincial Delegation.

These being the facts and the law of the case, the giving the instructions given for the plaintiff, and the refusing to give the only instructions authorized by the law and the evidence, is such error as must cause a reversal of the case.

But as this court may regard the question as being mixed with law and fact, it may feel it its duty to pass upon the mesne conveyance.

We pass over the deed from Morales to Manso with the single remark, that it was a purchase of land acquired under the Colonization Law; and Manso took the land subject to the principle, that if he afterwards became domiciliated in a foreign country, the land became entirely vacant, and reverted to the public domain.

See 15th Art. of the Nat. Col. Decree of 1824; Holliman v. Peebles, 1 Tex. 673.

Affirmed by this court in McKinney v. Saviego, 18 How. 235.

When the deed from Leonardo Manso to Peter W. Grayson, dated April 6th, 1836, was offered in evidence, nine objections were taken to it, any one of which; it seems to us, was sufficient to have excluded it, and several of which should have destroyed its legal effect.

The court erred in refusing in every possible way to give the defendants the benefits of their pleas of prescription of three years, and in refusing to allow proof that the plaintiff had conveyed away a large part of his right pending the action. There was error in admitting the parol evidence and instructing the jury upon it.

Messrs. Robert Hughes, George M. Bibb and W. P. Ballinger, for defendant in error:

1. It is contended for the defendants in ejectment, that the patent under which Burnley claims is void, because of the surplus of land contained in the survey.

The survey was made by the officer appointed for that purpose by the Government over whom the patentee had no control. The Government made no objection to the survey and issued the patent. It would be unreasonable and unjust that the patentee should forfeit his right by the mistake, misjudgment or misconduct of the officer of the Government, in making the survey too large. It is not alleged that the patentee procured the surplus by fraud or misconduct on his part. If the survey had been too small, there was no mode by which it could be enlarged. The opinion and reasoning of this court in Taylor v. Brown, 5 Cranch, 249, seems to be conclusive on this point.

2. As to the question whether Leonardo Manso was or was not an alien enemy at the date of his deed, Sept. 26, 1834, to Peter W. Grayson, a citizen of Texas, Manso was a citizen of Mexico of which Texas was at that time a Province, and became a resident citizen of De Leon's Colony in Texas.

Wars between independent sovereigns are

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called foreign wars, the subjects of the one and the other being aliens, owing no common allegiance. There are also civil wars, where the subjects of citizens owing allegiance to the same government fight against each other in rebellion; some taking part in favor of the existing government, and some for revolution. These are enemies but not alien enemies.

"Alien enemy is such an one as is born under the obeisance of a prince or State that is in hostility with the King of England."

Bacon's Works, Vol. IV. p. 327; also pp. 358, 359.

In the case of Fairfax's Devisee v. Hunter, 7 Cranch, 603, it appears that Lord Fairfax, a citizen and inhabitant of Virginia, died in December, 1781; by his last will and testament devising his estate to Denny Martin, who was afterwards called Denny Fairfax, who was a native born British subject, and never became a citizen of the United States, but always resided in England.

It was contended that Denny Fairfax was an alien enemy and did not take by the devise; but this court decided that he did take by devise. This case is analogous to the case in question, and the decision is conclusive in favor of the deed from Manso to Grayson.

3. The defendants in ejectment endeavored to protect themselves by the Texas Statute of Limitations of three years. Sec. 15, Session Acts of 1841, p. 187.

It is clear that defendants lived within the plaintiff's grant, but not for the space of three years before the institution of this suit. They claim under a deed from White, who has a junior patent, interfering in part only with Burnley's elder grant. White settled outside of the interference with Burnley's grant. This possession of White outside of Burnley's grant, the defendants in ejectment claim to annex to their short possession within Burnley's grant, so as to eke out three years' adverse possession. By the elder grant to Burnley, the patentee became seised of all the land within the patent.

Green v. Liter, 8 Cranch, 247.

The possession of White outside of Burnley's patent did not disseise Burnley, nor give him any cause of action. The Statute could not begin to run against Burnley until he had cause of action. Now, it is clear that Burnley had no cause of action against White, White's possession not being within the bounds of Burnley's patent.

Trimble v. Smith, 4 Bibb. 257; Pogue v. McKee, 3 A. K. Marsh. 128; Talbot v. McGavock, 1 Yerg. 262; Fitzrandolph v. Norman, Tay. N. C. T. R. 132; Green v. Harman, 4 Dev. 158; Overton v. Davisson, 1 Gratt. 211.

4. As to forfeiture by abandonment. By the Constitution of Texas, all forfeitures accrued to the public. Constitution of Texas, Schedule, sec. 2. The President had power "to remit fines and forfeitures and to grant reprieves and pardons except in cases of impeachment." Art. 6, sec. 4.

The defendants could not appropriate to their private use a forfeiture. if it had accrued.

Lands forfeited or escheated to the Commonwealth, do not inure to the benefit of a junior patentee.

Jones v. Chiles, 4 J. J. Marsh. 612.

Penalties and forfeitures are public rights, not private and individual rights. They are private calamities and misfortunes to those who fall under the burden and loss.

Beard v. Smith, 6 Mon. 473.

"An individual sued cannot inquire into the question of forfeiture, under the provisions of the Constitution.

Swift v. Herrera, 9 Tex. 363; Hancock v. McKinney, 7 Tex. 384.

The abandonment relied upon by the defendants, was based upon the 20th articles of the Colonization Law of March 24, 1825. That article was repealed by the Colonization Law of 1832 (Decree190), and also by the Revolution and Constitution of Texas.

The government had instituted no proceedings to declare the forfeiture, neither by inquest of office nor by any other process of law.

By the Constitution of Texas, Declaration of Rights, sec. Sixth, "No man shall be deprived of life, liberty or property, but by due course of law."

This process of law means a judicial proceeding. By this the Legislature of Texas are prohibited from passing bills of attainder, bills of forfeiture and bills of escheat, by their own declaration, dispensing with any judicial proceeding.

The case was fairly submitted to the jury without any erroneous instruction. The jury have found for the plaintiff; and the facts found by the jury are not subject to revision to this court.

Mr. Justice Catron delivered the opinion of the court:

This suit was brought and tried in the District Court of Texas, to recover a league of land lying in that State, fronting in part on Matagorda Bay, east of the mouth of the Guadalupe River, and purporting to be in Martin De Leon's colony or empresa.

1. The first objection made on the trial, was to the introduction of the grant offered in evidence, on the ground that the land did not lie in the Colony, and therefore the officers of the same wanted jurisdiction, and had no power to grant to Benito Morales, under whom Burnley claims. If the premises were true, the conclusion would certainly follow. McLemore v. Wright, 2 Yerg. Tenn. 236.

It is an historical fact, established as such by the decision of the Supreme Court of Texas, in the case of De Leon v. White, 9 Tex. 598, that the empresario contract of Martin De Leon was so amended by order of the General Government of Mexico as to include the littoral leagues along the coast of the Mexican Gulf, including that portion thereof where the land in dispute lies.

It is not only established by the history of the country; but *here, it was also [*247 proved by witnesses, after proof had been made to the court, that many of the documents of the empresa had been destroyed by the soldiers of the Texas Army during the revolutionary struggle. The court left it to the jury to determine whether the land lay in the empresa of Martin De Leon, and they so found. In doing this, we think there was no error committed as against the defendant.

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2. The next question appears on the face of the grant. All the steps leading to the grant, with one exception, are regular.

The quantity of land that the lines of survey include is equal to two leagues, whereas only one league is called for; and the reason the surveyor gives in his certificate of survey for the excess is, that he included in the survey a bay of the ocean, which was not subject to grant, a quantity equal to a league.

This statement was proved to be untrue—almost entirely. The grant contains two leagues and more of fast land; and for this reason it was insisted at the trial that it was fraudulent and void. But the court charged the jury to the contrary, with several qualifications. These we deem to have been useless; as our opinion is, that a regular grant (that is, a completed title, made by those exercising the proper political power to grant lands) is not open to this objection, by an opposing claimant setting up a younger title; and we understand, that on this principle the well considered cases of Hancock v. McKinney, 7 Tex. 384, and of Swift v. Herrera, 9 Tex. 263, proceed. Such is the settled doctrine elsewhere. Overton v. Campbell, 5 Hayw. 165.

How far the Government of Texas might interfere by "due course of law" (that is, by a suit in its name and behalf), is a question for that Government to decide. Owens v. Rains' Lessee, 5 Hayw. 165, is to the effect that it can only be done by suit.

To hold that this grant was void, because the Surveyor returned an excess in his survey, without any evidence that the grantee participated in the matter, as is the case here, would be an alarming doctrine through a widespread portion of the United States. No instance is recollected where the State has interfered by suit to reform a land patent for excess of quantity. The consideration of more or less of excess, to constitute a prima facie case of fraud, would give a latitude of discretion to the Judicial Department over the executive and granting power, inconsistent with the independence of the latter in this branch of administration. Under the Spanish and Mexican Governments, the judiciary had no authority to interfere at all in any case. The Political Department retained to itself all the power to reform or to annul titles.

248*] *But where the executive authority intervenes, and calls on the courts of justice to aid "in the due course of law," no collision between the two departments can occur.

That a case of excess sufficiently gross could arise to justify a proceeding by suit on the part of the State of Texas, to reform a Spanish grant, we do not doubt.

United States v. Hughes, 11 How. 552.

But the question here is not of reform; it is of original nullity.

What was the condition of Morales' title? He applied for a league of land as a colonist; his petition was granted, and a survey ordered. The Surveyor made return of his survey to the Commissioner, who in effect exercised the granting power in De Leon's colony. The lines of the survey call for other adjoining tracts, and their corners previously made. On the faith of this survey, the Commissioner proceeded to extend the title to Morales. It is probable that no actual survey was made on the ground; and hence it happened that the Surveyor's certificate stated that more than one half of the boundary shown on the plat was covered by water, and not subject to grant. Of this matter, the Surveyor and the Commissioner, as the judge of land distribution, had jurisdiction; it was their duty to act justly between the Government and the grantee. The Commissioner acted by extending the title of possession, and thus vested a full title in Morales. No one at that time had any right to complain, if the Government was content; it has so far acquiesced, and younger grantees are bound by that acquiescence.

There is not the slightest evidence that Morales had any knowledge that the statement made by the Surveyor in his certificate of survey was untrue; and therefore the grant as to him is not void, and could only be voidable in part, if it could be reformed at all.

3. Morales conveyed to Manso, who was a citizen of Texas residing in De Leon's Colony, when resistance to the Central Government of Mexico was first agitated by the inhabitants of Texas.

All Spaniards were ordered to leave the country by the party which eventually proved successful; and Manso, being a Spaniard, left and went to Louisiana; and it is insisted that this forced removal was an abandonment of the country, and a forfeiture of his land, according to the colonization laws of Coahuila and Texas. Manso took no part in the revolutionary movement, quietly left, and resided in Louisiana from the fall of 1834 up to the time when he conveyed to Grayson, in April, 1836. Such was the only proof of his acts, so far as they affect this controversy.

*The evidence did not warrant any [*249 charge from the court on the ground of abandonment of the county by Manso. The case of Hardy v. De Leon, 5 Tex. 211, is conclusive on this ground of defense. To hold otherwise, would violate the entire doctrine laid down in the case of McMullin v. Hodge, 5 Tex. 34.

There must be some evidence on which a charge to the jury is founded, otherwise it cannot be lawfully given. As there was no evidence from which an abandonment could be found by the jury, an instruction on the subject could only mislead.

Chirac et al. v. Reinecker, 2 Pet. 625.

In the next place, we are of the opinion that there was no evidence introduced on the trial below which could have warranted the court to give any instruction to the jury destructive of Grayson's title, on the supposition that Manso was an alien enemy at the time of conveying, and therefore had no capacity to convey.

When one nation is at war with another nation, all the subjects or citizens of the one are deemed in hostility to the subjects or citizens of the other; they are perosnally at war with each other, and have no capacity to contract. Here Manso was a citizen of Coahuila and Texas, when he was forced to leave his country, and continued away, subject to the same coercion, until after independence was declared by Texas, March 2d, 1836. The Constitution of Texas was adopted March 17th, 1836; by the 10th section of which it is provided, that "all persons (Africans, etc., excepted) who

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were residing in Texas on the day of the Declaration of Independence shall be considered citizens of the Republic, and entitled to all the privileges of such." Manso conveyed to Grayson in April, afterwards. There was a suspicion (he being a Spaniard) that he sympathized with the federal authorities of Mexico, and might take sides with the enemies of Texas; but this record affords no proof that he did so, up to the time when he conveyed to Grayson; nor is there any proof showing that he had abandoned his domicil in Texas, which he was forced to leave some sixteen months before independence was declared; nor is it of any consequence, whether he did, or did not, become domiciled in Louisiana, if he was not an alien enemy to the Republic of Texas, and to her citizen Grayson, the grantee; as an alien friend can convey his lands situate in a foreign government; and that the title is defeasible, is nothing to the purpose of this case.

It is again insisted that Manso, after he conveyed to Grayson, removed to Mexico, and that this must be taken as evidence that he was an 250*] alien enemy when independence was *declared. The Texas courts hold that forcing a party to leave the country should not operate to his prejudice. Hardy v. De Leon, 5 Tex. 211. And this court held, in the case of McIlvaine v. Coxe's Lessee, 4 Cranch, 209, that a citizen of New Jersey did not forfeit his citizenship by joining the British Army during our Revolutionary War, and that his heirs took by descent, although their ancestor continued to reside abroad. Nor did the expression in the deed that Manso was a citizen of Mexico establish alienage, as the State might claim his citizenship, notwithstanding. To this effect is Coxe's case; and which is followed by the doctrine maintained in Inglis v. The Trustees of the Sailor's Snug Harbor, 3 Pet. 99.

4. The conveyance from Manso to Grayson is dated April 6, 1836, and was executed before a notary public in Louisiana. It embraced seventeen leagues in all, including the one in dispute. It was a civil law conveyance, made in a notary's book, and a copy furnished to the grantee, as a second original. This copy was offered in evidence. In December, 1836, the Legislature of Texas enacted, that "the common law of England, as now practiced and understood, shall, in its application to juries and evidence, be followed and practiced by the courts of this Republic." The conveyance had two attesting witnesses to it, besides the signature of the Notary. To let in the copy, it was proved by a witness that he had examined the original on file on the Notary's book; that the copy was a true one; that the Notary before whom the conveyance was executed was dead; that the witness knew his handwriting, which was genuine; that he, the witness, was well acquainted with the handwriting of John Simonds, one of the subscribing witnesses to the act of sale, who was also dead, and that the signature of Simonds was genuine.

The original of the conveyance from Manso to Grayson remained in the archives of the Notary in Louisiana, and consequently could not be produced, and the copy was of necessity offered. This is according to the case of Watrous v. McGrew, 16 Tex. 506. We are of opinion that the paper offered was sufficiently proved to be admitted on common law principles.

The copy from the Notary's books was also duly authenticated, according to the Act of Congress of 1804, as a record of another State. The Supreme Court of Texas held, in the case of Watrous v. McGrew, that as the 6th article of the Constitution of Texas of November, 1835, creating a provisional Government, had recognized the Civil Code and Code of Practice of Louisiana; and as the Ordinance of January 22, 1836, Hart. Dig. 321, had adopted, "in matters of probate the laws and principles in similar cases in the State of Louisiana," the *courts of Texas must recognize the [*251 Louisiana laws, and the proceedings under them, in cases of conveyances executed by notarial act of Louisiana; and on this ground the copy of the conveyance then before the court was admitted in evidence, being in all its features a copy of a record like the present.

5. The remaining question is, whether the defendants are protected by the Act of Limitations of three years. They pleaded, specially, that they, and those under whom they claim, have been in adverse possession of the premises sued for under color of title for three years next before the commencement of this suit; and that the plaintiff's cause of action accrued more than three years next before the commencement of said suit.

The 15th section of the Act of 1841, Hart. Dig. 729, declares that every suit to recover real estate as against any one in possession under title, or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards.

The defendants had both title and color of title, as required by the Act; and they, or some of them, had been in actual possession of their lands more than three years before this suit was commenced.

The younger title, owned and occupied by the defendants, lapped over one side of the grant to Morales, and to this interference the dispute extends. But no one of the defendants had been in actual possession of the disputed part for three years when the suit was brought.

The Act of 1841, section 15, requires suit to be instituted within three years "next after the cause of action shall have accrued." And we think it too plain for reasoning or authority to make it plainer, that, until the land of the plaintiff was trespassed upon, this action of trespass, to try title, could not be maintained. Such are the decisions of the elder States on statutes having corresponding provisions. Trimble v. Smith, 4 Bibb, Ky. 257; Pogue v. McKee, 3 A. K. Marsh. 129, 1022; Talbot v. McGavock, 1 Yerg. Tenn. 262.

We have endeavored carefully to follow the doctrines of the Supreme Court of Texas in this opinion, because we are bound to follow the settled adjudications of that State in cases affecting titles to lands there.

On the effect of excess of quantity in a grant, and on the three years' Act of Limitations, we had no direct guide, and therefore have expressed our independent views on these questions.

For the reasons here stated, it is ordered that the judgment of the District Court be affirmed.

Dissenting, Mr. Justice Daniel.

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EUGENE LEITENSDORFER and Joab Houghton, Plffs. in Error,
v.
JAMES J. WEBB.

(See S. C. 20 How. 176-186.)

Where allegiance is changed, rights of property not affected—New Mexican causes transferred to courts created by Congress—proceeding to abate attachment not reviewable.

Where people change their allegiance, the relation to their sovereign is dissolved; their relations to each other and their rights of property remain undisturbed.

The Legislative Assembly had power to transfer the cognizance of causes previously pending under the laws of the provisional government of the Territory of New Mexico, to the courts created by the Act of Congress establishing the Territory of New Mexico.

The preliminary proceedings in the District Court of the Territory, being interlocutory, to abate the particular remedy by attachment only, and having no application to the plaintiff's right to recover his demand, or to the jurisdiction of the Territorial Court, either as to the parties or the subject matter of the controversy, that proceeding comes not within the appellate or revisory *power of this court.

Argued Jan. 22, 1858. Decided Feb. 24, 1858.

IN ERROR to the Supreme Court of the Territory of New Mexico.

This case arose upon proceedings in attachment instituted by the defendant in error, in the Circuit Court in and for the County of Santa Fe, for the recovery of the amount due on a certain promissory note.

The case was afterwards transferred to the United States District Court for the first Judicial District of the Territory of New Mexico. The trial resulted in a verdict and judgment in behalf of the plaintiff, for $10,330.25. This judgment was affirmed on appeal to the Supreme Court of the Territory of New Mexico; whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. C. Cushing and R. H. Gillet, for the plaintiffs in error.

Mr. T. Polk, for defendant in error.

Mr. Justice Daniel delivered the opinion of the court:

This case is brought before the court upon a writ of error to the Supreme Court of the Territory of New Mexico.

177*] *Upon the acquisition, in the year 1846, by the arms of the United States, of the Territory of New Mexico, the civil government of this Territory having been overthrown, the officer, General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordanied, under the sanction and authority of the United States, a provisional or temporary government for the acquired country. By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain. Amongst the consequences which would be necessarily incident to the change of sovereignty, would be the appointment or control of the agents by whom and the modes in which the government of the occupant should be administered—this result being indispensable, in order to secure those objects for which such a government is usually established.

This is the principle of the law of nations, as expounded by the highest authorities. In the case of The Fama, in the 5 C. Rob. 106, Sir William Scott declares it to be "the settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property not taken from them by the orders of the conqueror, remain undisturbed." So, too, it is laid down by Vattel, book 3d, cap. 13, sec. 200, that "the conqueror lays his hands on the possessions of the State, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is, that they only change masters." In the case of The United States v. Percheman, 7 Pet. pp. 86, 87, this court have said: "It may be not unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other, *and their rights of property, remain [*178 undisturbed." Vide, also, the case of Mitchell v. The United States, 9th Ib. 711, and Kent's Com. Vol. I. p. 177.

Accordingly we find that there was ordained by the provisional government a judicial system, which created a superior or appellate court, constituted of three judges; and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned. By the same authority, the jurisdiction of the Circuit Courts to be held in the several counties was declared to embrace, 1st, all criminal cases that shall not be otherwise provided for by law; and 2d, exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes. Vide Laws of New Mexico, Kearney's Code, p. 48. Of the validity of these ordinances of the provisional government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation, these Ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was

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incompatible with them. But it has been contended, that whatever may have been the rights of the occupying conqueror as such, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest every institution which had been overthrown or suspended would be revived and re-established. The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled purpose of the United States never to relinquish the possession acquired by arms. We conclude, therefore, that the Ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or by that of the Territorial Government in the exercise of powers delegated by Congress. That no power whatever, incompatible with the Constitution or laws of the United States, or with the authority of the provisional goverment, was retained by the Mexican Government, or was revived under that government, from the period at which the possession passed to the authorities of the United States.

Among the laws ordained by the provisional government of New Mexico is one conferring upon creditors the right of proceeding 179*] *by attachment in certain cases against their debtors, and prescribing the instances in which and the modes by which, this remedy may be prosecuted.

This law is contained in what is called the Kearney Code, at p. 39, and is found under the title Attachments. Upon its provisions, the case under consideration was instituted; and those provisions, so far as they are pertinent to the questions before us, will now be examined.

By section 1st, it is declared that creditors, whose demands amount to $50 or more, may sue their debtors in the Circuit Court by attachment in the following cases, to wit:

"1st. When the debtor is not a resident of this Territory.

2d. When the debtor has concealed himself or absconded, or absented himself from his usual place of abode in this Territory, so that the ordinary process of law cannot be passed upon him.

3d. When the debtor is about to remove his property or effects out of this Territory, or has fraudulently concealed or disposed of his property or effects, so as to hinder, delay, or defraud his creditors."

It is under the 3d clause only of this 1st section of the Attachment Law, that this case has been or could have been instituted; since, by recurrence to the affidavit made by the plaintiff in the attachment, it will be found to state, that Leitensdorfer & Co. have fraudulently disposed of their property and effects. By the 2d section of this law it is declared, that a creditor, wishing to sue his debtor by attachment, shall file in the Clerk's office of the Circuit Court a petition or other lawful statement, with an affidavit of his cause of action, and a bond with a condition to the latter to prosecute his action with effect and without delay, and to refund all sums of money that may be adjudged to the defendant, and to pay all damages that may accrue to any defendant or garnishee, by reason of the attachment, or any process or judgment thereon.

The 3d section of this same Statute provides, that the affidavit made by the plaintiff shall state that the defendant is justly indebted to the plaintiff, after allowing all just discounts, in a sum to be stated in the affidavit, and on what account; and shall also state that the affiant has good reason to believe, and does believe, the existence of one or more of the causes which, according to the provision of the 1st section, will entitle the plaintiff to sue by attachment. See collection of the laws of New Mexico, comprising the Kearney Code, p. 39.

With the requisites of the aforegoing provisions of the Statute, it appears, by the record, that the plaintiff below, the defendant in error here, formally and regularly complied.

*The 16th section of the Statute [*180 enacts that "in all cases when property or effects shall be attached, the defendant may, at the court to which the writ is returnable, put in his answer without oath, denying the truth of any material fact contained in the affidavit; to which the plaintiff may reply. A trial of the truth of the affidavit shall be had at the same term; and on such trial, the plaintiff shall be held to prove the existence of the facts set forth in the affidavit, as the ground of the attachment; and if the issue shall be found for him, the cause shall proceed; but if it be found for the defendant, the cause shall be dismissed at the costs of the plaintiff."

At the October Term, 1849, of the Circuit Court of the Territory, established by the Kearney Code, the defendants in the attachment appeared and filed a demurrer to the petition, and at this point terminated the proceedings had in this cause in the court last mentioned. By subsequently tendering and joining in an issue in the District Court of the Territory, in bar of the plaintiff's right of recovery, the defendants must be considered as having waived the demurrer interposed by them in the Circuit Court of the provisional government, and there appears not to have been a joinder in the demurrer, nor any order whatever taken with respect to it.

On the 9th day of September, 1850, was approved the Act of Congress establishing the Territorial Government for the Territory of New Mexico. Vide Stat. at Large, Vol. IX. p. 446. By this Act, commonly distinguished as the Organic Law, the legislative and judicial powers of the Territorial Government are provided and defined, to have effect from the passage of that Act. The former (the legislative power, vide sec. 7), it is declared, shall extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States and the Act of Congress above mentioned. The latter (the judicial power, vide sec. 10), shall be vested in a supreme court, in district courts, and in justices of the peace. That the Supreme Court shall consist of a chief justice and two associate justices, any two of whom shall form a quorum; that the said Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the Su-

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preme Court, at such time and place as shall be prescribed by law. And it is further declared, that the jurisdiction of the several courts, as therein provided for, both appellate and original, and that of the justices of the peace, shall be as limited by law.

On the 19th day of September, 1851, the District Court of the United States for the First Judicial District created by the Act of Congress, being then in session, the plaintiff in the 181*]attachment *moved the court for leave to file therein the papers and proceedings in that case, and that the same might be made a part of the records of the District Court; and it was thereupon ordered by the court, that the case be entered upon its docket. Objection was made by the defendants to the transfer of this case from the Circuit Court of the provisional government (vide Kearney Code), to the District Court created by Congress, upon the ground that the Legislative Assembly had no power to authorize such a transfer. This objection was overruled by the District Court, and exception was taken to its decision.

Afterwards, viz.: on the 25th of March, 1852, the defendants in the attachment so far submitted themselves to the jurisdiction of the District Court, as to plead to the averments in the petition and affidavit, and to pray judgment of the action, because they say that at the time of the institution of the suit, viz.: on the 30th day of July, 1849, the defendants had not fraudulently disposed of their property, so as to hinder, delay and defraud their creditors. And again, at the same term of the said District Court, the defendants, upon affidavits made by them of the insufficiency of the sureties in the bond filed by the plaintiff in the attachment, applied for and obtained from that court an order for further security, which security was, upon the said application and order, given by the plaintiff.

On the 1st day of October, 1852, this cause was, upon the petition and affidavit, the plea of the defendants, and the evidence produced by the parties, submitted to a jury, who found that the affidavit of the plaintiff was true; whereupon it was considered and ordered by the court that the cause should proceed, and that the defendants should plead to the merits of the plaintiff's demand; and the defendants having pleaded that they did not promise and undertake as the plaintiff had charged them, and upon this last issue the cause having been committed to a jury, they found for the plaintiff, and assessed his damages at $10,330.25. After the finding of the juries upon both the issues in this case, motions were made, first for a new trial, and second for an arrest of judgment, both of which motions were overruled. As these were motions submitted to the discretion of the court, and determined by it upon facts and circumstances not fully disclosed upon this record, it would be improper in this court, and in conflict with its settled rule of action, to overrule or even to canvas the decision of the court which overruled these motions.

In the objection, which was taken to the power of the Legislative Assembly to transfer the cognizance of causes previously pending under the laws of the provisional government 182*] to the *courts created by the Act of Congress establishing the Territory of New Mexico, we can perceive no force. It was, undoubtedly within the competency of Congress either to define directly, by their own Act, the jurisdiction of the courts created by them, or to delegate the authority requisite for that purpose to the Territorial Government; and by either proceeding, to permit or to deny the transfer of any legitimate power or jurisdiction previously exercised by the courts of the provisional government, to the tribunals of the government they were about to substitute for the Territory, in lieu of the temporary or provisional government. This power we consider was, in fact, delegated by Congress to the Territorial Government by the 7th section of the Act of 1850, which declares, that "the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and with this Act;" and by the 10th section of the Act, which, after ordaining a Supreme Court, District and Probate Courts, and justices of the peace, and after dividing the Territory into three judicial districts, and directing a District Court to be held in each district, by one of the judges of the Supreme Court, goes on to declare, that "the jurisdiction of the several courts therein provided for, both appellate and original, and that of the Probate Courts, and of justices of the peace, shall be as limited by law."

The inquiry regularly suggested by these provisions of the Act of Congress, is not whether they invested the Legislative Assembly with authority to prescribe the subjects for the cognizance of the courts created by that Act—of this there can be no doubt—but whether the authority delegated to that Assembly has been in fact, and to what extent, exerted with reference to controversies previously in litigation in the courts of the provisional government, and to subjects of controversy subsequently arising.

Under the provisions of the Act of Congress above quoted, the Legislative Assembly have, in several instances, prescribed the powers and duties of the Territorial Courts, and, among others, by the 4th section of the Act of that Assembly, passed on the 12th of July, 1851; by which section it is declared, that the District Courts shall have original jurisdiction in all cases civil and criminal, in which the jurisdiction is not specially delegated to some other court: and by the 2d section of the Act of the Assembly, approved on the 14th of July, 1851, expressly providing, "that all bonds, writs and processes, which have remained in force, shall be carried to a final decision in the courts established by the Legislative Assembly, to the same effect as they would have been in the courts previously existing."

*As the Legislative Assembly possessed [*183 no power to organize or create courts differing from those created by the Act of Congress, which Act had divided the Territory into districts, and had designated the courts which should be vested either with appellate or original jurisdiction, it would seem to follow that, by an Act of the Legislative Assembly, designed to preserve, and to prevent the discontinuance of rights in litigation subsisting in the courts of the provisional government, the distribution of the cognizance of those rights was

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intended to be made to courts corresponding in their jurisdiction with the tribunals of the provisional government.

Such appears to have been the interpretation, by the Judges of the Supreme Court of the Territory, of the Acts of the Legislative Assembly, and by which interpretation they have recognized the transfer of causes pending in the Circuit Courts of the provisional government, for final decision, to the District Courts under the Territorial Government; and although there is some obscurity in the language of the Territorial Statutes on this subject, yet the reasonableness of their interpretation by the Supreme Court and the District Courts of the Territory commends it to our approval, and its adoption conforms to the rule of this court, by which it has followed the construction of local statutes established by the highest judicial authority of the community for whose government they are enacted.

At the trial of the issue joined upon the verity and effect of the affidavit, the plaintiff in the attachment, to maintain that issue, on his part, produced in evidence and proved the execution of an assignment, by which Leitensdorfer had conveyed all his goods, wares and merchandise, and all his property and effects, of the late firm of Leitensdorfer & Co. Also, an instrument executed at the same time, by Joab Houghton, the other member of the firm, whereby he authorized the assignees of Leitensdorfer & Co. to use and sign his name in any way that it might be necessary for them to use it in settling the business of the late firm of Leitensdorfer & Co. By the deed from Leitensdorfer, certain creditors to the amount of between twenty and thirty thousand dollars were preferred, besides all sums of money due by Leitensdorfer & Co. for simple deposits or money loaned without interest; after which, the general creditors were to be paid pro rata, from whatever might be collected, until the assets should be exhausted. There was no inventory of assets, nor any schedule of debts due by said Leitensdorfer, attached to or accompanying the deed of assignment. The deed provided that a fair and correct list of the liabilities of Leitensdorfer & Co., and also a fair list, so far as could be made, of all the as- 184*] sets, was to be made within ten *days after signing the deed; within this period, an inventory of assets was made out, but no list of liabilities. Some persons, whose names were not in the assignment, who had deposited with or loaned money without interest to the firm, were paid by the assignees, and the deed was not pursued in other respects. Upon the closing of the testimony on the trial in the District Court, the defendants, the now plaintiffs in error, moved the court for the following instructions to the jury, all of which were refused:

1. That as the assignment was the act of Leitensdorfer alone, with which Houghton had nothing to do, the act of one defendant would not authorize an attachment against two, and the verdict must be for the defendants.

2. That the deed of assignment was not fraudulent in law; and unless the jury find, from the evidence, that in fact, at the time of the commencement of this suit, the plaintiff had good reason to believe that the defendants had fraudulently disposed of their property and effects so as to hinder, delay and defraud their creditors, they must find for the defendants.

3. That as the plaintiff had shown no title to the note sued on in himself, he had no authority to sue, and the jury must find for the defendants.

The court then instructed the jury that the deed was fraudulent in law, because of the want of a schedule thereunto annexed of the property and effects conveyed to the assignees, and because of the want of a schedule of the preferred creditors, and because of a preference of some creditors; and also, if the jury found that the defendants, or either of them, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, at the time of the commencement of this suit, they must find for the plaintiff. That the execution of the deed by Leitensdorfer, unaccompanied by the proper schedules, was a fraudulent disposition in law, as aforesaid; and that the commission of a fraud in law by the defendants, or either of them, without fraud in fact, or without an intent to defraud, was a sufficient cause for the attachment as the commission of a fraud in fact, or with intent to defraud. And also, that upon the trial of this issue it was not necessary for the plaintiff to show himself a creditor of the defendants, farther than is shown in the affidavit, to entitle him to a verdict in his favor upon the issue of the truth of the affidavit; but that the sole issue was, whether the defendants, or either of them, at the time of the commencement of the suit, had fraudulently disposed of their property and effects, so as to hinder, delay or defraud their creditors.

Upon the refusal by the court of the 1st, 2d and 3d *prayers presented by the defend- [*185 ants, and to the granting of the instructions prayed for by plaintiff below, the defendants excepted.

Upon the trial of the issue joined on the plea in bar to the action, no question of law was raised, no exception taken to any of the proceedings under that issue.

On an appeal from the judgment of the District Court to the Supreme Court of the Territory of New Mexico, the judgment of the District Court was, on the 28th of February, 1853, affirmed.

It is obvious, that in the proceedings in the District Court, neither the justice nor the amount of the plaintiff's demand was put in controversy. These were not embraced within the issue raised upon the petition and affidavit. That issue related only to the right of the plaintiff to sue in a particular form of action, a right dependent upon his ability to show the alleged character of the defendants' acts, with respect to their creditors generally, and not with respect to the plaintiff particularly or exclusively. The verity and the amount of the plaintiff's demand were matters for distinct and ulterior investigation. The proceeding, then, upon the petition and affidavit, was in reality a proceeding in abatement, and not in bar of the plaintiff's debt or right of recovery. This appears to be a regular conclusion from the language of the law of the Territory, and it is in accordance with the construction by the courts of a neighboring State of a law identical in its

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provisions with the law of the Kearney Code, and from which law it is not improbable that the latter was adopted. Vide Missouri Reports, Vol. V. p. 544; Ib. 13, p. 118; Ib. 14, p. 600; Ib. 15, p. 499.

It is true, that by the practice of the State courts the preliminary proceedings upon the petition and affidavit, and any questions of law ruled by the courts in those proceedings, are carried for review to the tribunals of last resort. But this is a practice authorized by the States under their peculiar jurisprudence. The States possess an undoubted power to permit or to require of their courts the re-examination and control of proceedings in their own tribunals, entirely interlocutory in their nature. The appellate or revisory power of this court, as defined by the Constitution and laws of the United States, is more restricted in its extent than that with which some of the States have invested their courts. By the 22d section of the Act of Congress to establish the judicial courts of the United States, it is declared that final judgments and decrees in civil actions and suits in equity in a Circuit Court, brought there by original process, or removed there from the courts of the several States, or from a District 186*] Court, where the matter in *dispute exceeds the sum or value of $2,000, exclusive of costs, may be examined, and reversed or affirmed, in the Supreme Court. But there shall be no reversal for error in ruling any plea in abatement other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer.

From this provision in the Act of Congress it follows, that the preliminary proceedings in the District Court of the Territory, being in its nature interlocutory, and designed to abate the particular remedy by attachment only, and having no application to the plaintiff's right to a recovery of his demand, or to the jurisdiction of the Territorial Court, either as to the parties or the subject matter of the controversy, that proceeding comes not within the appellate or revisory power of this court.

Upon the trial in chief, or upon the merits, there appears to have been no question made, nor any point reserved upon the law or the evidence; the record of this trial presents simply the finding of the jury, and the judgment of the District Court upon that finding.

The decision of the Supreme Court of the Territory, in sustaining the judgment of the District Court, must, therefore, be affirmed.

219*] *JACOB U. PAYNE, J. P. Harrison, and George W. Huntington, Commercial Partners, under the Name and Firm of Payne & Harrison, Intervenors, etc., Plffs. in Er.,

v.

JOHNATHAN J. NILES, James M. Niles, Leander H. Corey, and Stephen Allen, Partners, doing Business under the Name and Style of Niles & Co., Plffs., and Wm. A. Broadwell, Syndic of Andrew Knox, Deceased, Deft.

(See S. C. 20 How. 219-221.)

Writs of error governed by common law—no one but party can bring error nor be made defendant in, unless party below.

Writs of error to remove the judgment of an inferior tribunal to this court are, under the Acts of Congress, governed by the principles and usages of common law.

No one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error, who was not a party to the judgment in the inferior court.

Argued Jan. 27, 1858. Decided Feb. 24, 1858.

THIS suit was brought in the Circuit Court of the United States for the Eastern District of Louisiana, by Niles & Co., against Knox, to enforce the vendor's privilege under the Civil Code, for the recovery of the price of certain machinery. Payne and Harrison, the plaintiffs in error, subsequently intervened by petition. On Feb. 8, 1856, the petition of intervention was dismissed by the court below, without Knox having been made a party to it.

The case is now here on a writ of error, sued out by Payne and Harrison.

A further statement appears in the opinion of the court.

Messrs. Chilton and Davidge, for the plaintiffs in error:

On behalf of the intervenors, the plaintiffs in error, it will be contended:

First. That their title and mortgages being admitted, they are entitled to precedence, unless Niles & Co. have established their claim to be considered privileged creditors.

Civil Code of La. 3150, 3278, 3153.

Second. That Niles & Co. are not entitled to the privilege.

Civil Code, 3152; Taylor v. Crain, 16 La. 292; 4 Ann. 97, 121; 1st Municipality v. Hall, 2 Ann. 549.

Messrs. J. P. Benjamin and Albert Pike, for defendants in error:

1. The writ of error must be dismissed. There is no such record as is required by the 11th and 31st rules of the court. There is nothing but a petition of intervention, and an agreed statement of facts without any date; but which seems to have been made up after the new trial was refused; no answer; no pleadings; no bill of exceptions.

Keene v. Whittaker, 13 Pet. 459; Curtis v. Petitpain, 59 U. S. (18 How.) 109.

2. The judgment applied for is one of which this court has no jurisdiction; the writ ought to be dismissed.

Bayard v. Lombard, 9 How. 550; Curtis v. Petitpain, 59 U. S. (18 How.) 110.

If, however, the court shall determine that it can rightfully take cognizance of the cause, the following points and authorities are further submitted:

1. The petition of intervention was rightfully dismissed for want of proper parties.

2. The Circuit Court was without jurisdiction on the petition of intervention.

Shields v. Barrow, 17 How. 130.

3. On the merits of the claim of the intervening parties, it is submitted that the right

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NOTE.—Who may appeal to, or sue out writ of error from, Federal Supreme Court—see note, 66 L.R.A. 854.

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of Niles & Co. is superior, both in law and in equity.

Mr. Chief Justice Taney delivered the opinion of the court:

220*] *This case is brought here by a writ of error directed to the Circuit Court for the Eastern District of Louisiana.

It appears by the transcript, that Niles & Co., citizens of Ohio, brought suit in the Circuit Court against Andrew Knox, of Louisiana, for the price of certain machinery furnished to the latter for the use of his plantation. They claimed the vendor's privilege on the articles sold, which were still in possession of the vendee. The suit was instituted on the 21st of February, 1855, and on the 17th of April, 1855, a decree was rendered in favor of the plaintiff for $2,686.69, with interest, and with the vendor's privilege on the machinery.

On the 19th of March, 1855, Payne & Harrison, the plaintiffs in error, citizens of Louisiana, filed in the Circuit Court a petition of intervention in the above-mentioned suit, alleging that Knox was indebted to them in a large sum of money, for which they held a mortgage on the plantation on which the machinery in question was erected; and claiming that their right by virtue of this mortgage was superior to the vendor's lien of Niles & Co., and prayed a citation for Niles & Co.; but did not pray for any process against Knox. Nor does the record show that he ever voluntarily appeared to or answered this petition. And on the 8th of February, 1856, it was by the judgment of the Circuit Court finally dismissed, with costs.

A statement of facts was afterwards agreed on between the counsel for Niles & Co. and the counsel for Payne and Harrison, which is set forth in the transcript, but it does not appear that Knox assented to it, or indeed had any knowledge of it.

Afterwards, on the 18th of February, 1856, the counsel for Payne & Harrison represented to the court that Knox had died after the suit on their intervention was instituted, and that no one had qualified as his executor or administrator; and that there was no representative of his estate, except William A. Broadwell, of New Orleans, who was the duly appointed and qualified syndic of said Knox; and thereupon moved the court that the said Broadwell be made a party to the cause, which was accordingly ordered by the court, and a copy of the order served on him by the marshal on the succeeding day; and on the day of the service, this writ of error was sued out by the intervenors, Payne & Harrison.

The writ recites that a judgment was rendered in a case between Niles & Co., plaintiffs, and Broadwell, syndic of Knox, defendants, and Payne and Harrison, intervenors in said suit, who were plaintiffs, both as against Niles & Co. and Broadwell, syndic of Knox; and citations were issued and served on Niles & 221*] *Co. and Broadwell, to appear in this court upon the return of the writ of error.

It will be seen, from this statement, that Payne & Harrison were not parties to the judgment in the suit of Niles & Co. v. Knox. The only judgment in the Circuit Court to which they were parties, was the judgment dismissing their petition of intervention; and Knox was not made a party defendant in that proceeding, nor was he a party to that judgment. The order of the court to make Broadwell, his syndic, a party, was passed after this judgment was rendered.

Writs of error to remove the judgment of an inferior tribunal to this court are, under the Act of Congress, governed by the principles and usages of the common law. And it is very well settled in all common law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error, who was not a party to the judgment in the inferior court. Payne & Harrison, therefore, have no right to sue out a writ of error upon the judgment in the suit between Niles & Co. and Knox, to which they were not a party, nor can they make Knox or his representative a defendant in a writ of error brought upon the judgment on the petition of intervention to which neither Knox nor Broadwell, his syndic, was a party.

This writ of error attempts to do both, and is therefore not warranted by law.

It cannot bring the judgments referred to, or either of them, before this court, and must, therefore, be dismissed, with costs.

THE COVINGTON DRAWBRIDGE COMPANY, Appts.,
v.
ALEXANDER O. SHEPHERD et al.

(See S. C. 20 How. 227-234.)

Averment, that corporation is citizen of a State sufficient for jurisdiction—when Act of Incorporation is a public law, averment of citizenship is sufficient.

In a suit by or against a corporation, in its corporate name, an averment that they were citizens of a particular State (if such was the fact), is sufficient to give jurisdiction to a court of the United States.

Where the Act of Incorporation is a public law, which the court is bound to notice, the averment of the citizenship of the members of the corporation is all that is required.

Argued Jan. 26, 1858. Decided Feb. 24, 1858.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

The Covington Drawbridge Co. was incorporated by the General Assembly of the State of Indiana, for the purpose of constructing a bridge across the Wabash River, at Covington, in Indiana. Authority was given to demand tolls of travelers upon said bridge, and an obligation was imposed upon the Corporation to construct a draw for the passage of steamboats, and to remove it upon the approach of boats, etc.

This suit was brought in the court below by the defendants in error, to recover damages resulting to their steamboat, The Cabinet, from an alleged failure of the said Bridge Company to open the draw of the said bridge at the proper time.

The trial below resulted in a verdict and judgment for the plaintiffs for $6,084.93, where

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upon the defendant brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Mr. O. H. Smith, for plaintiffs in error:

The declaration did not give jurisdiction to the court. The only part of the declaration that refers to the citizenship of the parties, is in these words: "Alexander O. Shepherd, James Davidson, Elijah F. Gillan, Samuel McClure, Samuel Peters, and George Willard, citizens of the State of Ohio, complain of the Covington Drawbridge Company, citizens of the State of Indiana, defendants in this suit, in a plea of trespass on the case."

I refer to the following authorities, showing that the question is res adjudicata in this court:

Bingham v. Cabot, 3 Dall. 19-382; Emory v. Greenough, 3 Dall. 369; Turner v. Enrille, 4 Dall. 7; Abercrombie v. Dupuis, 1 Cranch, 343; Wood v. Wagnon, 2 Cranch, 9; Marshall v. Balt. & O. R. R. Co. 16 How. 314; Lafayette Ins. Co. v. French, 59 U. S. (18 How.) 404.

The averment that the Company is a citizen of the State of Indiana, can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons or an association into a body politic, created by law, is a citizen of a State within the meaning of the Constitution. And therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed. But the plaintiff's replication alleges that the defendants are a Corporation created under the laws of the State of Indiana, having its principal place of business in that State. These allegations are confessed by the demurrer, and they bring the case within the decision of this court, in Marshall v. The Balt. & O. R. R. Co. 16 How 314, and the previous decisions.

In this case there was no replication to supply the defect in the declaration, and therefore I maintain that the judgment must be reversed and the suit dismissed.

Mr. R. W. Thompson, for the defendants in error:

The declaration in this case does not, in so many words, aver that the defendants are a Corporation, but it proceeds against the defendants as a Corporation, "The Covington Drawbridge Company;" the name is appropriate to a corporate body. It is not necessary to allege that the defendants were a Corporation, and a demurrer, for the want of such an allegation, would have been frivolous.

Union Ins. Co. v. Osgood, 1 Duer, 707.

A company may be declared against by the name by which it is known, without alleging it to be chartered or incorporated, or registered.

Woolf v. City Steamboat Co. 7 Man., G. & S. 103.

The general issue was pleaded in this case by the defendants, and that plea was an admission that the Corporation defendant was capable of suing and being sued.

Freeman v. Machias, etc. Co. 38 Me. 343.

So the plaintiffs admit that the defendants are a Corporation, by suing them in their corporate name, and are estopped to deny it.

People v. Turnpike & Bridge Co. 20 Barb. 518; 1 Pet. 450.

Also, by the law of Indiana, recognized so to be, and binding on this court.

Acts of Congress, May 19, 1828.

It has never been necessary in pleading, to aver that a party was a Corporation; if the name implied it, that was sufficient.

Harris v. Muskingun, Man Co. 4 Blackf. 267; Richardson v. St. Joseph Iron Co. 5 Blackf. 146; U. S. Bank v. Haskins, 1 Johns. Cas. 132.

This argument would not have been made, but for a remark made by Justice Curtis, in case of French v. The La Fayette Ins. Co. 5 McLean, 461. "It does not appear from it (the averment) that the La Fayette Ins. Co. is a corporation, or if it be such, by the law of what State it was created." That remark was well applied to that case, for the averment of citizenship was senseless and meant nothing. Surely this court cannot have meant to decide that, in declaring by or against a corporation, if the name used is appropriate to the corporate body, it is necessary to aver that the party is a Corporation.

No one will deny that the averment of the citizenship of the plaintiffs is well stated, and the allegation is the same with reference to the defendants. In the case of The Bank of the U. S. v. Deveaux, 5 Cranch, 61, the averment of the citizenship of the corporation plaintiffs was, and your petitioners aver that they are citizens of the State of Pennsylvania," and Chief Justice Marshall, in delivering the opinion of the court, upon the authority of a case in 12 Mod. said: "the court was authorized to look to the character of the individuals who composed the corporation, on a question of jurisdiction."

"Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs, as individuals, because it could not be true as applied to the corporation."

Surely the averment in that case was no stronger than this.

The averment in the declaration in this case is equivalent to a statement that the Covington Drawbridge Company was a Corporation (for the name implies it), and that all the members of the Corporation are citizens of the State of Indiana; this last averment is the essential element of jurisdiction. This court held, in the case of Louisville R. R. Co. v. Letson, 2 How. 497, that jurisdiction might be maintained against a corporation defendant in a State where it was incorporated and had its principal office of business, though all of the corporators did not reside in the State of the corporation.

The cases in this court since the case of The Commercial Bank of Vicksburg v. Slocomb, 14 Pet. 60, in which the question of jurisdiction has been decided, have proceeded upon the ground that jurisdiction might attach, though all the corporators defendants did not reside in the State where the suit was brought; but certainly the court has not said, that averments which were held sufficient in the cases of Strawbridge v. Deveraux & Slocum, when the utmost strictness was required, would be insufficient now.

See Justice Grier's opinion in Marshall v. B. & O. R. R. Co. 16 How. 314.

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By the rules of pleading applied to the declaration in this cause, the Covington Drawbridge Company is to be regarded as a Corporation which had built and maintained a drawbridge upon the Wabash River, at Covington, Indiana, as their name would indicate they should, and that all the corporators or members of that Company were and are citizens of Indiana.

If the court should renounce the jurisdiction of the Circuit Court in this case, then every decision of this court upon the question of jurisdiction anterior to the case of Letson v. Louisville R. R. Co. 2 How. 497, will be completely overthrown and not a vestige remain.

It certainly never was intended to declare that the court had no jurisdiction where all the corporators were citizens of the State in which they were sued and carried on their corporate business.

In the case of The Bank of Augusta v. Earle, 13 Pet. 519, it is said that a corporation can have no legal existence out of the bounds of the sovereignty by which it was created. It must dwell in the place of its creation.

This Corporation, the Covington Drawbridge Company, dwelt at the bridge upon the Wabash River, at Covington, which they built and maintained, and upon which the plaintiff's boat was ruined. The Corporation dwelling at that bridge in the State of Indiana, must necessarily have been created by the Legislature of the State of Indiana.

Mr. Justice Grier, in delivering the opinion of the court in the case of Marshall v. The B. & O. R. R. Co. 16 How. 328, 329, reiterates the law for which we contend, "that in deciding the question of jurisdiction, the court will look behind the corporate collective name given to the party, to find the persons who are the stockholders—the real parties to the controversy," and the question being whether an allegation that the "defendants are a body corporate by the Act of the General Assembly of Maryland," was sufficient to make it appear that the "real defendants," the stockholders, were citizens of that State, held that it was.

Mr. Chief Justice Taney delivered the opinion of the court:

The writ of error in this case was brought upon a judgment recovered by Shepherd and others, against the Covington Drawbridge
232*] *Company, in the Circuit Court of the United States for the District of Indiana.

The only error assigned here is, that upon the declaration and pleadings in the case, the Circuit Court had no jurisdiction.

This objection is founded upon the description of the parties in the declaration, which is in the following words:

"Alexander O. Shepherd, Elijah F. Gillan, James Davidson, Samuel McClure, Samuel Peters and George Willard, citizens of the State of Ohio, plaintiffs in this suit, complain of the Covington Drawbridge Company, citizens of the State of Indiana, defendants in this suit, in a plea of trespass on the case."

The plaintiff in error, who was defendant in the court below, contends that it does not appear by this averment that the Drawbridge Company was a Corporation chartered by Indiana, and had its principal place of business in that State; and that, unless this appears in the pleadings, the averment that they were citizens of that State was not sufficient to give jurisdiction to the Circuit Court.

It is very true, that where individuals voluntarily associate together, and adopt a name or description intended to embrace all of its members, and under which its contracts and engagements are made, and its business carried on, such a company can neither sue or be sued by the name they have adopted, and under which they act, in any court of common law, whether it be the court of a State or of the United States. They must sue and be sued in their individual names as partners in the Company.

But the answer to the objection taken by the plaintiff in error is, that the 27th sec. of the 4th article of the Constitution of Indiana provides that "every statute shall be a public law, unless otherwise declared in the Statute itself." The Statute of the Legislature of Indiana, incorporating the Covington Drawbridge Company, is therefore a public law, of which the Circuit Court and this court are bound to take judicial notice, without its being pleaded or offered in evidence. For wherever a law of a State is held to be a public one, to be judicially taken notice of by the state courts, it must be regarded in like manner by a court of the United States, when it is required to administer the laws of the State.

This being the case in this instance, the averment that the Covington Drawbridge Company are citizens of the State of Indiana is sufficient, according to the decision of this court in the case of The Louisville, Cincinnati, and Charleston Railroad Company v. Letson, 2 How. 497, which has ever since been adhered to, and must now be regarded as the settled law of the court.

*The question as to the jurisdiction of [*233 the courts of the United States in cases where a corporation is a party, was argued and considered in this court, for the first time, in the cases of The Hope Insurance Company v. Boardman, and of The Bank of the United States v. Deveaux, 5 Cranch, 57 and 61. These two cases were argued at the same term, and were, as appears by the report, decided at the same time. And in the last mentioned case, the court held that in a suit by or against a corporation, in its corporate name, this court might look beyond the mere legal being which the charter created, and regard it as a suit by or against the individual persons who composed the corporation: and an averment that they were citizens of a particular State (if such was the fact) would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators not named in the suit or the averment.

But in the case of The Louisville, Cincinnati, and Charleston Railroad Company v. Letson, 2 How. 497, the court overruled so much of this opinion as authorized a corporation to plead in abatement, that one or more of the corporators, plaintiffs or defendants, were citizens of a different State from the one described, and held that the members of the corporate body must be presumed to be citizens of the State in which the Corporation was domiciled, and that both parties were estopped from denying it. And

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that, inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also regarded as citizens of the State from which this legal being derived its existence and its faculties and powers. And in the case of The Bank of Augusta v. Earle, 13 Pet. 519, the court said that a corporation can have no legal existence outside of the dominion of the State by which it is created. Consequently, the Covington Drawbridge Company being chartered by the State of Indiana, it necessarily has its home and place of business in that State; and the only averment in the declaration necessary to show a case for jurisdiction, was that of the citizenship of the parties who composed the Company.

In the case of The La Fayette Insurance Company v. French, 18 How. 404, the declaration stated that the Corporation itself was a citizen of Indiana. Now, no one, we presume, ever supposed that the artificial being created by an Act of Incorporation could be a 234*] *citizen of a State in the sense in which that word is used in the Constitution of the United States, and the averment was rejected because the matter averred was simply impossible. But it appeared from other parts of the pleadings that the Corporation was chartered by Indiana, and had its principal place of business in that State. And the court, therefore, applied the principle decided in the case of The Louisville, Cincinnati and Charleston Railroad Company v. Letson, and held that the members of the corporate body must be presumed to be citizens of the same State. The citizenship of the corporators was regarded as the necessary and legal consequence of the facts stated in the pleadings, without any positive and direct averment to that effect. The case of Marshall v. The Baltimore and Ohio Railroad Company, 16 How. 314, was decided upon the same ground. But in the case before us, the citizenship of the corporators is not left to be inferred by the court from other facts stated in the pleadings, but is directly and positively averred, and consequently freed from all objection on that head. Indeed, it is the same form of pleading in this respect that was used in the case of The Bank of The United States v. Deveaux, 5 Cranch, 61, and which this court ruled to be good.

If the Act of Incorporation had not been a public law, which the court is bound to notice, then, undoubtedly, the proper description of the defendants would have been "The Covington Drawbridge Company, citizens of the State of Indiana, incorporated by that name, by the said State, and having their principal place of business therein." But in the case before us, the averment of the citizenship of the members of the Corporation is all that is required, because the existence and domicil of the corporate body is judicially known to the court.

The judgment of the court below is, therefore, affirmed.

Mr. Justice Campbell concurs in the result of the opinion of the court.

Mr. Justice Daniel, dissenting:

In dissenting from the decision of the court in this cause, it is not designed to reiterate objections which in several previous instances have been expressed. I will merely remark, with reference to the present decision, and to others in this court, numerous as they are said to have been, that they have wholly failed to bring conviction to my mind, that a Corporation can be a citizen, or that the term "citizen" can be correctly understood in any other sense than that in which it was understood in common acceptation when the Constitution was adopted, and as it is universally, by writers on government explained without a single exception.

GEORGE W. WATTERSTON, Plff. in Er.,

v.

ANDREW M. PAYNE.

Where cause is appealed solely for delay, judgment affirmed with ten per cent. per annum damages, and the costs—motion to open default too late after adjournment of court, where no appearance previous.

Where there is no bill of exceptions, assignment of error, or anything by which to revise the opinion of the court below, and the cause has been brought to this court solely for the purpose of delay, the judgment will be affirmed with ten per cent. per annum damages, and the costs in this court and in the court below.

Where a cause is reached in the regular order of the docket, and submitted on brief by defendant in error, no counsel appearing for plaintiff, on Feb. 1, and decided Feb. 24, the court continuing until Feb. 26, when it adjourned to first Monday of April, and up to the adjournment no appearance had been entered for, or motion made by plaintiff in error, a motion to open the judgment and permit argument or printed brief, by plaintiff in error, comes too late.

Submitted Feb. 1, 1858. Decided Feb. 24, 1858.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

Mr. J. P. Benjamin, for defendant in error:

The plaintiff in error was condemned in the Circuit Court to the payment of two bills of exchange drawn by himself to his own order, and indorsed by him in blank, the bills having been protested for non-payment and due notice given to him.

To sustain the first plea, defendant appealed to the conscience of plaintiff, by filing interrogatories calling on him to answer whether he was the real owner of the bills sued on. The plaintiff, by his answers, established his title, and the first plea was properly overruled.

As regards the second plea, it was properly overruled, because plaintiff sued, not as the assignee of Payne and Harrison, but as bearer of bills which the defendant had made payable to his own order and indorsed in blank.

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This was equivalent to making the bills payable to any bearer.

Smith v. Clapp, 15 Pet. 125.

Upon the merits there is no bill of exceptions, assignment of error, or anything which can enable this court to revise the opinion of the court below.

It is palpable that the writ of error has been prosecuted solely with a view to delay, and the defendant in error respectfully prays that damages be awarded in his favor, in conformity with the 17th rule of this court.

Mr. Chief Justice Taney made the following order:

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it appearing to this court that this cause has been brought to this court solely for the purpose of delay, it is thereupon now here ordered and adjudged by this court, that the judgment of the said Circuit Court (which on the 8th day of December, 1855, the date on which it was signed, amounted to $3,967.82, including the principal and interest to said date) be, and the same is hereby affirmed, with costs, in both this and said Circuit Court, and damages at the rate of ten per cent. per annum on said $3,967.82, from said 8th day December, 1855, to this 24th day of February, 1858, and without any further damages or interest upon either the judgment of the said Circuit Court or this court. And it is further ordered and adjudged by this court, that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to issue an execution in favor of the said Andrew M. Payne and against the said George W. Watterston, for the sum of $4,845.16 (being the amount of the aforesaid judgment of the said Circuit Court, together with the damages thereon, at the rate of ten per centum per annum, as aforesaid, and for $——, the costs laid out and expended by the said Andrew M. Payne in this case in this court, and also for the costs in the case in the said Circuit Court.

On motion of Mr. Bradley, of counsel for the plaintiff in error, for leave to enter his appearance and file and submit his brief for the consideration of the court,

Monday, April 12, 1858, Mr. Chief Justice Taney made the following order:

The case was brought up to this court and entered by the plaintiff in error on the docket at December Term, 1856. The defendant in error appeared at that term, but no appearance was entered for the plaintiff. At the late session of the court at the present term, the case was reached in the regular order of the docket, and called for trial on the first day of February.

The defendant in error appeared and submitted the case on a printed brief, no counsel appearing on behalf of plaintiff. The judgment of the court was not delivered until Wednesday, Feb. 24, and the court continued in session until Friday, the 26th, when it adjourned to the first Monday in this month; and up to the time of the adjournment, no appearance had been entered for the plaintiff in error, nor any motion made to the court in his behalf.

Under such circumstances, a motion at the present session to open the judgment and permit a printed brief or argument in behalf of the plaintiff in error, comes too late, according to the rules and practice of this court, and is therefore overruled.

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*THE UNITED STATES, Plff. in Er., [*253
v.
GOTLIEB BREITLING.

(See S. C. 20 How. 252-255.)

Alabama Statutes cannot prescribe rules to this court—exception must be taken at trial, but may be put in form afterwards—exception to decision must appear—charge erroneous, where no evidence to support.

The Statute of Alabama, and the regulation it prescribes to the courts of the State, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court.

An exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the judge afterwards.

The fact that a party made the point at the trial, and the court decided it against him, is not sufficient to bring the question before this court. He must show that he excepted to the decision.

It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered.

Submitted Jan. 21, 1858. Decided Feb. 25, 1858.

IN ERROR to the Circuit Court of the United States for the Southern District of Alabama.

This case was brought in the court below by the United States on the official bond of the defendant in error, for the non-payment of $8,704.79.

The trial below resulted in a verdict and judgment for the defendant; and the plaintiffs sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. Jeremiah S. Black, Atty-Gen., for plaintiffs in error:

1. Moore was an interested witness, and his testimony should not have been admitted.

Rush v. Flickwire, 17 S. & R. 82; Seymour v. Harvey, 11 Conn. 275; Riddle v. Moss, 7 Cranch, 206; Gov. of Va. v. Evans, 7 Cranch, 208, note.

2. This evidence was inadmissible, because of its irrelevancy.

U. S. v. Gibert, 2 Sumn. 19, 92; Riley v. Gourley, 9 Conn. 154; see, also, Smith v. Carrington, 4 Cranch, 62; Church v. Hubbart, 2 Cranch, 187.

3. The charge of the Judge, that the defend-

NOTE.—Rules of practice, their effect, construction and conclusiveness.

Courts cannot enlarge or diminish their own jurisdiction by a rule of practice, but they have power over their own process and mode of procedure. The St. Lawrence, 1 Black. 522; compare Ward v. Chamberlain, 2 Black. 430.

A rule of practice established by virtue of an Act of Congress has the force of a statute. Scott v. The Young America, Newb. 107.

Rules of practice yield to laws of Congress where there is any conflict between them. Magruder v. U. S. Dev. 21.

Courts of equity have the power to modify their

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ant was not bound by his signature unless he subsequently acknowledged it in presence of witnesses and ratified it, was erroneous.

There was no evidence given upon the trial, of the circumstances under which the defendant executed the bond. In Chirac v. Reinecker, 2 Pet. 613, 625, this court expressly held, that without such evidence upon a point, the court should not give an instruction upon it, and that no mere speculative question shall be decided.

Mr. P. Walker, for the defendant in error.

Mr. Chief Justice Taney delivered the opinion of the court:

This action was brought by the United States against the defendant in error, as one of the sureties in the official bond of David E. Moore, who was Receiver of the Public Moneys at Demopolis, in the State of Alabama. Under the instructions given by the court to the jury, the verdict and judgment were in favor of the defendant.

A bill of exceptions to these instructions, signed and sealed by the judge who tried the case, is set forth in the transcript. But the defendant contends that the exception was not taken by the United States according to law and the rules and pratice of the Circuit Court, and that it cannot, therefore, be regarded as a part of the record of the proceedings in that court, nor considered here in revising its judgment.

A brief extract from the exceptions, together with the note attached to it by the judge, will show how this question arises.

After setting forth the bond and testimony of several witnesses, examined on the part of the defendant, the exception proceeds in the following words:

"The defendant then offered to read in evi-
253*] dence the depositions *above referred to, when the plaintiff's counsel objected to the reading of the depositions of McDowell, W. H. Roberts and George G. Lyon, as they were severally offered, which objection the court overruled. The plaintiff's counsel objected to the evidence of D. C. Anderson, who was examined as a witness by defendant, whose evidence went to show that Smith, one of the obligors to the bond, was poor and in straitened circumstances, which objection was overruled. This, together with the depositions above referred to, was all the evidence offered by defendant, and the same having been submitted to the jury, and argued by counsel, the court, at the request of the defendant's attorneys, charged the jury, 'that if the jury believe, from the evidence, that at the time Breitling's name was signed to the bond, it was understood and intended that other persons were to sign it as obligors, and he was to have notice that they did so, and who they were, and then, if satisfied, was to acknowledge the bond in the presence of witnesses, who were to attest it; and if this was not done, and the bond was not afterwards ratified by him, the jury ought to find for the defendant;' to which charge the plaintiff's counsel excepted.

And the Judge, therefore, signs and seals their bill of exceptions, this 15th day of May, 1856, a day after the adjournment of the court.

John Gayle, [seal.]"

Explanations attached to the Bill of Exceptions.

"During the term of the court, the Attorney for the United States presented a bill of exceptions. The bill was presented on Saturday before the court adjourned, which was on Wednesday. On Monday morning, the bill was handed to the United States Attorney, with the request that he submit it to the opposing counsel. On the third day after this, the minutes were signed, and the court adjourned.

I heard nothing further from the bill till the 9th or 10th May, when it was presented by the plaintiff's attorney again, with the written objections of the attorneys of the defendant, that it should be signed after the adjournment. The Clerk will subjoin this explanation to the bill of exceptions.

John Gayle."

[Filed 15th May, 1856.]

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rules to meet the purposes of justice. Lawrence v. Bowman, 1 McAll. 419.

For good reason and on proper terms, rules made by the Circuit Court, may be dispensed with or varied, such as allowing longer time to file plea to the jurisdiction which is not merely dilatory and captious. Wallace v. Clark, 3 Wood & M. 359.

Court may suspend its own rules or except a case from them for the purposes of justice, Russell v. McLellan, 3 Wood & M. 157, or in a proper case disregard them. Clark v. Brooks, 26 How. Pr. 285.

Rules deliberately adopted by the whole number or a majority of the judges authorized to make them, ought to be very generally observed and enforced. And the courts are unwilling to sanction a disregard of them. Battershall v. Davis, 23 How. Pr. 383; Matter of Livingston, 34 N. Y. 555, 582; 1 Abb. N. S. 1, 28.

How far appellate court will interfere with a disregard of a general rule. See matter of Livingston, supra; Coleman v. Nantz, 63 Penn. St. 178.

All courts have full power to construe their own rules and they are the only proper judges of their construction, and hence an appeal will not lie from an order or direction of a court which gives a construction to its own rules. Life Ins. Co. v. Francisco, 17 Wall. 673; Coleman v. Nantz, 63 Penn. St. 178.

Nor will appellate court review decision of inferior court as to its own rules. Martine v. Lowenstein, 68 N. Y. 456.

Rules prevail over previous decisions as to practice. Havemeyer v. Ingersoll, 12 Abb. N. S. 301.

Rules cannot alter statutes, and if inconsistent with them are of no effect. Glenney v. Stedwell, 64 N. Y. 120. They, however, serve to show the construction put upon statutes. Myers v. Feeter, 4 How. Pr. 210; 2 Code R. 147.

In N. Y. rules must be consistent with the Code. Rice v. Ehele, 55 N. Y. 518, 524; Rev'g, 65 Barb. 185; 46 How. Pr. 153; Lakey v. Cogswell, 3 Code R. 116.

If existing rules do not apply, former practice and that of the English courts govern. Miller v. Stettiner, 22 How. Pr. 518; 7 Bosw. 695; Dubois v. Phillips, 5 Johns. 235; Chesterman v. Eyland, 1 Reptr. 210.

Every court of record has an inherent right to make rules for the transaction of its own business, which they may from time to time change, alter, rescind or repeal. While they are in force they must be applied to all cases that fall within them; they can use no discretion, unless such discretion is given by the rules themselves. Rules of court cannot contravene the Constitution or the law of the land. 3 Pick. 512; 5 Pick. 187; 2 Harr. & J. 79; 1 Pet. 604; 3 Binn. 227, 417; 3 Serg. & R. 253; 8 Serg. & R. 336; 2 Mo. 98.

Rules prescribed by the Supreme Court under authority of Congress have the force and effect of positive statutes upon the Circuit Courts of the U. S., except where they remit matters to the discretion of that court. Being general in their application they establish a uniform system of equity practice throughout U. S. in these courts. Ex parte Poultney, 13 Pet. 472; Ex parte Whitney, 13 Pet. 404.

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The objection stated in the note is founded upon a rule of the Circuit Court, which in general terms adopts the practice of the State Courts; and the practice of the State Courts, in relation to exceptions, is regulated by a law of 254*] the State, which *provides that no bill of exceptions can be signed after the adjournment of the court during which the exception is taken, unless by consent of counsel in writing, when it may be signed within ten days thereafter, except in such cases as is otherwise provided.

But the answer to this objection is, tnat the Statute of Alabama, and the regulation it prescribes to the courts of the State, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court. And it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it. The attention of this court has, upon several occasions, been called to this subject, and the rule established by its decisions will be found to be this: the exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the Judge afterwards. This point was directly decided in the case of Phelps v. Mayer, 15 How. 160; and again, in Turner v. Yates, 16 How. 28. And the time within which it may be drawn out and presented to the court, must depend on its rules and practice, and on its own judicial discretion. In the case before us, the Judge who tried the case has deemed it his duty to seal and certify the exception to this court; and under the circumstances stated in the exception and the note, we think he was right in doing so, and that this exception is legally before this court as a part of the record of the proceedings of the court below.

In proceeding to examine the points raised upon it and argued in this court, it is not necessary to state at large the testimony given by the witnesses for the defendant, nor the grounds upon which the United States objects to the admissibility of the evidence; for it does not appear that the plaintiff excepted to any one of the decisions of the court overruling his objections. The exception states that he made the objections which have been argued here, and that the court overruled them. But the fact that he made the point at the trial, and the court decided it against him, is not sufficient to bring the question before this court. He must show that he excepted to the opinion. And as there is no evidence that he did so while the jury were at the bar, the objections to the testimony of the witnesses are not before us.

It is otherwise, however, in relation to the charge of the court to the jury. This, it appears, was excepted to, and consequently is regularly and legally before this court, and we think the judge erred in giving it.

It is clearly error in a court to charge a jury 255*] upon a supposed *or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficent to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony.

In the case before us, we do not see any evidence in the record which tends, in the least degree, to prove any one of the facts hypothetically assumed in the opinion. If such testimony was given, it certainly does not appear in the transcript.

And upon this ground, without examining further into the opinion of the court below, the judgment must be reversed.

ELIPHAS SPENCER, Plff. in Er.,
v.
JOHN W. LAPSLEY.

(See S. C. 20 How. 264–280.)

District Judge, when interested, may order cause removed—plea in abatement not permitted five years after plea in bar—refusal of court below to allow amendment, or new plea, not ground of error—power of Governor of Coahuila and Texas to sell lands—third party cannot allege fraud in grant, in ejectment.

A district judge can make an order in a suit in which he is interested, for the removal of the cause to competent jurisdiction.

A plea in abatement, pleaded five years after pleas in bar had been filed, is contrary to the rule and practice of the courts, and was properly disallowed.

The refusal of an inferior court to allow a plea to be amended or a new plea to be filed cannot be questioned for error in this court.

The power of the Governor of Coahuila and Texas, to sell lands to Mexicans, not exceeding eleven leagues in quantity, is unquestionable.

The defects in an entry and survey cannot be taken advantage of at law.

A third party cannot raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the grant.

Argued Feb. 1, 1858. Decided Feb. 25, 1858.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action of trespass brought in the District Court of the United States for the District of Texas, held at Galveston, by the defendant in error, to try title to a certain tract of land containing eleven leagues.

Subsequently the cause was transferred to the District Court of Texas, held at Austin. On Dec. 9, 1854, an order was entered for its transfer to the Circuit Court of the United States for the Eastern District of Louisiana, the Judge stating "that he has an interest in the land in controversy in this suit."

The trial having resulted in a verdict and judgment in behalf of the plaintiff, the defendant brought the case to this court on a writ of error.

A further statement appears in the opinion of the court.

Mr. J. P. Benjamin, for plaintiff in error:

1. The court below erred in its decision strik-

NOTE.—Right of judge, disqualified by prior connection with the case, to make formal orders—see note, 25 L.R.A. 116.

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ing out a part of the amended answer, and refusing permission to file the plea in abatement, coupled with the affidavit of defendant. If the plaintiff's title is purely fictitious and colorable, for the purpose of giving an apparent jurisdiction to the Federal Court, the suit should have been dismissed.

Maxfield's Lessee v. Levy, 4 Dall. 331; McDonald v. Smalley, 1 Pet. 624; Smith v. Kernochen, 7 How. 215; Jones v. League, 18 How. 81.

2. The document A was improperly admitted in evidence.

On its face it is a copy. The signatures to the original, and the genuineness of the original or of the copy, are not proven by any witness. The witness Hewetson only swears that the copy is in the handwriting of Gonzales, and that the signatures of Gonzales and the two witnesses or assistants are genuine.

3. The grant as offered in evidence, even if free from all the objections hereintofore set forth, so far as its validity is concerned, is at most only an inchoate, equitable title, not sufficient to maintain an action at law.

The grant was on conditions which the Republic of Texas, on acquiring independence, had the right to exact or release, and the government had a right to acknowledge or repudiate the binding efficacy of the grant.

League v. De Young, 11 How. 200.

Now, it pleased Texas to recognize such grants only to the extent of one league and one labor, and on condition of payment into her treasury of the price due, within six months, and it was only when this was done that their title was "to be completed."

Hart. Dig. 570, 588.

And Texas specially required proof of those who had purchased under colonization laws of Coahuila and Texas, of actual residence in Texas during the time the law was in force, without which proof the claimant could not be permitted to purchase the land.

Hart. Dig. 584.

So that the grant sued on, being insufficient in law to vest title in fee and being merely inchoate and equitable, even if taken in the most favorable sense for plaintiff, the judgment below cannot be affirmed in this court.

5. The title of plaintiff in this case is liable to all the objections fully set forth in the case of the U. S. v. Cambuston, 20 How. 59, just decided in this honorable court.

Messrs. W. G. Hale and Robert Hughes, for defendant in error.

Mr. Justice Campbell delivered the opinion of the court:

The defendant in error, Lapsley, commenced this suit in January, 1851, in the District Court of the United States for Texas, against the plaintiff in error, Spencer, to recover a parcel of land, and damages for the ouster he had suffered. At the April Term of the court, 1851, the defendant appeared and demurred to the petition, assigning—1st. The description of the premises is insufficient. 2d. The citizenship of the parties is not specifically averred. 3d. There is no indorsement on the petition, as the Statutes of Texas require.

With this demurrer, an answer containing pleas of not guilty, the Statute of Limitations, and that the plaintiff claims under a grant with conditions, and that the grant is fraudulent, and the conditions were not performed, was filed. Subsequent to the Act of Congress of 3d March, 1851, 9 Stat. at L. ch. 32, sec. 6, p. 618, this cause was transferred to the District Court of Texas, held at Austin. No order of the court appears for this transfer, and it is presumed it was done by consent. The defendants appeared to the cause at Austin, by attorney. At the November Term of that court, in 1854, the following order was made by the District Court:

"This day came the plaintiff aforesaid, by his attorney, and on motion of said plaintiff, by his attorney, the judge now presiding states and enters upon the record that he has an interest with the plaintiff in the land in controversy in this suit, which, in his opinion, renders it improper for him to sit in the trial of the same; and thereupon, the court upon further motion orders, because there is no Circuit Court of the United States *in this State, that [*266 an authenticated copy of this order, and of all the record and proceedings in this action, be forthwith certified to the Circuit Court of the United States for the Eastern District of the State of Louisiana, at New Orleans, that court being the most convenient of the United States Circuit Courts in adjoining States.

The authority to make this order is supposed to be derived from the Act of Congress of the 3d March, 1821, 3 Stat. at L. ch. 51, p. 643, which provides: "That in all suits and actions in any District Court of the United States, in which it shall appear that the judge of such court is any ways concerned in interest, or has been of council for either party, or is so related to or connected with either party as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court." He was then required to order an authenticated copy of the record to be certified to the most convenient Circuit Court of an adjacent State, which Circuit Court shall, upon such record being filed with the clerk thereof, "take cognizance thereof, in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly, and the jurisdiction of such Circuit Court shall extend to all such cases, so removed, as were cognizable in the District Court from which the same was removed."

The record was filed in the Circuit Court in Louisiana, in April, 1855, and the cause was continued until the April Term of 1856, before it came to trial. In April, 1856, the defendant moved to dismiss the cause: 1st. Because the record shows that the judge of the District Court for Texas, before the suit was brought, had an interest in the land in dispute. 2d. Said interest disqualified said judge from making an order in the cause. 3d. That his orders were void. 4th. That the Circuit Court at New Orleans had no jurisdiction.

It is quite unimportant to consider whether a judge can make any, and if any, what orders, in a suit in which he is interested. This was much discussed in The Grand Junction Canal

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Company v. Dimes, 12 Beav. 62; 3 H. L. Ca. 759. The Act of Congress proceeds upon an acknowledgment of the maxim, "that a man should not be a judge in his own cause," and requires a judge found in that predicament, on the motion of either party, to make an order for the removal of the cause to another competent jurisdiction. No other order in this cause was made by the District Judge, and he was not authorized to act under the Statute, except on motion, and when the motion was made the order was entered. The entry on the 267*] *record by the judge imports verity, and his order authorized the Circuit Court at New Orleans to take cognizance of the cause.

The defendant obtained leave of the Circuit Court to amend his answer the third term after the transfer. In the amendment, after adding to his pleas in bar of the action, he pleaded that the apparent legal title was vested in the plaintiff by collusion between him and three other persons, who were citizens of Texas (one of whom was the judge of the District Court), to litigate and establish a fraudulent grant in that court, and that these persons were the only persons interested in the said grant. In so far as this statement contained any defense to the action, it was comprehended in pleas already on file. As a plea in abatement of the suit, it was open to the objections that it was pleaded, without an affidavit, five years after pleas in bar had been filed, and which were undisposed of, and that it was filed in connection with other matter in bar. Such pleading was contrary to the rule and practice of the courts, and was properly disallowed.

Sheppard v. Graves, 14 How. 505; Bailey v. Dozier, 6 How. 23; Drake v. Brander, 8 Tex. 351; Dallon v. Bowman, 16 Mo. 225.

The defendant then applied for leave to file a formal plea in abatement, containing the same allegations as those before stated; and with this plea the defendant propounded thirty-one interrogatories to the plaintiff, to obtain evidence for its support; and also filed an affidavit, to the effect that he had not discovered the facts pleaded at the time his plea of the general issue had been filed in 1851. But the defendant made no offer to withdraw his pleas in bar; nor did the affidavit show when or in what manner his discovery was made; nor why the application to file the plea and obtain the evidence had not been made at an earlier date; nor why it was delayed till a time when any allowance of it might operate a continuance, when the case had already been pending for a year in the Circuit Court. The Circuit Court denied the application. This court has decided that such applications are addressed to the judicial discretion of the inferior court, and its decision is not open for revision here. It has decided that the refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial or a continuance, or to reinstate a cause which has been legally dismissed, cannot be questioned for error in this court.

Marine Ins. Co. of Alexandria v. Hodgson, 6 Cranch, 206; Sims v. Hundley, 6 How. 1.

A fortnight after these dilatory motions had been disposed of, the cause was submitted to 268*] the Circuit Court on its merits. *The *title* of the plaintiff consists of a petition of Thomas De La Vega and two other persons, addressed to the Government of Coahuila and Texas, the 14th June, 1830, each to purchase eleven leagues of vacant lands, under the 24th section of the Colonization Law of Mexico. The Governor responded to the petition, that "he concedes in sale to each one of the petitioners the eleven leagues they solicit;" to be selected after the commissioner of the Supreme General Government shall have reserved a sufficiency of lands to meet the debt of the State. He orders the constitutional alcalde of the municipality to which the lands selected may belong, to give the possession of the leagues, to settle the class of the lands so as to adjust the price, and to dispatch the corresponding title in form. No further proceedings took place until May, 1832, upon this contract. At that date, one of the parties, for himself and the others, represented to the Governor the facts contained in his former memorial, and the executive order; that no impediment existed to the fulfillment of the contract, and that it might happen the parties would select lands within an empresario contract, and therefore prayed that either the alcalde before whom they might present themselves, or in case that he could not do so, that the commissioner of surveys might perform the act requisite to the delivery of possession and the perfection of the title.

The Governor thereupon nominated the commissioner for the distribution of lands in the empresa to which the lands selected might belong, to perform the acts necessary; but if they did not belong to an empresa, that the first alcalde of the respective municipality, or that most convenient, might act, so that, according to law and the instructions, possession might be given.

In the following year (3d October, 1833), Samuel M. Williams, professing to be attorney in fact for La Vega, presented authenticated copies of the petitions and orders before mentioned to the Alcalde of the Municipality of San Felipe de Austin, and solicited the location of his contract of purchase upon lands at a designated point on the Brazos River, within the Colony of Austin and Williams, if they would consent, and referred to the order of the 2d May, 1832, as conferring an authority for that purpose. The alcalde granted the prayer of the petitioner, and directed that the consent of the empresarios should be obtained, and that the surveyor of the Colony should survey the lands at the place designated, and should classify them so that the price might be settled. The empresario, Williams, consented for himself and as attorney for his partner, and the Surveyor returned the order of survey with a figurative *plan and notes of survey of [*269 the eleven leagues. On the 4th October, 1833, the Constitutional Alcalde dispatched the title in form, which contains a recital of the petitions, orders, consents and survey, the authority conferred, the price settled, and the investiture of the possession and property. The plaintiff, on the trial, connected himself with this grant by conveyances which had been recorded, and as to which no question arose, except in reference to a power of attorney from La Vega to Williams, under which a deed had been executed in 1840 to Menard and Williams, in trust for Sophia St. John.

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The defendant produced no documentary evidence of title, and relied on a possession of some two or three years.

No exception was taken in the Circuit Court to the introduction of the various public Acts which constitute the evidence of a title in La Vega; nor was there exception to the charge of the court which pronounced the evidence adduced of its authenticity, competent. It may be proper to state that the title, in the Mexican language, was authenticated from the Land Office of Texas, and that the translation in the amended record in this court was used in the Circuit court for convenience only. But the sufficiency of those papers to vest a title in the grantee, and their supposed want of conformity to the laws of Coahuila and Texas, were much debated, and the opinion of the court upon them has been properly reserved for the examination of this court.

The power of the Governor of those States to sell lands to Mexicans, not exceeding eleven leagues in quantity, is unquestionable; and the petition and order in 1830, in connection with the petition and order of May, 1832, are evidence of such a contract. The proceedings in 1830 are sufficiently identified by the statements and recitals of the papers dated in 1832, even if we were to hold that the absence of the Governor's signature to the first order is a fatal defect. But that petition and the executive order are certified by the Secretary of State as official documents; they were so treated by the Governor and the constitutional alcalde, and the petitioners, in the subsequent proceedings. The Secretary of State is designated in the Constitution of the confederate States to authenticate "all laws, decrees, orders, regulations, and instructions, circulated among the towns, or directed by the Governor to a particular corporation or person," and that without this requisite they shall not be obeyed or be productive of faith. At the present term of this court, we have decided that a decree not signed by the judge, but which is found in the record, and is certified by the Clerk, and which has been executed by the parties, cannot be collaterally impeached for the want of the 270*] signature. Secombe v. *Steele, 20 How. 94; and the courts in Texas have decided that titles in form, executed without the requisite number of witnesses, are still valid though there is a special requirement on the subject of the number of witnesses in the law. 14 Tex. 189. We do not feel authorized to deny faith to the Act certified by the Secretary of State as an official paper, nor can we assume that the order certified did not receive the executive sanction.

The Circuit Court instructed the jury, "that the court was required to take notice of the organization of the States of Coahuila and Texas, and of the officers who were competent to perform the duties imposed in the decree of the Governor, upon the petition of La Vega.

The court charged, that there was no such organization of the colonies of Robertson, or of Austin and Williams, as to render it indispensable for the grantee to apply to a commissioner for distribution to perfect the grant of the Governor; that those colonies were not empresas in the sense in which that term was used in that decree; and that having reference to the location of the land and the situation of the parties, as is shown by the evidence; the alcalde of Austin was a proper officer for taking the measures requisite for the perfection of the grant." The land described in the title was situated within the limits of both the colonies before mentioned. The colonization contract of Robertson was granted in 1825; its execution was suspended in 1830; and it expired, by limitation, in 1831, and was not again renewed until 1834. The selection of the lands was made after it had expired, and before it was renewed. The history of this empresa has been judicially ascertained by the Supreme Court of Texas; and they have also decided that lands in a colony thus situated might be sold without reference to the empresario in such a contract. Houston v. Robertson, 2 Tex. 1; Jenkins v. Chambers, 9 Tex. 167.

The empresario contract of Austin and Williams was concluded in 1831, and included land embraced in the Robertson Colony. This land was excluded from their contract in 1834, when Robertson's contract was renewed, and was restored in 1835. Houston v. Perry, 5 Tex. 462. No commissioner was appointed for this colony until September, 1835. The contract of an empresario obliged him to introduce colonists into a specific district. The colonist having a family was entitled to one league of land, of a particular quality, for which he paid a small sum to the government. The empresario was paid five leagues and five labors for every one hundred families introduced. Of course, the excess of land within the limits of the colony, after *supplying the colonists and the [*271 empresario, remained to the government. The Commissioner of Distribution was an officer of the government, who superintended the fulfillment of the contract by the empresario. He ascertained the character of the colonists; allotted to them and the empresario their shares of land, and for that purpose appointed surveyors; received returns of survey, and executed the final titles. Usually this officer was not appointed until colonists were introduced, and a community was to be formed. The sale of the land within the limits of the colony might disturb the interest of the empresario or of the colonists, and hence reference of the contracts of sale to the Commissioner for execution. If there were no colonists, and the empresario opposed no objection, there was no reason why sales should not be made, nor was there any occasion for the services of a commissioner.

Sales of land could only be made to Mexicans, and no inquiries as to their character were required. We understand the decisions of the Supreme Court of Texas to be, that the alcalde was a competent and proper person to complete the titles on a contract of sale, where no organization of the colony had taken place. The case of Clay v. Holbert, 14 Tex. 189, resembles that before the court. The contract of sale is dated in 1831. The Commissioner or alcalde was ordered to put the purchaser in possession and to issue the corresponding titles. The lands were selected in the colony of Austin and Williams, in September, 1833. Williams consented for himself and partner. The survey was returned by Johnson, the Surveyor. The alcalde (Lesassier), who officiated in this case, completed the title. The Supreme Court of Texas determined the grant to be valid. Wat-

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rous v. McGrew, 16 Tex. 512; Ryan v. Jackson, 11 Tex. 391; Hancock v. McKinney, 7 Tex. 384; Jenkins v. Chambers, 9 Tex. 167.

The Circuit Court further instructed the jury, "that the grant could not be defeated by proof that the principal Surveyor did not in person perform the work of making the surveys, or because the survey was made before the order directed to the Surveyor by the alcalde was entered on the grant," and, upon the whole case, that there was no such evidence of fraud in the making of the grant which would serve to defeat it in this action.

The charge of the court in reference to the survey, followed adjudications of the Supreme Court of Texas and of this court in analogous cases. It was a common practice in Texas for empresarios and others to have their surveys completed in anticipation of the arrival of colonists, or the measures requisite for the procurement of the final title. The return of such 272*] surveys *by a surveyor, and their recognition by the Commissioner or alcalde was treated as a substantial compliance with the law. A surveyor might adopt the surveys of other persons. Jones v. Menard, 1 Tex. 789; Howard v. Perry, 7 Tex. 259; Horton v. Pace, 9 Tex. 81; Jenkins v. Chambers, 9 Tex. 167; Doswell v. De La Lanzo, 20 How. 29.

In Hoofnagle v. Anderson, 7 Wheat. 212, this court say: "It is not doubted that a patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation." In Boardman v. Reed, 6 Pet. 328, the defendants offered to prove that the lines were not run by a qualified surveyor; that the plats and certificates were made out by protraction, and had been surreptitiously returned to the Register's office, and patents obtained.

The court said, "that at law no facts behind the patent can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud; but the defects in an entry and survey cannot be taken advantage of at law. The patent appropriates the land, and gives the legal title to the patentee." White v. Burnley, 20 How. 235.

So, if we were to consider the discrepancy of one day between the date of the preliminary order and the date of the certificate of the Secretary, and the absence of the Governor's signature, and the fact that one empresario consents for himself, and as attorney for his partner, without adducing that power; and that the officers do not affix to their names the name of their respective offices; and that the survey must have been made before the order, and probably by a deputy or other person, as marks of irregularity or of malpractice, our opinion could not be affected. In Stevenson v. Newnham, 16 L. & Eq. Baron Parke, in delivering the opinion of the Court of Exchequer Chamber, says: "The effect of ordinary fraud is not absolutely to avoid the contract or transaction which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance, the property passes in the subject matter," and "rests till avoided." And this court, after a full review of the subject, in Field v. Seabury, 19 How. 324, states the question and the answer applicable to this case. The question was: "When a grant or patent for land, or a legislative confirmation of title to land, has been given by the sovereignty or legislative authority having the exclusive power to make it, without any provision having been made in the patent or by the law to inquire into its fairness, as between the grantor *and [*273 grantee, or between third parties, can a third party raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the grant?" The reply of the court is, we are not aware that such a proceeding is permitted in a court of law.

But we do not assert that the circumstances enumerated constitute evidence of fraud. We have seen that the preliminary title is referred to, and recited in all stages through which it passed, and by every officer whom the law appointed to superintend its perfection, and that the survey was in accordance with the current and recognized practice of the country.

The title emanated from the State of Coahuila and Texas, a quarter of a century ago, when Texas was a wilderness. Colonists from abroad were invited, and a league of land, was offered to the colonist having a family, for $30. Mexicans were allowed to purchase eleven leagues of ordinary grazing land for $100 the league; or of arable land for $150. These eleven leagues were sold for less than $1,200. Since that time, two revolutions in the condition of the State have been accomplished, and a vast improvement in the political condition of the country effected. The defendant entered upon the land in dispute after the second revolution was terminated, and after the burden and heat of the contest were over. He entered without a color of title. Neither the State of Coahuila and Texas, nor the Republic of Texas, nor the State of Texas, has taken measures to cancel this grant, nor have they conferred on the defendant any commission to vindicate them from wrong. He is a volunteer.

The doctrines of this court do not favor such a litigant.

The remaining questions presented by the bill of exceptions relate to the power of attorney from La Vega to Williams, under which a conveyance to Menard and Williams, in trust for Mrs. St. John, of Connecticut, was made in 1840.

The paper produced was the testimonio of an authentic Act passed before the regidor of the illustrious Ayuntamiento of the City of Leona Vicario, and second alcalde in turn in it and its jurisdiction, who, by reason of the sickness of the first alcalde, etc., and bears date in 1832. The donee of this power located the land for La Vega, and solicited the final title in 1833, and conveyed the land in 1840. Its authenticity has never been questioned by La Vega, so far as is shown by the record.

The regidor is an officer known to the Spanish law, and to the legislation of Coahuila and Texas, 1 Tapia Freb. p. 197; sec. 10; Decrees, 124, sec. 6; 262, sec. 11; Laws C. & T.; *Edwards v. James, 7 Tex. 383, and was [*274 authorized to discharge the duties recited in

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the Act. Evidence was adduced to the handwriting of the regidor and the assisting witnesses; besides, proof was made that two of them were dead, and the other beyond the limits of the United States. Considered as the act of a foreign officer, without the support of this proof, the Supreme Court of Texas, in Paschal v. Perez, 7 Tex. 348, say: "Its admissibility and effect is by no means a settled question at common law, and on the principles of international jurisprudence. Whether the rules of evidence of the forum are to be exclusively observed, or whether those of a foreign country are to have weight, was considered by Mr. Justice Story as an embarrassing question, and which was not settled. Story's Conf. Laws, 634. But the court in that case, and the case of DeLeon v. White, 9 Tex. 599, decided that a testimonio is sufficiently established by evidence of the handwriting of the officer, and the assisting witnesses. 8 Tex. 210. The conveyance to the trustees, for the benefit of Mrs. St. John, an alien, was not invalid, nor can the conveyance be impeached by this party, or in this mode of proceeding.

The averment in the petition of the citizenship of the parties corresponds to the form commonly used in the District Court of Texas, and which has never been questioned in the various causes which have heretofore been before this court from that district.

We think that the allegation is sufficiently specific.

Judgment affirmed.

Mr. Justice Daniel, dissenting:

I find myself constrained to differ with my brethren as to the views they have taken of this case—views more accurate, perhaps, than my own; yet differing so materially from my apprehension of the law of the case as to impose, according to that apprehension, the duty of endeavoring to explain what by me is deemed its true aspect.

The difficulties and irregularities incident to the removal or to the modification of pre-existing institutions, by the introduction and superior control of systems really or seemingly incompatible with the former, must necessarily involve the hazard of error, and impress therefore the propriety of great caution with respect to innovations to be adopted.

Wherever the obligation exists to harmonize portions of the previous system with the creation and the exigencies of a new regime, the safest, indeed the only safe guide, must be found in the adherence to enlightened and generally admitted principles, as a guaranty for the rights and duties deducible both 275*] *from the past and from supervening institutions. In following such a guide, I am conducted to conclusions differing from those which have been reached by the majority of this court in this case.

Conceding in its utmost extent a power in the Colonial Governor or political head of Texas to make grants of land; conceding, too, for argument's sake, an entire exemption in the plaintiff below from all obligation to produce the original of a grant made by the competent officer; admitting, also, the sufficiency of a copy from the record, still I hold that a copy, in order to become evidence, must purport upon its face to be a full and perfect copy, and must be verified by some competent person. The grant, or the paper claimed to be a grant in this case, is defective upon its face. In the first place, it is without date, and consequently can be identified or coincident as to time with no document in this cause; it is not signed by any person whomsoever, in the name or character of Governor, nor by a deputy, nor by a person professing to be clothed with authority to sign such an instrument. In its structure it commences by speaking in the first person, as if by the maker of the grant, but breaks off before reaching the conclusion, and is incorporated or converted into a certificate, dated June 13th, 1839, by Santiago del Vallee, signing himself a "Secretary," stating that so far as he has given this document, it is a true copy. This certificate, then, is a confession, in terms, that the entire act of the Governor is not given, but that the document is incomplete.

The rule of evidence is, with regard to copies, that they must be complete, and must be properly authenticated. Records are never allowed to be adduced in evidence, unless they are perfect records. It is never permitted to garble them, nor to read parts of them or extracts from them, as evidence. Yet here we have a paper introduced as a record, as the act of the Governor, when the proof relied on to sustain it conclusively shows that the record, if it be one, is incomplete; that it in fact is falsified by itself; and the act of the Governor, if it be his act, is not permitted to speak for itself; but an attempt is made to establish that act by a wholly distinct and independent declaration by a person styling himself a "Secretary."

Every foundation of the plaintiff's claim, so far as it is made to rest upon this alleged grant, or in the verity of the copy, must fail.

This defect in the evidence appears to have been perceived and its force felt; and hence, perhaps, the effort at the removal or remedy thereof, by the introduction of a petition bearing date on the 2d of May, 1832, signed by Jose Maria Aguirre, on *behalf of him- [*276 self and the other parties to the former petition, in which it is recited that the Government had conceded to himself and his associates on sale on certain conditions, on the 14th of June, 1830, the leagues of land now asked for in this renewed petition (no quantity or number being set forth), and then further states, that the conditions on which the concession here spoken of having been removed or fulfilled, it prays that the proper officers may be appointed to survey the lands, and to put the petitioners in possession. Following this petition, is an order or decree of the same date with the petition, and signed Letona, not styling himself Governor, nor assuming any official designation; but the order is certified by Santiago del Vallee as being a copy from the archives in his charge, and stating that he had been commanded to take this copy from the archives by the disposition of the most excellent Governor.

Upon a recurrence to this petition of the 2d of May, 1832, signed Jose Maria de Aguirre, and to the decree or order of the same date, it will be perceived that neither of these papers

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contains any description or quantity of land. The petition has reference to an alleged grant as made on the 14th of June, 1830 (nowhere shown), the order or decree refers to some act or proceeding of the Political Chief of the Department of Bexar (nowhere exhibited on this record), of the 2d of June, 1830, which, of course, cannot be identified with the alleged concession of a different date, viz.: of the 14th of June; and the prayer of this petition of Aguirre and the order of Letona can by no correct induction be received as curing the defects in the first alleged grant, or as supplying the absence of date and of signature by any official of any denomination or of any grade of power whatsoever.

But it has been supposed that these material defects have been remedied by the act of Lesassier, purporting to put the parties, or rather La Vega, one of them, into possession. To this suggestion it may be replied in possession of what? It surely cannot be pretended that Lesassier had any rightful authority to create or to originate or to authenticate a grant. He could not determine the rights of claimant, nor decide upon the extent of concessions made by the government. He had no judicial or discretionary powers touching these matters; he was merely a ministerial and subordinate agent, to execute the orders of his superiors; and accordingly it is seen that in his account of his proceeding, he has constant reference to the orders and decrees, recognizing these as the only authority for his acting at all. His acts could have no effect whatever, either to confirm or to invalidate those orders or decrees, and of 277*] course *could not supply any defect or insufficiency in their provisions, or in the authentication of them.

This paper, purporting to be the act of Lesassier, is in itself defective as to the proof of its verity; for it is not introduced as a copy from a record, nor established upon proof of the signature thereto; nor upon the testimony of the assisting witnesses at its execution; nor is the absence of those witnesses accounted for.

In the next place, with respect to the deduction of title from La Vega, to whom it is said a grant was made by the government, by the decrees just examined. The first step in the deraignment of this title is the paper styled the power of attorney from La Vega to Williams, dated May 5th, 1832. The authenticity of this paper rests upon no foundation of legitimate evidence. It cannot be considered as possessing the dignity and verity of a record, nor of a copy from a record. It is not shown that the laws of Texas required it to be recorded; and without such a requisition it could not be made in legal acceptation a record, by the mere will or act of a private person. This paper does not appear to have been placed on record, and if in truth it had been recorded in a proper legal sense; still there is no copy said to have been taken from a record, or certified by any legal custodian of the record or of the original document. This paper is signed by Juan Gonzales, who certifies that it was copied, not from the public archives, but from the original with which he says that it agrees. This certificate is an assertion that the document certified was not copied from a record—that it is not the original, and that the certificate was not and did not purport to be proof of the execution of the original. Where, then, is found proof of this instrument, with respect either to its dignity as a record, as a copy from a record, or as to the truth of its execution by the parties thereto? It has been seen, then, that this document is neither a record nor a copy of a record. The language of the instrument and that of the certificate of Gonzales alike contradict any such conclusion; the certificate declares it to be a copy of a private paper, and nothing more. The next inquiry pertinent to this alleged power, is as to any authority in Gonzales to certify copies of records, and still more to certify copies of private papers in the possession of parties—papers, the execution of which he did not see—and by such certificate to conclude or prevent all inquiry into the fact of their execution, or of the bona fides with which they may have been prepared. Here there is no pretense to proof of execution of the alleged power. The "instrumentary witnesses," as they are termed, the witnesses present at the execution of the instrument (and in this instance there appear to *have been three), were not called, nor [*278 was any reason assigned for their absence; they seem not to have been even thought of; and with respect to those who are called the assistant witnesses—the witnesses to the certificate of Gonzales—although it is sworn to by Hewetson that one of these witnesses was dead, and the other, J. M. Morel, resided in Mexico, no effort by commission or otherwise was made to procure his testimony, nor was there proof of the impracticability of procuring it. The irregularities connected with this alleged power of attorney seem to me too glaring, and too obviously liable to gross abuse, and tend too strongly to injury to the rights of property, to be tolerated in courts governed by correct and safe rules of evidence.

The objections urged by the defendant below to the legality of the documents above commented upon, and to their relevancy to the issue between the parties, appear to have been substantially and sufficiently reserved in the fourth and fifth bills of exception by the defendant, and satisfy me that those documents should have been ruled out of the cause.

It seems to me that there was error in the instruction of the court to the jury, that there was no fraud in the transactions by which the alleged title to the land in controversy had been obtained or transmitted to the plaintiff.

In this action, the plaintiff could succeed or should have succeeded in virtue of a legal, valid, perfect title, and none other adverse possession, with claim of right, was title until a clear, fair, honest, legal, paramount title in the plaintiff was shown. If, therefore, the documents upon which the claim of the plaintiff was based should have been found to carry with them, either upon their face or in the manner of their procurement, any of the badges of fraud, this would have been a sufficient objection to their validity. A blemish or a defect, or an infirmity, in that necessarily fair and legal title, by which the possession of the defendant, presumed legal as against all but the true and rightful claimant, could be displaced, would be fatal. What were the circumstances attending the fabrication or procuring

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of the documents relied on by the plaintiff, or the manner in which they were transmitted to him, were, it seems to me, subjects exclusively appropriate to the consideration of the jury. The inquiry in this case was not one arising solely upon the construction of written instruments; it embraced also the conduct of agents alleged to have been the makers of those instruments; the discharge of these duties in the exercise of powers ascribed to them; and the honesty and good faith of those professing to have dealt with them, and to have derived and to have transmitted rights founded upon 279*] *those transactions. These considerations, in connection with the incongruities as to dates, and the apparent deviations from regular official proceedings, and in the conduct of those through whom the title is traced by the plaintiff, from what is usual, appear to be inseparable, from the inquiry of fraud in fact and in intent, and should have been submitted to the jury, from whom they were withdrawn by the instruction of the court.

It is unquestionably true that in courts whose proceedings are regulated by the rules of pleading at the common law, matter in abatement is not allowed to be pleaded after pleading in bar, unless, indeed, the matter tendered in abatement shall have arisen, or shall have come to the knowledge of the pleader, puis darrein continuance; and when such matter is allowed in defense, all that has been previously relied on in bar is considered as relinquished. Such, however, has been represented as not having been the rule adopted in Texas. There it has been said that a defendant may plead both in bar and in abatement. In this case, the matter tendered was accompanied by an affidavit of its discovery since the issue in bar; but no evidence appears upon the record of an offer to withdraw the latter; nor am I aware of the necessity of a formal proffer to that effect. The matter tendered in abatement should, if material, be admitted; and where so admitted, the matter previously relied on in bar is by legal consequence, and without any necessity for an express order upon the defendant, thereby waived. It is true that the decision of the Circuit Court rejecting this plea is not matter for reversal here, but the consent or acquiescence of the party in sheltering himself under an artificial rule, in a controversy in which was impugned the good faith of that party, is matter for regret, at least, and cannot be altogether indifferent in an inquiry seeking an examination into the fairness of the transactions involved. The removal of this cause from one portion of the district of Texas to another, in neither of which the District Judge, upon the facts conceded as known to him, was competent to take cognizance of it, we are told may be presumed to have taken place by consent. Upon what fact such a consent can be inferred, this record does not disclose; and it is difficult to conceive any reason existing with the defendant below for such consent. There are presumptions, however, connected with this removal within the district, from which there can be no escape.

First. It must be presumed that the District Judge was cognizant ab initio of his acknowledged interest in the subject in controversy.

Second. It must be presumed that he was also cognizant of his absolute disqualification, by reason of that interest, from *mak- [*280 ing any decision or holding any plea in the cause; and that the removal of it from one point to another within the district was an useless as it was an irregular and illegal act.

Third. It must be presumed, that knowing himself to be thus disqualified, he could have no legitimate power to retain the cause under his own control for several years; that such a retention might be oppressive as it was illegal; and that his only power was that which the law imposed upon him as a duty, the power of an immediate removal of the cause, upon its institution, to a tribunal exempt from disqualifications which he knew existed with reference to himself. It may truly be thought to have been a mistaken and unfortunate course in those to whom the interests of the District Judge where confided, that they did not seek, nay, challenge and insist upon investigation, rather than exclude it under the stress of a formula in pleading, the application of which was of doubtful propriety, if not irregular in this case. By a different proceeding, they might have met directly charges openly alleged, and might have removed implications, to which the suppression of inquiry may have imparted a semblance of truth.

Upon the considerations hereinabove stated, and with a view to the more thorough investigation as to the law and the facts of this cause than the record before us has disclosed, it is my opinion that the judgment of the Circuit Court should be reversed, and this cause remanded to that court, for a new trial to be had therein.

THOS. JACKSON, Wm. Higdon and Archibald Olds, Owners of the Steamboat Wetumpka, Libts. and Appts.,

v.

THE STEAMBOAT MAGNOLIA, her Tackle, etc., Wm. F. James, Master, etc.

(See S. C. 20 How. 296-343.)

District courts have jurisdiction above the tide, in navigable waters.

District Courts have jurisdiction of cases of collision on the great public navigable rivers within the body of a county, or above the tide.

The Judiciary Act of 1789 does not confine admiralty jurisdiction to tide waters.

The Act of 1845 was a declaratory Act.

Argued Feb. 25, 1857. Held under advisement Feb. 27, 1857. Further printed argument submitted Dec. 16, 1857. Decided Apr. 13, 1858.

THE libel in this case was filed in the District Court of the United States for the Middle District of Alabama, by the appellants, to recover damages resulting from a collision which occurred on the Alabama River, within the State of Alabama.

The District Court dismissed the libel for want of admiralty jurisdiction. The libelants thereupon took an appeal to this court. The sole question now presented for the consideration of this court is, whether the court below had jurisdiction.

A further statement of the case appears in the opinion of the court.

NOTE.—To what places the jurisdiction of admiralty is confined—see note. 16 L. ed. U. S. 111.

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Mr. Francis Lee Smith, for the appellants:

By sec. 2 of art. 3 of the Constitution of the United States, it is declared that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction."

In construing this clause of the Constitution, Judge Story, in the case of De Lovio v. Boit, 2 Gall. 472, says: "The language of the Constitution will, therefore, warrant the most liberal interpretation; and it may not be unfit to hold that it had reference to that maritime jurisdiction which commercial convenience, public policy and national rights have contributed to establish, with slight local differences, over all Europe; that jurisdiction which, under the name of Consular Courts first established itself upon the shores of the Mediterranean, and from general equity and simplicity of its proceedings, soon commended itself to all the maritime States; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable consolato del mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind.

The contemporaneous construction of this clause of the Constitution by Congress would undoubtedly embrace within this jurisdiction all the navigable waters within the United States.

Thus, by the first Act passed by Congress in relation to the Judiciary, Sept. 24, 1789, it is declared that the admiralty and maritime jurisdiction extended to "all waters navigable from the sea, of ten or more tons burthen."

See, also, Act in relation to Seamen in the merchant service, passed July 20, 1790, sec. 6.

The Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same, passed Feb. 18, 1793, and the subsequent Act of March 2, 1819, supplementary to the Acts concerning the coasting trade, and the Act of May 2, 1822, for the collection of duties on exports and tonnage in Florida, expressly include "all the navigable rivers of the United States."

So far, then, as legislative construction is concerned, it would seem from the above references, that Congress did not intend that the admiralty jurisdiction of the U. S. should be confined to the sea and to tide water, but that the ebb and flow of the tide should be considered as the proper test.

How, then, does the question of jurisdiction stand under the decisions of this court?

In the case of The Thomas Jefferson, 10 Wheat. 428, it was held that admiralty jurisdiction extended to the sea and to waters within the ebb and flow of tide, and this doctrine was subsequently recognized in other cases.

Congress, on Feb. 26, 1845, passed "An Act extending the jurisdiction of the District Courts in certain cases upon the lakes and navigable waters connecting the same."

Under this Act arose the case of The Genesee Chief v. Fitzhugh, 12 How. 443. It was there insisted that the law of 1845 was not authorized by the Constitution of the U. S., and was therefore void. But the court held otherwise, and sustained the law as constitutional.

The opinion of the court was delivered by Chief Justice Taney, and is distinguished by the ability and clearness with which the extent of admiralty and maritime jurisdiction under the Constitution and laws of the United States is examined. The doctrine, as laid down in the hitherto leading case of The Thomas Jefferson, that the admiralty jurisdiction in the U. S. was limited to tide water, is carefully and elaborately reviewed and expressly overruled, and the principle established that our admiralty jurisdiction was not confined to tide water, but extended to all the public navigable waters in the United States.

The old doctrine about the ebb and flow of tide was by that decision exploded, and the law established on a basis far more compatible with the true condition of the country and its rapidly increasing commerce and navigation. The case of Fretz v. Bull, 12 How. 466, sanctions and affirms the law as laid down in the case of The Genesee Chief.

See, also, Walsh v. Rogers, 13 How. 283.

The collision between The Wetumpka and The Magnolia, occurred in the Alabama River (which is navigable from the sea), below the City of Montgomery, which is a port of entry. The Wetumpka was engaged in navigation and commerce between the port of New Orleans, in Louisiana, and the port of Montgomery, in Alabama. If, then, admiralty jurisdiction in the U. S. is not confined to tide water, and there is no law aside from the Act of 1845, requiring that in a case of collision the vessel seized should be engaged in navigation and commerce between different States or Territories, it does not appear that there can be any valid objection to the exercise of admiralty jurisdiction in this case.

Messrs. E. S. Dargan and P. Phillips, for appellees.

Mr. Justice Grier delivered the opinion of the court:

The only question presented for our consideration on this appeal is, whether the court below had jurisdiction.

The libel purports to be in a cause of collision, civil and maritime. It alleges that the steamboat Wetumpka, a vessel of three hundred tons burthen, was on a voyage from New Orleans to the City of Montgomery, in Alabama; that while ascending the Alabama River, she was run into and sunk by the steamboat Magnolia, which was descending the same.

The answer of the respondents, among other things, alleges "that the collision took place far above tide water, on the *Alabama [*298 River, in the County of Wilcox, in the State of Alabama, and therefore not within the jurisdiction of the District Court sitting in admiralty.

This plea was sustained by the court, and the libel dismissed. The record does not disclose the reasons on which this judgment was based. It is presumed, therefore, to be founded on the facts stated in the plea, viz.:

I. That the collision was within the body of a county.

II. That it was above tide water.

1. The Alabama River flows through the State of Alabama. It is a great public river, navigable from the sea for many miles above the ebb and flow of the tide. Vessels licensed

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for the coasting trade, and those engaged in foreign commerce, pass on its waters to ports of entry within the State. It is not, like the Mississippi, a boundary between coterminous States. Neither is it like the Penobscot (see Veazie v. Moor, 14 How. 568), made subservient to the internal trade of the State by artificial means and dams constructed at its mouth, rendering it inaccessible to sea-going vessels. It differs from the Hudson, which rises in and passes through the State of New York, in the fact that it is navigable for ships and vessels of the largest class far above where its waters are affected by the tide.

Before the adoption of the present Constitution, each State, in the exercise of its sovereign power, had its own court of admiralty, having jurisdiction over the harbors, creeks, inlets and public navigable waters, connected with the sea. This jurisdiction was exercised not only over rivers, creeks and inlets, which were boundaries to or passed through other States, but also where they were wholly within the State. Such a distinction was unknown, nor (as it appears from the decision of this court in the case of Waring v. Clarke, 5 How. 441) had these courts been driven from the exercise of jurisdiction over torts committed on navigable water within the body of a county, by the jealousy of the common law courts.

When, therefore, the exercise, of admiralty and maritime jurisdiction over its public rivers, ports and havens, was surrendered by each State to the Government of the United States, without an exception as to subjects or places, this court cannot interpolate one into the Constitution, or introduce an arbitrary distinction which has no foundation in reason or precedent.

The objection to jurisdiction stated in the plea, "that the collision was within the County of Wilcox, in the State of Alabama," can, therefore, have no greater force or effect from the fact alleged in the argument, that the Alabama River, so far as it is navigable, is wholly with-299*] in the boundary of the State. *It amounts only to a renewal of the old contest between courts of common law and courts of admiralty, as to their jurisdiction within the body of a county. This question has been finally adjudicated in this court, and the argument exhausted, in the case of Waring v. Clarke, 5 How. 441. After an experience of ten years, we have not been called on by the bar to review its principles as founded in error, nor have we heard of any complaints by the people of wrongs suffered on account of its supposed infringement of the right of trial by jury. So far, therefore, as the solution of the question now before us is affected by the fact that the tort was committed within the body of a county, it must be considered as finally settled by the decision in that case.

2. The second ground of objection to the jurisdiction of the court is founded on the fact, that though the collision complained of occurred in a great navigable river, it was on a part of that river not affected by the flux and reflux of the tide, but "far above it."

This objection, also, is one which has heretofore been considered and decided by this court, after full argument and much deliberation. In the case of The Genesee Chief, 12 How. 443, we have decided, that though in England the flux and reflux of the tide was a sound and reasonable test of a navigable river, because on that island tide water and navigable water were synonymous terms, yet that "there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason—and, indeed, contrary to it." The case of The Thomas Jefferson, 10 Wheat. 428, and others, which had hastily adopted this arbitrary and (in this country) false test of navigable waters, were necessarily overruled.

Since the decision of these cases, the several District Courts have taken jurisdiction of cases of collision on the great public navigable rivers. Some of these cases have been brought to this court by appeal, and in no instance has any objection been taken, either by the counsel or the court, to the jurisdiction, because the collision was within the body of a county, or above the tide. See Fretz v. Bull, 12 How. 466; Walsh v. Rogers, 13 How. 283; The New World v. King, 16 How. 469; Ure v. Coffman, 19 How. 56; New York and Virginia S. B. Co. v. Calderwood, 19 How. 245.

*In our opinion, therefore, neither of [*300 the facts alleged in the answer, nor both of them taken together, will constitute a sufficient exception to the jurisdiction of the District Court.

It is due, however, to the learned counsel who has presented the argument for respondent in this case, to say, that he has not attempted to impugn the decision of this court in the case of Waring v. Clarke, 5 How. 441, nor to question the sufficiency of the reasons given in the case of The Genesee Chief for overruling the case of The Thomas Jefferson; but he contends that the case of The Genesee Chief decided that the Act of Congress of 1845, "extending the jurisdiction of the District Court to certain cases upon the lakes," etc., was not only constitutional, but also that it conferred a new jurisdiction, which the court did not possess before; and consequently, as that Act was confined to the lakes, and "to vessels of twenty or more tons burthen, licensed and employed in the business of commerce and navigation between ports and places in different States and Territories," it cannot authorize the District Courts in assuming jurisdiction over waters and subjects not included in the Act, and more especially where the navigable portion of the river is wholly within the boundary of a single State. It is contended also that the case of Fretz v. Bull, and those which follow it, sustaining the jurisdiction of the Court of Admiralty over torts on the Mississippi River, cannot be reconciled with the points decided in the former case, as just stated, unless on the hypothesis that the Act of 1845 be construed to include the Mississippi and other great rivers of the West; which it manifestly does not.

But it never has been asserted by this court, either in the case of Fretz v. Bull, or in any other case, that the admiralty jurisdiction exercised over the great navigable rivers of the West was claimed under the Act of 1845, or by virtue of anything therein contained.

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The Constitution, in defining the powers of the courts of the United States, extends them to "all cases of admiralty and maritime jurisdiction." It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only. Consequently, as Congress had never before 1845 conferred admiralty jurisdiction over the Northern fresh-water lakes not "navigable from the sea," the District Courts could not assume it by virtue of this clause in the Consti-
301*] tution. *An Act of Congress was, therefore, necessary to confer this jurisdiction on those waters, and was completely within the constitutional powers of Congress; unless, by some unbending law of nature, fresh-water lakes and rivers are necessarily within the category of those that are not "navigable," and which, consequently, could not be subjected to "admiralty jurisdiction," any more than canals or railroads.

When these States were Colonies, and for a long time after the adoption of the Constitution of the United States, the shores of the great lakes of the North, above and beyond the ocean tides, were as yet almost uninhabited, except by savages. The necessities of commerce and the progress of steam navigation had not as yet called for the exercise of admiralty jurisdiction, except on the ocean border of the Atlantic States.

The Judiciary Act of 1789, in defining the several powers of the courts established by it, gives to the District Courts of the United States "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures, etc., when they are made on waters which are navigable from the sea by vessels of ten or more tons burthen, etc., as well as upon the high seas."

So long as the commerce of the country was centered chiefly on the Eastern Atlantic ports, where the fresh-water rivers were seldom navigable above tide water, no inconvenience arose from the adoption of the English insular test of "navigable waters." Hence it was followed by the courts without objection or inquiry.

But this Act does not confine admiralty jurisdiction to tide waters; and if the flux and reflux of the tide be abandoned, as an arbitrary and false test of a "navigable river," it required no further legislation of Congress to extend it to the Mississippi, Alabama, and other great rivers, "navigable from the sea." If the waters over which this jurisdiction is claimed be within this category, the Act makes no distinction between them. It is not confined to rivers or waters which bound coterminous States, such as the Mississippi and Ohio, or to rivers passing through more than one State; nor does the Act distinguish between them and rivers which rise in and pass through one State only, and are consequently "infra corpus comitatus." The admiralty jurisdiction surrendered by the States to the Union had no such bounds as exercised by themselves, and is clogged with no such conditions in its surrender. The interpolation of such conditions by the courts would exclude many of the ports, harbors, creeks, and inlets most frequently by ships and commerce, but which are wholly included within the boundaries of a State or the body of a county.

*It seems to have been assumed, in [*302 the argument of this case, that because the District Courts had not exercised their admiralty jurisdiction above tide water before the decision of the court of the case of The Genesee Chief, that such jurisdiction had been exercised by them as conferred by the Act of 1845. It is upon this mistaken hypothesis that any difficulty is found in reconciling that case with the case of Fretz v. Bull, which immediately followed it.

The Act of 1845 was the occasion and created the necessity for this court to review their former decisions.

It might be considered in fact as a declaratory Act reversing the decision in the case of The Thomas Jefferson. We could no longer evade the question by a judicial notice of an occult tide without ebb or flow, as in the case of Peyroux v. Howard, 7 Pet. 343. The court were placed in the position, that they must either declare the Act of Congress void, and shock the common sense of the people by declaring the lakes not to be "navigable waters," or overrule previous decisions which had established an arbitrary distinction, which, when applied to our continent, had no foundation in reason.

In conclusion, we repeat what we then said, that "courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and a speedy decision of controversies where delay would be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which this Union was formed, to confine these rights to the States bordering on the Atlantic, and to the tide water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams of the Western States. Certainly, such was not the intent of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the Constitution; that is, perfect equality in the rights and privileges of the citizens of the different States, not only in the laws of the General Government, but in the mode of administering them."

The decree of the court below, dismissing the libel for want of jurisdiction, is therefore reversed; and it is ordered that the record be remitted, with directions to further proceed in the case as to law and justice may appertain.

Mr. Justice McLean read a separate opinion concurring in the decree of the court.

Dissenting, Messrs. Justices Daniel, Campbell and Catron.

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303*] *Mr. Justice McLean:

I agree to the decision in this case; but as I wish to be on one or two points somewhat more explicit than the opinion of the court, I will concisely state my views.

The Constitution declares that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction." The Judiciary Act of 1789 provides, "that the District Courts shall have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction."

The Act of the 25th February, 1845, is entitled "An Act to extend the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting with the same." This Act was considered by Congress as extending the jurisdiction of the District Court; and it was so, very properly, treated by the court in the case of The Genesee Chief.

In the opinion, it was said this Act was not passed under the commercial power, but under the admiralty and maritime jurisdiction given in the Constitution. No terms could be more complete than those used in the Constitution to confer this jurisdiction. In all cases of admiralty and maritime jurisdiction, such suits may be brought in the District Court.

This jurisdiction was limited in England to the ebb and flow of the tide, as their rivers were navigable only as far as the tide flowed. And as in this country the rivers falling into the Atlantic were not navigable above tide-water, the same rule was applied. And when the question of jurisdiction was first raised in regard to our western rivers, the same rule was adopted, when there was no reason for its restriction to tide-water, as in the rivers of the Atlantic. And this shows that the most learned and able judges may, from the force of precedent, apply an established rule where the reason or necessity on which it was founded fails.

In England and in the Atlantic States, the ebb and flow of the tide marked the extent of the navigableness of rivers. But the navigability of our western rivers in no instance depends upon the tide.

By the civil law, the maritime system extends over all navigable waters. The admiralty and maritime jurisdiction, like the common law or chancery jurisdiction, embraces a system of procedure known and established for ages. It may be called a system of regulations embodied 304*] and matured by the *most enlightened and commercial nations of the world. Its origin may be traced to the regulations of Wisbuy, of the Hanse Towns, the laws of Oleron, the Ordinances of France, and the usages of other commercial countries, including the English Admiralty.

It is, in fact, a regulation of commerce, as it comprehends the duties and powers of masters of vessels, the maritime liens of seamen, of those who furnish supplies to vessels, make advances, etc., and, in short, the knowledge and conduct required of pilots, seamen, masters, and everything pertaining to the sailing and management of a ship. As the terms import, these regulations apply to the water, and not to the land, and are commensurate with the jurisdiction conferred.

By the Constitution, "Congress have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The provision "among the several States," limits the power of Congress in the regulation of commerce to two or more States; consequently, a State has power to regulate a commerce exclusively within its own limits; but beyond such limits the regulation belongs to Congress. The admiralty and maritime jurisdiction is essentially a commercial power, and it is necessarily limited to the exercise of that power by Congress.

Every voyage of a vessel between two or more States is subject to the admiralty jurisdiction, and not to any State regulation. A denial of this doctrine is a subversion of the commercial power of Congress, and throws us on the Confederation. It also subverts the admiralty and maritime jurisdiction of the Federal Courts, given explicitly in the Constitution and in the Judiciary Act of 1789.

In this case, the steamboat Wetumpka was engaged in a commerce between New Orleans, in Louisiana, and Montgomery, in Alabama. The Magnolia was running between Mobile and Montgomery, in the State of Alabama. The Wetumpka, within the State of Alabama, was as much under the federal jurisdiction as it was in the State of Louisiana. No one will contend that one State may regulate the commerce of another; nor can it be maintained that the power to regulate the commerce of The Wetumpka in this case was in either State. It was a commerce between the two States, which comes within the definition of commerce expressly given to Congress. While thus protected and regulated by the power of Congress. The Wetumpka was run into by the Magnolia, and sunk, in the Alabama River; and it is earnestly contended that the admiralty can give no remedy for this aggravated trespass. Since the decision in the case of The Genesee Chief by seven *judges, only one dissenting, [*305 the admiralty jurisdiction has been constantly applied on all our lakes and rivers of the north; and some of the cases have been reviewed in this court without objection. The navigators of the Alabama River must have been more prudent and skillful than those of the north, or their voyages were less frequent, if the above collision is the first that has occurred on the Alabama River.

It is true, The Magnolia was engaged in a commerce strictly within the State; but this does not exonerate her, as the trespass was on a vessel protected by the admiralty law. Cases have frequently occurred on the Ohio and Mississippi rivers, where steamboats, having run down and sunk flat-boats, were held responsible for the injury in the admiralty. And if a steamer is liable in such cases, a remedy for an injury done to it cannot be withheld in the same court.

In The Genesee Chief case, 12 How. 443, this court held: "The admiralty jurisdiction granted to the District Courts of the United States under the Constitution extends to the navigable rivers and lakes of the United States, without regard to the ebb and flow of the tides of the ocean." It is difficult to perceive how this language could have been mistaken, as alleged by the counsel in argument. All the lakes and all the navigable rivers in the Union are declared to be subject to this jurisdiction with-

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out reference to the tide, and it overrules all previous decisions on that subject.

It was said in that case the Act of 1845 extended the jurisdiction of the admiralty; and this was so, as by the Act of 1789 it was limited to rivers navigable from the sea by vessels of ten tons burden and upwards.

It is alleged that the assumption of this jurisdiction will absorb matters of controversy and the punishment of offenses and misdemeanors now cognizable in the courts of the State, without the trial by jury, and before a foreign tribunal, contrary to the wishes and interests of a State.

The admiralty and maritime jurisdiction has been in operation on all the navigable rivers of our Atlantic coast since the organization of the government, and its exercise has not been found dangerous or inconvenient. Experience is a better rule of judgment, than theory. If this jurisdiction has been found salutary in that part of our country which is most commercial, it cannot be injurious or dangerous in those parts which are less commercial.

The Federal Courts have no cognizance of common law offenses, on the land or on the water. Jurisdiction has been conferred on them, of common law and chancery in specified cases, in every State and Territory of the Union; but 306*] I am not *aware that this has been considered a foreign jurisdiction, or one that has been dangerous to the people of any State. Occasional conflicts of jurisdiction have arisen between this tribunal and the State Courts, to preserve the rights guarantied by the Federal Constitution; but this became necessary in maintenance of the fundamental law of the Union. And if Congress should deem it necessary for the regulation of our internal commerce, amounting to more than ten hundred millions of dollars annually, to enact laws for its protection, they will no doubt be as mindful of the rights of the States as of those who, by their enterprise and wealth, carry on the commerce of the country.

Everyone knows how strenuously the admiralty jurisdiction was resisted in England by the common law lawyers, headed by Coke. The contest lasted for two centuries. The admiralty civilians contended that the Statutes of Richard II. and 2 H. IV. did not curtail the ancient jurisdiction of the admiralty over torts and injuries upon the high seas, and in ports within the ebb and flow of the tide, which was shown by an exposition of the ancient cases, as was opposed by the common law courts; but they continued the contest until they acquired a concurrent jurisdiction over all maritime causes, except prize. The Vice-Admiralty Courts in this country, under the Colonial Government, exercised jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas, and this was the jurisdiction conferred on our courts by the Constitution.

But it was not until a late period that the jurisdiction of the admiralty in England was settled by the Statute of 3 and 4 Victoria, ch. 67, passed in 1840. This is entitled "An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty in England." And it is gratifying to the bar and bench of this country to know, that the above Statute has placed the English Admiralty substantially on the same footing that it is maintained in this country. To this remark it is believed there are but two or three exceptions. Insurance, ransom, and surveys, are believed to constitute the only exceptions. The flow of the tide, as before remarked, is used to designate the navigableness of their rivers. Whether an insurance is within the admiralty, has not been considered by this court. It is singular, that while the English Admiralty, by its extension, has been placed substantially upon the same basis as our own, ours should be denounced as having a dangerous tendency upon our interests and institutions, and a desire expressed to abandon the enlightened rules of the civil law, and follow the misconstrued Statutes of Richard II.

*Antiquity has its charms, as it is [*307 rarely found in the common walks of professional life; but *it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs; and this is especially the case in all systems of jurisprudence which are matured by the progress of human knowledge. Whether it be common, chancery, or admiralty law, we should be more instructed by studying its present adaptations to human concerns, than to trace it back to its beginnings. Everyone is more interested and delighted to look upon the majestic and flowing river, than by following its current upwards until it becomes lost in its mountain rivulets.

Mr. Justice Daniel, dissenting:

Against the opinion of the court in this cause, and the doctrines assumed in its support, I feel constrained solemnly to protest.

If in the results which have heretofore attended repeated efforts on my part to assert what are regarded both as the sacred authority of the Constitution and the venerable dictates of the law were to be sought the incentive to this remonstrance, this act might appear to be without motive; for it cannot be denied that to earnest and successive remonstrances have succeeded still wider departures from restrictions previously recognized, until in the case before us every limit upon power, save those which judicial discretion or the propensity of the court may think proper to impose, is now cast aside. But it is felt that in the discharge of official obligation there may be motives much higher than either the prospect or the attainment of success can supply; and it may be accepted as a moral axiom, that he who, under convictions of duty, cannot steadily oppose his exertions, though feeble and unaided, to the march of power, when believed to be wrongful, however overshadowing it may appear, must be an unsafe depositary of either public or private confidence. My convictions pledge me to an unyielding condemnation of pretensions once denominated, by a distinguished member of this court, "the silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretentions;" and still more inflexibly of the fearful and tremendous assumptions of power now openly proclaimed for tribunals pronounced by the venerable Hale, by Coke, and by Blackstone, and by the authorities avouched for their opinions, to have been merely tolerated by, and always subordinate

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to, the authority of the common law—an usurpation licensed to overturn the most inveterate principles of that law; licensed in its exercise 308*] to invade the jurisdiction *of sovereign communities, and to defy and abrogate the most vital immunities of their social or political organization. I cannot, without a sense of delinquency, omit any occasion of protesting against what to my mind is an abuse of the greatest magnitude, and one which, hopeless as at present the prospect of remedy may appear, it would seem could require nothing but attention to its character and tendencies to insure a corrective. It must of necessity be resisted in practice, as wholly irreconcilable with every guarantee of the rights of person or property, or with the power of internal police in the States.

Having, in cases formerly before this court (New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. p. 395, et seq.; Newton v. Stebbins, 10 How. p. 607; Genesee Chief v. Fitzhugh, 12 How. 465; Ward v. Peck, 18 How. p. 269), traced with some care the origin of the admiralty jurisdiction in England, and the modes and limits to which that jurisdiction was there subjected, no farther reference will here be made to the authorities by which that investigation has been guided, than is necessary to illustrate the origin and extent of the like jurisdiction as appertaining to the tribunals of the United States. Among the novelties which are daily brought to notice, it would not awaken very great surprise to hear it contended, in the support of a favorite theory or position, that the Admiralty Courts of England were not governed by the laws and ordinances of that country, or in effect that England did not govern herself, but has been, and still is, controlled by some foreign or extraneous authority. Something not unlike this strange idea has, on more than one occasion, been intimated; and with respect to her Colonies, strictly subordinate as they are known to have ever been in political and legislative power to the mother country, it has been broadly asserted that these have been released from the restrictions upon the admiralty in the mother country, whilst this emancipation is coupled with the incongruous position that they (and the United States, as once forming a portion of those Colonies) are more or less subject to the admiralty regulations of every petty community in the world. I am constrained to repel such an argument, if argument it can be called, as consonant neither with reason nor historical accuracy. The only known difference between the administration in Admiralty Courts in the mother country and in her American Colonies, was created by express Statute, with reference to the revenue; was limited to the single regulation prescribed by the Statute; and has, by every writer upon the subject, been treated as a special direction, applicable solely to the matter of which it 309*] *treated, and as neither entering into, nor deducible from, any regular and constitutional attribute of the admiralty jurisdiction. It was an exception, an anomaly, and in its nature and operation was unique and solitary. Of the same character, precisely, is the provision of the 11th section of the Judiciary Act of 1789, which invests the District Courts with jurisdiction in cases of seizure under the laws of imposts of the United States. This provision confers, in the first place, in general terms, without limitation, on the District Courts, admiralty and maritime jurisdiction. So far, then, as it was the purpose to constitute these tribunals courts of admiralty, the jurisdiction conferred by the language of the Act just quoted was complete. The District Courts were thereby created courts of admiralty to all intents and purposes; but the section goes on to add to the powers of the District Courts, the cognizance of other subjects not regularly appertaining to the jurisdiction of the admiralty, viz.: of seizures under the laws of imposts; subjects belonging to a class which was in England peculiarly cognizable in the Court of Exchequer and under the authority and process of the common law.

The conclusion, then, from the 11th section of the Judiciary Act, is inevitably this: that the power thereby vested with respect to seizures, is not an admiralty power—was never conferred by the investment of admiralty power in accordance with the Constitution; but is in its character distinct therefrom, and is peculiar and limited in its extent. Such appears to have been the opinion of two distinguished commentators upon the admiralty jurisdiction of the courts of the United States, Chancellor Kent and Mr. Dane; the former of whom, in the 1st vol. of his Commentaries, p. 376, holds this language: "Congress had a right, in their discretion, to make all seizures and forfeitures cognizable in the District Courts; but it may be a question whether they had any right to declare them to be cases of admiralty jurisdiction, if they were not so by the law of the land when the Constitution was made. The Constitution secures to the citizen trial by jury in all criminal prosecutions, and in all civil suits at common law where the value in controversy exceeds twenty dollars. These prosecutions for forfeitures of large and valuable portions of property, under the revenue laws, are highly penal in their consequences; and the government and its officers are always parties, and deeply concerned in the conviction and forfeiture. And if, by Act of Congress or by judicial decisions, the prosecution can be turned over to the admiralty side of the District Court, as being neither a criminal prosecution nor a suit at common law, the trial of the cause is then transferred from a jury of the country to *the breast of a single judge. It is [*310 probable, however, that the Judiciary Act did not intend to do more than to declare the jurisdiction of the District Courts over these cases; and that all the prosecutions for penalties and forfeitures upon seizures under laws of imposts, navigation, and trade, were not to be considered of admiralty jurisdiction when the case admitted of a prosecution at common law; for the Act saves to suitors in all cases the right to a common law remedy, where the common law was competent to give it. We have seen that it is competent to give it; because, under the vigorous system of the English law, such prosecutions in rem are in the exchequer, according to the course of the common law; and it may be doubted whether the case of U. S. v. LaVengeance, 3 Dall. 297, on which all subsequent decisions of the Supreme Court have rested, was sufficiently considered. The

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Vice-Admiralty Courts in this country, when we were Colonies, and also in the West Indies, obtained jurisdiction in revenue causes to an extent totally unknown to the jurisdiction of the English Admiralty, and with powers as enlarged as those claimed at the present day. But this extension, by statute, of the jurisdiction of the American Vice-Admiralty Courts beyond their ancient limits to revenue cases and penalties, was much discussed and complained of at the commencement of the Revolution." Judge Conkling, also, in his Treatise on the Admiralty, Vol. II., p. 391, says: "In England, all revenue seizures are cognizable exclusively in the exchequer; and such of them as are cognizable on the admiralty side of the District Courts of the United States are made so only by force of a legislative Act."

From the above exposition of the jurisdiction of the Vice-Admiralty Courts in the British Colonies, it is manifest that neither by custom nor practice, nor by positive enactment, has there ever been created in those courts any power or jurisdiction appertaining to their character and constitution strictly as courts of admiralty, which they did not derive regularly by their commission from the Lord High Admiral. Brown, in his Civil and Admiralty Law, Vol. II., p. 490, says of these courts, "that all powers of the Vice Admiralty Courts within His Majesty's dominions are derived from the High Admiral, or the Commissioners of Admiralty in England, as inherent and incident to that office. Accordingly, by virtue of their commission, the Lords of the Admiralty are authorized to erect Vice-Admiralty Courts in North America, the West Indies, and the settlements of the East India Company; and in case any person be aggrieved by sentence, or interlocutory decree having the force of a sentence, he may appeal to the High Court of Admiralty." So, too, Blackstone, Vol. III., 311*] p. 68, says: "Appeals from the *Vice-Admiralty Courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the Admiral's jurisdiction."

It may here be pertinently asked, how, with this exposition of the law, can be reconciled the assertion that at the time of the American Revolution, and down to the adoption of the Constitution of the United States, there were vested in the colonial courts of England, and were appropriate to them as courts of admiralty, powers which never were vested in their superior, by whom they were created, and by whom they were to be supervised and controlled. With perfect respect, it would seem to imply an incongruity, if not an absurdity, to ascribe to any tribunal an appellate or revisory power with reference to matters beyond its legitmate jurisdiction, and which confessedly belonged to a different authority. Yet is this assertion of jurisdiction in admiralty in the colonial courts beyond that of their creator and superior, constantly renewed arguendo, whilst, in reply to repeated challenges of authority by which the assumption may be sustained, not one adjudication in point has been adduced. Again, it may be asked whether, in the history of jurisprudence, another instance can be found in which it is alleged that a system, a corpus juris, has grown up and been established, and yet not an ingredient, not a fragment of any such system can be discovered. But there have been decisions which were made in this country—decisions cotemporaneous with the event of the separation from the mother country; but these decisions, respectable for their learning and ability, so far from sustaining the obiter assertion above mentioned, devest it of even plausibility; for they affirm and maintain a complete conformity and subordination of the admiralty jurisdiction in the Colonies, to that which had prevailed in England from the time of the Statutes of Richard, and from the days of Owen, Brownlow, Hobart, Fortescue and Coke. I refer to the case of Clinton v. The Brig Hannah, decided by Judge Hopkinson, of Pennsylvania in 1781 (Bee, 419), and the case of Shrewsbury v. The Sloop Two Friends, decided by Judge Bee, of South Carolina, in 1786 (Bee, 433). And, indeed, the phrase "admiralty jurisdiction," except in the acceptation received by us from the English courts, is without intelligible or definite meaning, for under no other system of jurisprudence is the law of the marine known to be administered under the same organization.

Let us now take a view of the claims advanced for the admiralty power, in its constant attempts at encroachment upon the principles and genius of the common law, and of our republican and peculiar institutions, at least from the decision in the *case of The [*312 Thomas Jefferson, in 10 Wheat. p. 428, to that of The Genesee Chief v. Fitzhugh, in 12 How. 443, inclusive; this last case, to my apprehension, more remarkable and more startling as an assumption of judicial power than any which the judicial history of the country has hitherto disclosed, prior to the case now under consideration.

By the Statute of 13th Richard II., cap. 15th, it is enacted, that "the admirals and their deputies shall meddle with nothing done within the realm, but only with things done upon the sea;" and by the 15th of Richard II., cap. 3d, "that in all contracts, pleas, and quarrels, and other things done within the bodies of counties, by land or water, the Admiral shall have no cognizance, but they shall be tried by the law of the land." The language of these provisions is truly remarkable. By that of the first is denounced the exclusion, utterly of the Admiral's power from the entire realm; by that of the second, is as explicitly denied to him all cognizance of things done in the bodies of the counties, either by land or by water. And the Statute of Henry IV., chap. 11, by way of insuring a sanction of these exclusions, provides, "that he who finds himself aggrieved against the form of the Statute of Richard, shall have his action grounded upon the case against him who so pursues in the admiralty, and recover double damages." Lord Hale, in his History of the Common Law, speaking of the Court of Admiralty, says (p. 51): "This court is not bottomed or founded upon the authority of the civil law, but hath both its powers and jurisdiction by the law and custom of the realm in such maters as are proper for its cognizance." And again, in an enumeration of matters not within the cognizance of the admiralty, he continues: "So also of damages in navigable rivers within the bodies of counties, things done upon

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the shore at low water mark, wreck of the sea, etc., these things belong not to the Admiral's jurisdiction." And the cause, the only cause assigned as the foundation of that jurisdiction, is the peculiar locality of each instance, viz.: its being neither within the body of any county or vicinage, nor infra fauces terræ, so that the venue or pays can be summoned for its trial. No one pretends to doubt that thus stood the admiralty law of the realm of England at the period of separation, from the American Colonies, and perhaps in the particulars above mentioned it may remain the unchanged law of that country to the present moment, as it is a fact recorded in history, that for a departure from that law, one of the most learned and brillant of her admiralty judges (Sir William Scott, afterwards Lord Stowell) was condemned in a very heavy verdict. Such, I say, was the law of the realm of England, and I think that the fallacy or pretense of any change 313*] in *the admiralty law proper of that realm, in its application to the Colonies, has been clearly demonstrated.

The admiralty law of England, according to every accurate test, was the admiralty law of the United States at the period of the adoption of the Constitution. It is pertinent in this place to remark, that the jurisdiction of the admiralty having been, both by the common law and by the language of the Statutes of Richard II. and Henry IV., excluded not only from the body of the counties, both on the land and on the water, and even from the realm, it followed, ex consequenti that the locality of that jurisdiction was (and necessarily so) within the ebb and flow of the tide. Hence, it is more than probable, arose the adoption and use of the phrase as a portion of the description of the locus of that jurisdiction, viz.: that it was maritime, i. e., connected with or was upon the sea, and was neither upon the land nor within the fauces terræ, nor upon any navigable water within a county, and was within the ebb and flow of the tide.

Under such a state of the admiralty law, conceded to be the law of England, and as I contend, the law of the United States, came before this court for decision the case of The Thomas Jefferson, in 10 Wheat. p. 428. In this case, not a single ingredient required by the English cases to give jurisdiction, existed. It could, by no possibility or by any propriety of language, be styled maritime as every fact it presented occurred at the distance of a thousand miles from the ocean, and it could not be found that there ever existed a tide in the water-course on which the occurrences that produced the suit originated. Yet, in the absence of these essential ingredients of admiralty jurisdiction, the court, with that greed for power by which courts are so often impelled beyond the line of strict propriety, makes a query, whether, under the show of regulating commerce, Congress might not assert a distinctive and original authority, viz.: the power of the admiralty. The court, however, felt itself constrained to concede the necessity of a locality within the ebb and flow of the tide, and for the want of that requisite to deny the jurisdiction.

In the case of Peyroux v. Howard, 7 Pet. 324, the necessity for the ebb and flow of the tide to give jurisdiction is equally conceded; but the court, in order to maintain its power, deems itself authorized to appeal virtute officii, not to the attraction of the moon, the received philosophic explanation of this phenomenon, but to the current of the Mississippi, which, in precipitating itself upon the waters of the Gulf, occasions, they say, by conflict with the latter, some changes in the rise and fall of the river at New Orleans. This judicial theory of the *tides possesses at least the character- [*314 istics of novelty. Whether it will be accepted, and find a place in the annals of scientific discovery, may admit of some doubt.

Next follows in order of time the case of The Steamboat New Orleans v. Phœbus et al., 11 Pet. p. 175. In this case, as in that of Peyroux v. Howard, 7 Pet. 324; the vessel libeled was in the same City of New Orleans, one of the termini of her trading voyages and adjudged by the case last mentioned, to be within the ebb and flow of the tide. It was contended by the counsel for the claimants of the steamboat New Orleans, a gentleman now upon this bench, that the situation of the steamboat libeled in each case, as conferring jurisdiction by reason of locality, was identical; and it surpasses any acumen I possess, to perceive any real distinction between the cases. The court, however, speaking through the late Justice Story (whom none could ever suspect of any leaning against the admiralty), insisting with consistent pertinacity on the requisite of the ebb and flow of the tide, said: "The case is not one of a steamboat engaged in maritime trade and navigation. Though in her voyages she may have touched at one terminus of them in tide waters, her employment has been substantially on other waters. The admiralty has not any jurisdiction over vessels employed on such voyages in cases of disputes between part owners. The true test of its jurisdiction in all cases of this sort is, whether the vessel be engaged substantially in maritime navigation, or in interior navigation and trade not on tide-waters. In the latter case, there is no jurisdiction. So that, in this view, the District Court had no jurisdiction over the steamboat involved in the present controversy, as she was wholly engaged in voyages on such interior waters."

In the case of Waring et al. v. Clarke, in the 5th of How. 441, and in that of The New Jersey Steam Navigation Company v. The Merchant's Bank, in the 6th of How. 344, anomalous as these cases appear to me, and wholly unsustained either, as I deem them, by English precedent or by that construction of the Federal Constitution which is warranted, nay, demanded, by the language of the Constitution, by history, or precedent, yet they both concur in establishing the ebb and flow of the tide as the test of jurisdiction in the admiralty. As, for example, in the former of these last mentioned cases, the court announces the conclusion at which it had arrived, and which it proposed to demonstrate by argument and authority, in the following terms, viz.: "It is the first time that the point has been distinctly presented to this court, whether a case of collision in our rivers, where the tide ebbs and flows, is within the admiralty jurisdiction of the courts of the United States if the locality *be, in the sense [*315 in which it is used by the common law judges in England, infra corpus comitatus. It is this

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point that we are now about to decide, and it is our wish that nothing which may be said in the course of our remarks shall be extended to embrace any other case of contested admiralty jurisdiction. Thus, too, in the second of these cases, Nelson, J., as the organ of the majority of the court, p. 392, propounds these propositions: "On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved or came under observation, it will be found that the inquiry has been not into the jurisdiction of the Court of Admiralty in England, but into the nature and subject matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide." And again: "The exclusive jurisdiction in admiralty was conferred on the National Government, as closely connected with the grant of the commercial power. It is a maritime court, instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction in some measure within the grant of the commercial power, which would confine it in cases of contracts to those concerning the navigation and trade of the country, upon the high seas and tide-waters, with foreign countries, and amongst the several States. Contracts growing out of the purely internal commerce of the State, as well as commerce beyond tide-waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the Federal Courts."

These several decisions, founded, as they are believed to have been, in error, and upon a misconstruction of the law, of the Constitution, and the history of the country, in so far as they sought to permit invasions of the territorial, municipal and political rights of the States, are, nevertheless, not entirely without their value. By the limit they prescribed to the admiralty, viz.: the ebb and flow of the tide, they at least rejected the ambitious claim to undefined and undefinable judicial discretion over the Constitution and the law (and the indispensable territorial rights of the States), and so far fortified the foundations of a government, based, in the theory at any rate, upon restricted and exacted defined delegations of power only. It was under the stress of the aforegoing decisions, and, as is well known, upon an application of a portion of this court, that the Act of Congress of February 26, 1845, chap. 22, was passed, with the sole view of extending the admiralty jurisdiction to cases arising upon the 316*] lakes, and upon the rivers connecting *the said lakes, on which there were no tides, and which (i. e., the lakes) were within no state limits. Here, then, we have the exception, the solitary exception, fortifying the general rule as to the admiralty jurisdiction, which jurisdiction is again described and defined in this provision of the Statute above quoted, as existing upon the high seas or upon the tide-waters of the United States only.

This interference by the Legislature Department of the Government, elicited, too, by the Judiciary Department, whether within the competency of the former, under the Constitution, or not, must be received by every reasonable rule of induction as a concession, by both, that there existed a propriety of necessity for the enlargement of the admiralty jurisdiction over the lakes, and the rivers which connected them, in which there were no tides, and that whatever extension was either called for or made must be the result of legislative action, and not of mere judicial discretion. The repeated and explicit decisions of this court already cited, and the Act of Congress of 1845, might, it is supposed, have been regarded as some earnest of uniformity and certainty in defining the admiralty jurisprudence of the United States, at least upon the points adjudged, and as to the provisions of the statute; but, in this age of progress, such anticipations are held to be amongst the wildest fallacies. It is now discovered that the principles asserted by the Admiralty Courts in England, or said to have been propounded by the mysterious, unedited and unproduced proceedings of the Colonial Vice-Admiralty Courts, so often avouched here in argument; the decisions of this court and the provisions of the Act of 1845, are all to be thrown aside, as wholly erroneous. That the admiralty power is not to be restricted by its effect upon the territorial, political or municipal rights and institutions upon which it may be brought to bear, nor by any checks from the authority of the common law. That there is but one rule by which its extent is to be computed, and that is the rule which measures it by miles or leagues; that the scale for its admeasurement can be applied only as the discretion of the judiciary may determine, upon its necessity or policy, irrespective of the Constitution, the Statute, or the character of the element on which it is to be exerted, or the adjudications of this court on this last point. That the admiralty of the fixed and limited realm of England, and as known to the framers of the Constitution, cannot be the admiralty of this day; and, of course, the admiralty of our time and of our present day must be changed according to the judgment or discretion of the courts, in the event or further acquisitions of territory.

Such are the conclusions regularly deducible from the opinion *of this court in [*317 the case of The Genesee Chief—conclusions, in my deliberate judgment, the most startling and dangerous innovations anterior to that decision. ever attempted upon the powers and rights of internal government appertaining to the States. Speaking of the case of Waring v. Clarke, the court say, p. 456 of 12 How.: "The majority of the court thought there was sufficient proof of tide there, and consequently it was not necessary to consider whether the admiralty power extended higher. But that case showed the unreasonableness of giving a construction to the Constitution which would measure the jurisdiction of the admiralty by the tide." It may, I think, be here pertinently inquired, whether the natural and appropriate limit of a jurisdiction admitted by all to be maritime, can be the more reasonably measured by the element on which alone that jurisdiction is authorized to act, for which alone existence has been given it, or by an indefinite arbitrary and mutable mathematical or geographical extension. Again, it is said by the court (p. 457), speaking of the limitation resulting from the character of the river: "If such be the con-

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struction, then a line drawn across the River Mississippi would limit the jurisdiction, although there were ports of entry above it, and water as deep and navigable, and the commerce as rich and exposed to the same hazards and incidents as the commerce below." If the experience of a pretty long official life had not familiarized me with instances, unhappily not a few, in which the meaning and objects of the Constitution and the just influence of the actually surrounding condition of the country when that instrument was framed have been lost sight of or made to yield to some prevailing vogue of the times, I confess that some surprise would have been felt at the seeming forgetfulness of the court in giving utterance to the expressions above quoted, of the facts, that when the Constitution was adopted, there was no such navigation as that on the Mississippi then known—no such river was then possessed by the United States; that the Constitution was formed by, and for, a co-existing political and civil association; was designed to be adapted to that state of things; and was in itself complete, and fully adapted to the ends and subjects to which it was intended to be applied. And but for the reason or the examples above referred to, the greater surprise would have been awakened by the disregard manifested, in the reasoning of the court, to this great fundamental principle of republican government, that if the Constitution was, at the period of its adoption, or has since, by the mutations of time and events, become inadequate to accomplish the objects of its creation, it belongs exclusively to those who formed it, and in whom resides the right to alter or abolish it, 318*] *to remedy its defects. No such power can exist with those who are the creatures of the Constitution, clothed with the humbler office of executing the provisions of that instrument. Suppose, at the time of its adoption, the Constitution was universally believed to be defective, in many respects essentially defective, would such a conviction have rendered it less the Constitution? Would it have lessened in any degree the obligation of obedience to it, or changed the power whence a remedy for its defects was to be derived? Could the judiciary, without usurpation, have essayed such a remedy? It is conceded by the court, that at the time of forming the Constitution the admiralty jurisprudence of England was the only system known and practiced in this country; it is admitted, also, that the English system was limited in theory and practice to the ebb and flow of the tide. It is further admitted, that at the time the Constitution was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. These admissions form a virtual surrender of anything like a foundation on which the decision of the court could be rested, either in the case of The Genesee Chief, 12 How. 443, or in this case depending, on that alone. For, if it be admitted that at the time of the adoption of the Constitution the admiralty rule in England limited the jurisdiction to tide-waters, and that the same rule was adopted and was proper here, it follows, by inevitable induction, that the jurisdiction intended to be created by the Constitution was that which was the only one then known, and which, in the language of this court, was then proper here (as the Constitution cannot be supposed to establish anything unauthorized or improper), and necessarily was complete, and adapted to the existing state of things. And this inquiry, therefore, forces itself upon us, viz.: if the system was thus limited, and was known to be so by the framers of the Constitution, and if this instrument was designed to be applicable to the existing state of things, and was complete in itself, in all its delegations of and restrictions upon power, where is to be sought the right or power to enlarge or to diminish the effect or meaning of the instrument to make it commensurate with a predicament or state of things not merely not existing when the Constitution was framed, but which was not even within the contemplation of those by whom it was created? Such a power could not exist in the Legislature, the only branch of the government on which anything like a faculty to originate measures was conferred; much less could it be claimed by functionaries who have not, and rightfully cannot have, any creative faculties, but whose capacities and duties are restricted to an interpretation of the *Constitution and laws [*319 as they should have been fairly expounded at the times of their enactment.

But the court, after having declared the correctness of the English rule and its adoption here, go on to say, nevertheless, "that a definition which would at this day limit public rivers to tide-water rivers is wholly inadmissible." And why? Because the Constitution, either by express language or by necessary implication, recognizes or looks to any change or enlargement in the principles or the extent of admiralty jurisdiction? Oh, no! For no such reason as this. "But we have now (say the court) thousands of miles of public navigable water, including lakes and rivers, in which there is no tide." Such is the argument of the court, and, correctly interpreted, it amounts to this: The Constitution, which at its adoption suited perfectly well the situation of the country, and which then was unquestionably of supreme authority, we now adjudge to have become unequal to the exigencies of the times; it must, therefore, be substituted by something more efficient; and as the people, and the States, and the Federal Legislature, are tardy or delinquent in making this substitution, the duty or the credit of this beneficient work must be devolved upon the judiciary. It is said by the court, "that there is certainly no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public waters used for commercial purposes." Let this proposition be admitted literally, it would fall infinitely short of a demonstration that because the Constitution, adequate to every exigency when created, did not comprise predicaments not then in existence or in contemplation, it can be stretched, by any application of judicial torture, to cover any such exigency, either real or supposed. This argument forcibly revives the recollection of the interpretation of the phrase "necessary and proper," once ingeniously and strenuously wielded to prove that a bank, incorporated with every faculty and attribute of such an institution, was not in reality, nor was designed to be, a bank; but was essentially an agent, an indispensable

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agent, in the administration of the Federal Government. And with reference to this doctrine of necessity, or propriety, or convenience, it may here be remarked, that it is as gratuitous and as much out of place with respect to the admiralty jurisdiction, as it was with respect to the Bank of the United States —perhaps still more so; as it is certain, and obvious to every well informed individual, that, with the exception of some of the lakes, there is not a water-course in the country, situated above the ebb and flow of the tide, which is not bounded on one or on both its margins by some county. And in the case before us, it is 320*] alleged expressly *in the pleading, and admitted throughout, that every fact in reference thereto transpired upon an inland water of the State of Alabama, two hundred miles above the tide, and within the County of Wilcox, in that State. And by adhering to what is an essential test of the admiralty jurisdiction in England, and formerly adopted and practiced upon in this country, there will be obtained a standard as to that jurisdiction, far more uniform and rational than that furnished by the tides. I allude to the rule which repels the pretensions of the admiralty whenever it attempts to intrude them infra corpus comitatus. This is the true rule as to jurisdiction, as it is susceptible of certainty, and concedes and secures to each system of jurisprudence, that of the admiralty and of the common law, its legitimate and appropriate powers. For this plain and rational test, this court now attempts to substitute one in is nature vague and arbitrary, and tending inevitably to confusion and conflict. It is now affirmed, that the jurisdiction and powers of the admiralty extend to all waters that are navigable within or without the territory of a State. In quest of certainty, under this new doctrine, the inquiry is naturally suggested, what are navigable waters? Will it be proper to adopt, in the interpretation of this phrase, an etymological derivation from navis, and to designate, as navigable waters, those only on whose bosoms ships and navies can be floated? Shall it embrace waters on which sloops and shallops, or what are generally termed river craft, can swim; or shall it be extended to any water on which a batteau or a pirogue can be floated? These are all, at any rate, practicable waters, navigable in a certain sense. If any point between the extremes just mentioned is to be taken, there is at once opened a prolific source of uncertainty, of contestation and expense. And if the last of these extremes be adopted, then there is scarcely an internal water-course, whether in its natural condition, or as improved under the authority and with the resources of the States, or a canal, or a mill-pond, some of which are known to cover many acres of land (and, as this court can convert rivers without tides into seas, may be metamorphosed into small lakes), which would not by this doctrine be brought within the grasp of the admiralty. Some of our canals are navigated by steam, and some of them by sails; some of them are adjuncts to rivers, and form continuous communications with the ocean; all of them are fed by, and therefore are made portions of, rivers. Under this new regime, the hand of federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these water-courses, which is not liable to be arrested on its way to the next *market town by the [*321 high admiralty power, with all its parade of appendages; and the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomentor of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles.

A citizen of any State of this Confederacy, bound as he is by habit, by affection, and fealty, to the soil and the institutions of his fathers, upon whom this magnificent machinery is brought to bear (especially when recollecting by whom, and for whose sole benefit, this Confederacy was created), may, as I have often done when contemplating the ceaseless march of central encroachment, be led to a tone of reflection like the following:

"Urbem quam Romam dicunt putavi.
Stultus ego, huic nostrae similem,
Verum hæc tantum, alias inter caput extulit urbes,
Quantum lenta solent inter viburna cupressi."

Few, comparatively, of the attributes of sovereignty and equality, presupposed to have existed in those by whom the Federal Government was created, have remained perfectly intact and exempt from aggression by their own creature; and by no conceivable agency could they be more fearfully assailed than by this indefinite and indefinable pretension to admiralty power, which, spurning the restraints prescribed to it by the wise caution of our own ancestors, challenges as occasion suits, the opinions and practices of all nations, people and tongues, however diverse or incongruous with the genius of our own institutions.

Not the least curious circumstance marking this course, is the assertion, that it produces equality amongst all the citizens of the United States. Equality it may be, but is is equality of subjection to an unknown and unlimited discretion, in lieu of allegiance to defined and legitimate authority.

In truth, the extravagance of these claims to an all controlling central power, their utter incongruity with any just proportion or equipoise of the different parts of our system, would exhibit them as positively ludicrous, were it not for the serious mischiefs to which, if tolerated, they must inevitably lead—mischiefs which should characterize those pretensions as fatal to the inherent and necessary powers of self-preservation and internal government in the States; as at war with the interests, *the habits and feelings of the peo- [*322 ple, and therefore to be reprobated and wholly rejected. For myself, I can only say, that to whatsoever point they may, under approbation here or elsewhere, have culminated, they never can offer themselves for my acceptation, but they must encounter my solemn rebuke.

Mr. Justice Campbell, dissenting:

I dissent from the judgment of the court in this cause, and from the opinion delivered

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by the judges composing a majority of the court.

The judgment of the District Court affirms that the court had no jurisdiction as a court of admiralty, under the Constitution and laws of the United States, in a cause of collision arising in Wilcox County, in the State of Alabama, between steamboats navigating the Alabama River. The Alabama River flows entirely within the State, and discharges itself into the Mobile River, and through that and the Mobile Bay connects with the Gulf of Mexico. The collision occurred two hundred miles above the ebb and flow of the tide, and on a river upon which no port of entry or delivery before that time had been established. This court decides that the judgment shall be reversed, and that the District Court shall take cognizance of the cause, against its own sense of obligation and duty.

It is my opinion that this court claims a power for the District Court not delegated to the Federal Government in the Constitution of the United States, and that Congress, in organizing the Judiciary Department, have not conferred upon any court of the United States. That this court has assumed a jurisdiction over a case only cognizable at the common law, and triable by a jury; and that its opinion and judgment contravene the authority and doctrine of a large number of decisions pronounced by this court, and by the Circuit Courts, after elaborate arguments and mature deliberation, and which for a long period have formed a rule of decision to the court, and of opinion to the legal profession; and that no other judgment of this court affords a sanction to this. 10 Wheat. 428; 7 Pet. 324; 11 Pet. 175; 12 Pet. 72; 5 How. 441; 6 How. 344; 4 Dall. 426; 2 Gall. 398; The Anne, 1 Mass. 508; 1 Bald. 544.

The judicial power of the United States extends to all cases in law and equity arising under the Constitution and laws of the United States, and treaties made, or which shall be made, under their authority—to all cases of admiralty and maritime jurisdiction. Whatever other jurisdiction is allowed to the Judiciary Department is particular in its nature, depending upon the character or status of the persons 323*] or communities *who are parties to the controversy, and not upon the subject matter. This classification of the cases to which the judicial power of the United States should extend among courts of law, equity, and of admiralty and maritime jurisdiction, refers to a division recognized in the jurisprudence of all the States that were parties to the Federal Compact, and is intimately related to the constitutional history of the Colonies and of the mother country. Neither at the Declaration of Independence by the Colonies; nor when the Federal Constitution was adopted, was there a body of municipal law common to the States, nor a uniform system of judicial procedure in use in their courts. Until the Constitution was framed, the States preserved their sovereignty, freedom, and independence, and every power, jurisdiction and right which had not been expressly delegated to the United States in Congress assembled.

Whatever reference is made in the Federal Constitution to any existing system of law, or any modes of judicial proceeding, as the basis of a distribution of power and authority, relates to the system thus recognized as existing in the several States as it was received from England.

A portion of that judicial system was esteemed of such vital importance to the liberty of the citizen, that it was incorporated into the Constitution of the United States, and placed above the reach of the authority of any department of the Federal Government. The sections of the Constitution, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of the grand jury; that, in all criminal prosecutions, the accused shall enjoy the right of trial by an impartial jury of the State and district wherein the crime shall have been committed," and "be informed of the nature and cause of his accusation;" "that in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved;" "that no person shall be deprived of life, liberty or property, without due process of law;" and others of a like kind, identify the men of the Revolution as the descendants of ancestors who had maintained for many centuries a persevering and magnanimous struggle for a constitutional government, in which the people should directly participate, and which would secure to their posterity the blessing of liberty. The supremacy of those courts of justice that acknowledged the right of the people to share in their administration, and directed their administration according to the course of the common law, in all the material subject of litigation—of that common law which sprung from the people themselves, and is legitimate by that highest of all sanctions, the consent of those *who are submitted to it— of that com- [*324 mon law, which resulted from the habitual thoughts, usages, conduct and legislation of a practical, brave and self-relying race was established, in England and in the United States only by their perservering and heroic exertions and sacrifices. Magna Charta, from which a portion of this Constitution was extracted, was, according to Lord Bougham, "a declaration of existing and violated rights." It was renewed thirty times. To preserve its authority, it was read in churches, published four times a year in the county courts, sustained by force of arms, and when violated, the commons vindicated it by the infliction of exemplary punishment upon the guilty authors. A delinquent King at one time was required to imprecate the wrath of Heaven on those who transgressed it. The archbishop and bishops appareled in their official robes, with candles burning, "did excommunicate, accurse, and from the threshold of the church cut off all those who, by any art or device, shall violate, break, lessen, or change, secretly or openly, by deed, word or counsel, against it, in any article whatsoever, and all those that against it shall make statutes, or observe them being made, or shall bring in customs, or keep them when they be brought in, and the writers of such statutes, and also the counselors and executioners of them, and all those that shall presume to judge according to them."

The old historian, who describes this solemn ceremony, says, "that when this imprecation

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was uttered, and when the candles extinguished had been hurled upon the ground, and the fumes and stench rose offensive to the nostrils and eyes of those who observed it, the archbishop cried, "Even so let the damned souls be extinguished, smoke, and stink, of all who violate this charter or unrighteously interpret it."

The reign of Richard II. was an epoch to be remembered with interest, and studied with care, by those concerned in administering the constitutional law of England or the United States. A formal complaint was made by the Commons, of defects in the administration, as well about the King's person and his household as in his courts of justice, and redress was demanded. Measures were taken for placing the judicial institutions of England upon a solid constitutional foundation, and to exclude from the realm the odious systems of the Continent. The first of the enactments was directed against the usurpations of the great military officers, who administered justice by virtue of their seignioral powers—the Lords' Constable and the Earl Marshal. The Acts of 8th and 13th Richard II. provide that, "because the Commons do make a grievous complaint that the court of the Constable and Marshal have ac-
325*] croached *to them, and do daily accroach, contracts, covenants, trespasses, debts, detinues and many other actions pleadable at the common law in great prejudice to the King, and to the great grievance and oppression of the people," therefore they were prohibited, and their jurisdiction confined to contracts and deeds of arms without the realm, and "things that touch more within the realm which cannot be determined and discussed by the common law."

The Lord High Admiral received a similar rebuke. The preamble of the Act of 13 Richard II. recites, "that complaints had arisen because Admirals and their deputies hold their sessions within divers places of the realm, accroaching to them greater authority than belonged to their office, to the prejudice of the King, etc." It was declared that the Admiral should not meddle with anything done within the realm, but only with things done upon the sea, as had been used in the time of Edward III. But this did not suffice to restrain the accroaching spirit of that feudal lord and his deputies.

Two years after, the Parliament enacted, "that the Court of Admiralty hath no manner of cognizance, power, nor jurisdiction of any manner of contract, plea or quarrel, or of any other thing done or arising within the bodies of counties, either by land or water, and also with wreck of the sea; but all such manner of contracts, pleas and quarrels, and all other things rising within the bodies of counties, as well by land as by water as aforesaid, and also wreck of the sea, shall be tried, termined, discussed, and remedied by the laws of the land, and not before, nor by the Admiral or his lieutenant, in no manner. Nevertheless, of the death of a man and of a mayhem done in great ships, being and hovering in the main stream of the great rivers, beneath the points of the same rivers, and in no other place of the same rivers, the Admiral shall have cognizance."

In the 16th year of the reign of Richard II., the rule of the Roman chancery, like that of the Lords' Constable, Marshal and Admiral, was banished from England. In that year it was enacted that, "Both those who shall pursue or cause to be pursued, in the court of Rome or elsewhere, any processes, or instruments, or other things whatsoever, which touch the King, against his crown and regality, or his realm, shall be outlawed and placed out of the King's protection." In the following reign the accroaching spirit of the Courts of Admiralty received a further rebuke.

Upon the prayer of the Commons, the Statutes of Richard II. were confirmed, and a penalty was inflicted upon such as should maintain suits in the admiralty, contrary to their spirit.

This body of statute law served in a great degree to check *the usurping tendencies [*326 of these anomalous jurisdictions, and to prevent in a measure the removal of suits triable at the common law ad aliud examen, and to be discussed per aliam legem. It placed upon an eminence the common law of the realm, and enabled the Commons to plead with authority against other encroachments and usurpations upon the general liberty. But, though a foreign law and despotism were not allowed to enter the kingdom through the courts-martial, ecclesiastical, or admiral, the perversion of judiciary powers to purposes of oppression was not effectually prevented. The courts of the Star Chamber and of High Commission, originally limited to specific objects, "assumed power to intermeddle in civil causes and matters only of private interest between party and party, and adventured to determine the estates and liberties of the subject, contrary to the law of the land and the rights and privileges of the subject," and "had been by experience found to be an intolerable burden, and the means to introduce an arbitrary power and government." Among the cases of jurisdiction claimed by the Star Chamber were those between merchant strangers and Englishmen, or between strangers, and for the restitution of ships and goods unlawfully taken, or other deceits practiced on merchants.

One of the most practiced proctors of this court has left his testimony: "That since the great Roman Senate, so famous in all ages and nations as that they might be called jure mirum orbis, there hath no court come so near them in state, honor, and adjudication, as this." But, by the 16th of Charles I., it was enacted, both in respect of this and the High Commission Court, "that from henceforth no court, council, or place of judicature, shall be erected, ordained, constituted, or appointed, which shall have, use, or exercise the same or like jurisdiction as is or hath been used, practiced, or exercised," in those courts.

But the Statute did not terminate with this. The patriot leaders of that time, reviewing in the preamble to the Act the various parliamentary enactments in regard to the legal institutions of England, and reciting those declarations of the public liberties which had extended over a period of four hundred years, proceeded to add another. It was solemnly enacted, "that neither His Majesty, nor his Privy Council, have, or ought to have, any jurisdiction, power, or authority by English bill, petition, articles, libel, or any other arbitrary

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whatsoever, to examine or draw in question, determine, or dispose of the lands, tenements, hereditaments, goods and chattels, of any of the subjects of this realm, but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law."

327*] *This selection of a few sections from various English Statutes, and the historical facts I have mentioned, is designed to illustrate the intensity and duration of the contest which resulted in placing the judiciary institutions of England on their existing foundation. In the midst of that contest, the settlements were formed in America in which those institutions were successfully planted.

They have been incorporated into the Constitution of the United States, and prevail from the Atlantic Ocean to the Pacific, and from the Lakes to the Gulf of Mexico. These statutes show how the courts-martial, ecclesiastical, admiral, and courts proceeding from an arbitrary royal authority, were either limited or suppressed.

The inquiry arises, how would a case like that before this court have been decided in England, either at the period of the Declaration of Independence, or at the adoption of the Constitution of the United States, in the court of admiralty?

In 1832 a question arose in that court, whether a cause of collision, arising between steam vessels navigating the River Humber, a short distance from the sea, within the ebb and flow of the tide, within the port of Hull, below the first bridges, when the tide was three fourths flood, was cognizable by the court. The judge of the admiralty, an exact and conscientious judge, answered: "Since the Statutes of Richard II. and of Henry IV., it has been strictly held that the Court of Admiralty cannot exercise jurisdiction in civil causes arising infra corpus comitatus." I cite this opinion not simply as evidence of the law in 1832, but also as affording authentic evidence of the historical fact it enunciates. The Public Opinion, 2 Hagg. 399.

I proceed now to inquire of the admiralty jurisdiction as exercised by the courts of vice-admiralty in the Colonies and in the United States before the adoption of the Constitution.

The jurisdiction included four subjects, and a separate examination of each title of jurisdiction will shed light upon the discussion. These are: prize; breaches of the acts of navigation, revenue, and trade; crimes and misdemeanors on the high seas; and cases of civil and maritime jurisdiction.

The prize jurisdiction originated in a special commission from the King; and is usually conferred at the commencement of hostilities, upon the Admiral and his subordinates. It is a part of the ancient jurisdiction of the court, as thus derived. Congress, by the Articles of Confederation, were authorized to appoint courts of appeal to determine finally upon cases of that kind, and no doubt has ever been expressed that this branch of jurisdiction, under the Constitution and Acts of Congress

328*] *since the adoption of the Constitution, is vested in the District Courts of the United States. The Hunter, 1 Dod. 483; Le Caux v. Eden, 2 Doug. 613; 13 How. 498; 2 Gall. 325; Id. 20.

The Admiralty Court of Great Britain and the Vice-Admiralty Courts of the Colonies were vested with jurisdiction over cases for the violation of a series of statutes for the regulation of trade and revenue in the Colonies. The origin and extent of this jurisdiction are explained in the case of The Columbus, decided in the British Admiralty in 1789, on an appeal from the Vice-Admiralty Court of Barbadoes. The learned judge of that court said: "The Court of Admiralty derives no jurisdiction in causes of revenue from the patent of the judge, or from the ancient customary and inherent jurisdiction of the prerogative of the Crown, in the person of its Lord High Admiral, and exercised by his lieutenant. Not a word is mentioned of the King's revenue, which seems to have been entirely appropriated to the Court of Exchequer, which is both a court of law and equity. If, therefore, there is any inherent prerogative right of judging of seizures upon the sea, for the rights and dues of the Crown, whether of peace or of war, as in the right of prize and reprisal, that prerogative jurisdiction is put in motion by special commission or by Act of Parliament. The first Statute which places judgment of revenue in the plantations with the Courts of Admiralty, is the 12th of Charles II., ch. 18, sec. 1, which Act has been followed by subsequent statutes." This lucid opinion has not been cited in any previous discussion of the subject in this court, from the fact that it is not published in the regular series of the admiralty reports. 2 Coll. Jur. 82; 2 Dod. Adm. 352.

By an Act of the 22d and 23d Charles II., to regulate the trade of the plantations, suits were authorized for breaches of its enactments "in the Court of the High Admiral of England, or any of his vice-admirals," or in any court of record. The Acts of 7th and 8th of William III., 6th George II., 4th, 5th, 6th, 7th and 8th, of George III., confer plenary jurisdiction upon the same courts, in cases of navigation, trade and revenue in the Colonies, and the latter statutes extend their authority to seizures upon the land as well as water. The reason for this jurisdiction, as given in the Acts themselves, and as repeated by British writers, is not creditable to the colonists; but, as Justice Chase has assigned in this court a similar reason for the Acts of Congress on the same subject, no offense can be taken for repeating the British opinion. Reeves, in his History of Navigation and Shipping, says: "The laws of navigation were nowhere disobeyed and contemned so openly as in New England;" "that, *in minds[*329 tempered as theirs were, obedience and disobedience were much the same thing to the interests of the mother country;" "that the contraband trade was carried on with skill and courage;" "that the exclusion of all but native subjects of Great Britain from serving on juries afforded no corrective;" "that for the purpose of securing the execution of the acts of trade and navigation, the government proceeded to institute courts of admiralty, and to appoint persons to the office of Attorney-General in those plantations where such courts and such offices had never before been known; and from this time there seems to have been a more general obedience to the acts of trade and navigation." Reeves' Hist. 79, 90; Stokes' Const. Col. 360, 361.

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The first of these Acts was passed when the colonial settlements in New England and Virginia were in their infancy, and before those in the remaining Colonies had been fairly commenced. The jurisdiction was familiar to the colonists, and these Acts explain the origin of the clause of the Judiciary Act of 1789, on the same subject. The Judiciary Act confers on the District Courts, "cognizance of all civil causes of civil and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade, of the United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." It is difficult to comprehend on what principle the court can construe the grant of jurisdiction in this Act over cases of seizure under the law of impost and trade upon navigable waters, to any extension of the civil jurisdiction of the admiralty to the same localities. The admiralty jurisdiction, in cases of seizure, is a special jurisdiction, not belonging to the original constitution of the Courts of Admiralty, and this Act treats it as such. And so this court, until the revolution, in its doctrines in these latter years, uniformly treated it. The long and painful discussions from Delovio v. Boit, 2 Gall. 398, to The New Jersey Nav. case, 6 How. 344, are without meaning on any other hypothesis. If the jurisdiction in both classes of cases had been supposed to rest on the same foundation, the whole controversy would have been settled by the case of U. S. v. La Vengeance, reported in 3 Dall. 297.

The civil and maritime jurisdiction of the Vice-Admiralty Courts extended to the same subjects and was exercised under the safe limitations in the Colonies as in Great Britain. "Upon the establishment of Colonial Governments," says a learned judge of one of those courts, "it was deemed proper to invest the Governors with the same civil and maritime jurisdiction; and therefore it became usual for 330*] the Lord High Admiral or the *Lords Commissioners to grant a commission of vice-admiral to them." The office thus conferred on the Governor was precisely the same with that of the vice-admirals in England, and was confined to that civil and maritime jurisdiction which was the original branch of his authority. Stewart's V.-Ad. 394, 405. These courts were subordinate to the Admiralty Court of England, and until the late reign of William IV., it received appeals from them. 1 Dod. Adm. 381. The incompatibility of the criminal jurisdiction of the Admiral on the high seas with the legal Constitution of England, was declared and corrected by the 28 H. VIII. ch. 12.

Hawkins, in his Pleas, says that, it being inconsistent with the liberties of the nation that any man's life should be taken away, unless by the judgment of his peers or the common law of this land, that Act was passed. 1 Hawk. Pl. 251. And the same principle is embodied in the Constitution of the United States, with much enlargement: for the extension of the admiralty jurisdiction under the laws, professedly of navigation and trade, for the punishment of offenses and misdemeanors, in the reign of George III., was a prominent cause of the American Revolution. In 1768, John Adams, the Coke of the Revolution, prepared for the citizens of Boston instructions to their representatives, Otis, Cushing, Samuel Adams, and Hancock. The citizens said to their representatives, that, "next to the revenue itself, the late extensions of the jurisdiction of the admiralty are our greatest grievance. The American Courts of Admiralty seem to be forming by degrees into a system that is to overturn our Constitution and to deprive us of our best inheritance, the laws of the land. It would be thought in England a dangerous innovation if the trial, of any matter on land was given to the admiralty." They refer to the Statutes passed in the reign of George III., and declare that they violate Magna Charta; and they conclude by an earnest recommendation to their representatives, "by every legal measure to endeavor that the power of these courts may be confined to their proper element, according to the ancient English Statutes; and that they petition and remonstrate against the late extensions of their jurisdictions, and they doubt not that the other Colonies and Provinces, who suffer with them, will cheerfully harmonize with them in any justifiable measures of redress." Other testimony of the same kind might be adduced, to show what the opinions of the colonists were, as to the legitimate extent of the admiralty jurisdiction in the Colonies. The journals of the First Congress (1774) render this unnecessary. They are replete with proof of the pervading sentiment in the British Colonies.

*That Congress declare that "the re- [*331 spective Colonies are entitled to the common law of England, and to the benefit of such English Statutes as existed at the time of the colonization, which have been found suitable to their situation." In their address setting forth the cause and necessity for their taking up of arms, they allege that statutes have been passed for extending the jurisdiction of Courts of Admiralty beyond their ancient limits. In the several addresses to the inhabitants of Great Britain, to the people of the Colonies, to the people of Ireland, and to the King, the enlarged authority of those courts, their interference with the common law right of trial by jury, and their offensive use of the laws and course of proceeding adopted from Roman tyrants, are distinctly reprehended.

1 Jour. Cong. 16, 28, 32, 47, 101.

There can be no room for doubt that the statesmen and jurists who composed the Congress of 1774 regarded the limits of the Courts of Admiralty as settled by the Statutes of Richard II., Henry IV., Henry VIII., and the early Acts of Navigation and Trade, and that the enlargement of this jurisdiction was such a wrong as to justify a resort to arms. Their declarations bear no other interpretation; and the admiralty system of the States before the Constitution was administered upon this opinion.

Bee's Adm. 419, 433; 1 Dall. 33.

Before examining the constitutional history and Constitution of the United States, it will not be irrelevant to ascertain the origin of the Courts of Admiralty in France, and their jurisdiction at the period of the adoption of the Constitution. The Admiral was, in France, as in England, a great feudatory, with the seignioral privilege of administering justice by judges of his appointment. There were there, as in England, contests with other officers in

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regard to jurisdiction, and the royal authority was interposed to settle them. In 1627 the office, with its dignity and privileges, was abolished; in 1668 it was revived by Louis XIV., and conferred upon a member of the royal family; in 1791 it was suppressed, and its judicial establishment disappeared from history, other courts and authorities being established to perform their functions. The Ordinances of Louis XIV. enlarged and defined the jurisdiction of the courts of the Admiral, to promote the convenience of commerce, to determine the unsettled jurisprudence concerning maritime contracts, to define the duties of seamen, the powers of the officers, and to provide an adequate police for the ports, harbors, and the coasts of the sea.

Their jurisdiction extended to a number of cases of contract specified in the Ordinance, and conferred the ancient jurisdiction over piracies and thefts at sea, the desertion of crews, and 332*] *generally of all crimes, offenses and trespasses, committed on the sea, in ports, roadsteads and havens, and the shores within the ebb and flow of the tide.

The police and navigation of the rivers of France were not placed under the admiralty, but were regulated by other officers under other Ordinances. Without supposing that the Ordinances of Louis XIV. have any authority on this subject, it is yet certain that a cause of collision arising upon one of the rivers of France above the ebb and flow of the tide was not cognizable before the admiralty of France, in 1789, or for centuries previously.

The judicial power of the United States was organized to comprehend all cases that might properly arise under the Constitution, laws and treaties of the United States, and, in addition, cases of which, from the character of the parties, the decision might involve the peace and harmony of the Union. This principle was accepted without dissent among the framers of the Constitution. The clause "all cases of admiralty and maritime jurisdiction" appears in the draught of the Constitution imputed to Charles Pinckney, and submitted at a very early stage of the session of the Convention. It was reported by the committee of detail in their first report, and it was adopted without debate. In one of the sittings, in an incidental discussion, Mr. Wilson, of Pennsylvania, remarked: "That the admiralty jurisdiction ought to be given wholly to the national government, as it related to cases not within the jurisdiction of a particular State, and to a scene in which controversy with foreigners would be most likely to happen." 2 Mad. Papers, 799. No other observation in the Convention illustrates this clause.

The judiciary clause is expounded in the numbers of the Federalist, by Alexander Hamilton.

He says, the judicial power extends— 1st, to all those cases which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the Articles of Union; 3d, to all those in which the United States are a party; 4th, to all those which involve the peace of the Confederacy, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th, to all those which originate on the high seas; and are of admiralty or maritime jurisdiction; and lastly, to all in which the state tribunals cannot be supposed to be unbiased and impartial.

In regard to the 5th class, he says: "The most bigoted idolizers of state authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime *causes. These so generally depend on [*333 the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations relative to the public peace. The most important of them are, by the present Confederation, submitted to . leral jurisdiction."

Similar remarks are to be found in the debates in various of the Conventions of the States which adopted the Constitution, as incidentally occurring. In none of the Conventions was the judiciary clause of the Constitution considerately examined, except in Virginia; and in the Convention of Virginia no objection was made to this clause. Gov. Randolph said there, that "cases of admiralty and maritime jurisdiction cannot with propriety be vested in particular state courts. As our national tranquility, reputation, and intercourse with foreign nations, may be affected by admiralty decisions, as they ought therefore to be uniform, and as there can be no uniformity if there be thirteen distinct independent jurisdictions, the jurisdiction ought to be in the Federal Judiciary." Mr. Madison, in a luminous exposition of the article, expressed a similar opinion. He said: "The same reasons supported the grant of admiralty jurisdiction as existed in the grant of cognizance of causes affecting ambassadors and foreign ministers." "As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform." In the same speech, this statesman affirmed, that all controversies directly between citizen and citizen will still remain with the local courts. And after the Constitution was adopted, we find Chief Justice Jay, in analyzing the judicial power of the United States, and assigning reasons for the grant, says of this portion of it, "because, as the seas are the joint property of nations, whose rights and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to a national jurisdiction." The instance jurisdiction of the court, now the object of such ambition and interest, and involving questions so threatening, was hardly referred to by the friends of the Constitution, and not an alarm was expressed by any of its vigilant and jealous opponents. The prize jurisdiction of the court—that which concerned the foreign relations of the Union in war or in peace, and which is so intimately related to the honor and dignity of the country—was in the minds of all those statesmen who referred to the subject.

It did not enter the imagination of any opponent of the Constitution to conceive that a jurisdiction which for centuries had been sternly repelled from the body of any county could, by any authority, artifice, or device, assume a jurisdiction through the whole extent of every lake and water-course within the *limits of the United States. The colli- [*334

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sion described in the libel of the appellants occurred at a place which in 1789 formed a part of the State of Georgia. Had a similar cause then arisen, I can affirm with perfect safety that not an individual member of any Convention, whether State or federal, who was concerned in the making or the ratifying of the Constitution, would have admitted the existence of an admiralty jurisdiction over the case. Such being the facts, I affirm that no change in the opinion of men, nor in the condition of the country, nor any apparent expediency, can render that constitutional which those who made the Constitution did not design to be so.

"If any of the provisions of the Constitution are deemed unjust," said the Chief Justice, in Scott v. Sandford, 19 How. 393, "there is a mode prescribed in the instrument itself by which it may be amended; but, while it remains unaltered, it must be construed as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning with which it spake when it came from the hands of its framers, and was voted on and adopted by the people of the United States."

That the framers of the Constitution designed to secure to the Federal Government a plenary control over all maritime questions arising in their intercourse with foreign nations, whether of peace or war, which assumed a judicial form through courts of its own appointment, is more than probable from the instrument and the contemporary expositions I have quoted. This was the primary and designed object of the authors of the Constitution in granting this jurisdiction. It is likewise probable that the jurisdiction which had been exercised from the infancy of the Colonies to the reign of George III., by courts of admiralty, under laws of navigation, trade, and revenue, was considered as forming a legitimate branch of the admiralty jurisdiction. Such was the opinion of the First Congress under the Constitution, and it has been confirmed in this court. 3 Dall. 397; 2 Cranch, 405; 4 Cranch, 443; 2 How. 210. If the instance jurisdiction of the court was at all remembered, the reminiscence was not of a nature to create alarm. The cases for its employment were few and defined. Those did not depend upon any purely municipal code, nor affect any question of public or political interest. They related for the most part to transactions at a distance, which did not involve the interests nor attract the observation of any considerable class of persons. No one could imagine that 335*] this jurisdiction, *by the interpretation of those who were to exercise it, could penetrate wherever a vessel of ten tons might enter within any of the States.

The question arises, what are the power and jurisdiction claimed for the courts of the United States by this reversal of the judgment of the District Court of Alabama?

The Supreme Court requires that court to take cognizance of cases of admiralty and maritime jurisdiction that arise on lakes and on rivers, as if they were high seas. Dunlap, defining the constitutional jurisdiction in 1835, said, that "it comprehends all maritime contracts torts and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, whensoever they may be made and executed, or whatever may be the form of the stipulation which relates to navigation, business, or commerce of the sea." Dunlap's Pr. 43.

This was the broad pretension for the admiralty set up by Mr. Justice Story, in De Lovio v. Boit, in 1815, (2 Gall. 398), under which the legal profession and this court staggered for thirty years before being able to maintain it. The definition to be deduced from the present decision deprives that of any significance. That affords no description of the subject.

The definition under this decree, if carried to its logical extent, will run thus: "That the admiralty and maritime jurisdiction of the courts of the United States extends to all cases of contracts torts, and injuries, which arise in or concern the navigation, commerce or business of citizens of the United States, or persons commorant therein, on any of the navigable waters of the world."

I proceed now to examine the jurisprudence of the courts of the United States, to ascertain the various stages in the progress to the goal which has been to-day attained. The tendency of opinion in the first years of the existence of the Union was to limit the admiralty jurisdiction according to the constitution of the British Court of Admiralty. Justice Washington so declared in 1806, United States v. McGill, 4 Dall. 428; and his learned successor maintained the same doctrine. Bald. 544.

This opinion was assailed by Justice Story in De Lovio v. Boit, 2 Gall. 398, in the year 1815.

The question of jurisdiction arose on a libel founded on a policy of insurance, and the jurisdiction of the court was sustained. I believe I express a general, if not universal, opinion of the legal profession in saying that this judgment was erroneous. I understand Justice Curtis to intimate the existence of such an opinion in The Gloucester Insurance Company v. Younger, 2 Curt. 322.

*The opinion of Justice Story, in the [*336 cause of Delovio v. Boit, is celebrated for its research, and remarkable, in my opinion, for its boldness in asserting novel conclusions, and the facility with which authentic historical evidence that contradicted them is disposed of. The examination of the English authorities resulted in the following conclusions:

In the construction of the Statutes of Richard II. and Henry IV., "the admiralty has uniformly and without hesitation," he says, "maintained that they were never intended to abridge or restrain the rightful jurisdiction of the court; that they meant to take away any pretense of entertaining suits upon contracts arising wholly upon land, and referring solely to terrene affairs: and upon torts or injuries which, though arising in ports, were not done within the ebb and flow of the tide; and that the language of these statutes, as well as the manifest object thereof, as stated in the preambles, and in the petitions on which they were founded, is fully satisfied by this exposi-

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tion. So that, consistently with the statutes, the admiralty may still exercise jurisdiction: 1. Over torts and injuries upon the high seas, and in ports within the ebb and flow of the tide, and in great streams below the first bridges; 2. Over all maritime contracts arising at home or abroad; 3. Over matters of prize and its incidents." In regard to the conclusions of the courts of common law he says:

That the common law interpretation of these statutes abridges the jurisdiction to things wholly done on the sea. 2. That the common law interpretation of these statutes is indefensible upon principle, and the decisions founded upon it are inconsistent and unsatisfactory. 3. That the interpretation of the same statutes does not abridge any of its ancient jurisdiction, but leaves to it cognizance of all maritime contracts, torts, injuries and offenses upon the high seas, and in ports as far as the ebb and flow of the tide. 4. That this is the true limit of the admiralty jurisdiction, on principle. In regard to the case of the collision between ships and steamboats, we have the authoritative declaration of the judge of the admiralty. I have cited it to show that this statement of the English law is not accurate. And Sir John Nicholl, in the same court, in 3 Hagg. 257, 283, differs materially from other portions of the same statement. It may be true that the English Court of Admiralty, with the approbation of the King, took cognizance of causes arising within the limits of England, in despite of the prohibition by Parliament. But the great charter, and other statutes of importance to the liberties of the realm, were also violated by the same authority. It is also true that the twelve judges of England, and 337*] the Attorney-General, *in the presence of the King and the Privy Council, after solemn debate, in 1632, signed an agreement to concede to the admiralty a larger jurisdiction. But such an act was illegal, and by the judges extrajudicial. Ten of those judges, four years later, presided in the case against Hampden, for ship money; the Attorney-General was the inventor of the writ for its levy; the Privy Council was that which Strafford and Laud had organized to rule England without a Parliament, and which was made hateful by its arbitrary and violent proceedings. And the contract itself was denounced as unconstitutional by Lord Coke, who, but a few years before, had prepared the Petition of Right in which the legal Constitution of England was embodied. For all contracts, pleas and quarrels, made and done upon a river, haven, or creek, within the realm of England, he said, "the Admiral, without question, hath not jurisdiction, for then he should hold plea of things done within the body of the county, which are triable by verdict of twelve men, and merely determinable by the common law, and not within the admiralty, and by the civil law; for that were to change and alter the law in such cases." 4 Co. Inst. 135, And finally, in 1640, to close the door upon all such attempts of the King and his Privy Council, the 5th section of the Act "For the regulating of the Privy Council, and for taking away the court commonly called the Star Chamber," which I have already quoted, was adopted.

The great and controlling question of contest in this long period of contest was as to the supremacy of the Parliament, and a very important form of that question related to its organization of the courts and its regulation of their jurisdiction. When the supremacy of Parliament had been established by the Revolution, its enactments which had defined the constitutional limits of the courts of judicature were no longer opposed or contradicted. The error of the opinion in Delovio v. Boit, on this subject, in my judgment, consists in its adoption of the harsh and acrimonious censures of discarded and discomfited civilians on the conduct of the great patriots of England, whose courage, sagacity and patriotism secured the rights of her people, as any evidence of historical facts.

But the royal Ordinances of Louis XIV. unquestionably afford that support to the decision and opinion in that case which cannot be found in the English law. The policy of insurance is enumerated among the contracts submitted to the French Courts of Admiralty, and the formulary in which the jurisdiction as to torts and offenses is expressed in the opinion is a free translation from the French Ordinances. I refer to the opinion in the case of Delovio v. Boit, as the first and most complete *ex- [*338 position of the system which its author afterwards introduced as the doctrine of the court, in The Thomas Jefferson, in 1825, 10 Wheat. 428; Orleans v. Phœbus, in 1837, 11 Pet. 175, and Coombs' case, in 1838; and which was more fully sanctioned in the opinions of the court in subsequent cases; and because he defends in that opinion the jurisdiction of the admiralty upon grounds which are not to be reconciled with the opinion of the court in the present cause.

In The Steamboat Orleans v. Phœbus, 11 Pet. 173, decided in 1835, the court say: "The true test of jurisdiction is, whether the vessel be engaged substantially in maritime navigation, or in interior navigation and trade, not on tide-waters. In the latter case there is no jurisdiction." In The United States v. Coombs, 12 Pet. 73, the direct question arose as to the limits of this jurisdiction. The court answers, as in former cases, "That in cases purely dependent upon the locality of the act done, it is limited to the sea and to tide waters as far as the tide flows; and that it does not reach beyond high water mark. It is the doctrine repeatedly asserted by this court, and we see no reason to depart from it." In Waring v. Clarke, 5 How. 441, the same question was again considered by the court. The claimants of the largest extent of jurisdiction for the court expressed their opinion through Mr. Justice Wayne. He cited the former decisions with approbation, and said that the question was no longer open in the court; "that it was res judicata in this court." Again, in 1848, Mr. Justice Nelson, expressing the views of the four judges who concurred with Justice Wayne in the former case (New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344), disclaimed jurisdiction over "contracts growing out of the purely internal commerce of the State, as well as commerce beyond tide waters," stating that "they are generally domestic in their origin and operation, and could hardly have been intended to be drawn within

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the cognizance of the federal courts." I think it is manifest, that had the case before the court been produced before it ten years ago, it would have been unanimously dismissed for the want of jurisdiction. From the decision in The Thomas Jefferson, in 1825, 10 Wheat. 428, to that of The New Jersey Navigation Co. v. The Merchants' Bank, in 1848, 6 How. 344, two generations of judges have agreed to doctrines wholly irreconcilable with the judgment now given.

In 1851 the case of The Genesee Chief v. Fitzhugh, 12 How. 443, came before the court. It was a cause of collision between steamboats navigating Lake Ontario, and engaged in the commerce of different States. The District Court exercised jurisdiction under the Act of February, 1845 (5 Stat. at L. 726), 339*] *which provided for such cases on the lakes, and navigable waters connected with them, in the same manner as if the same vessels had been employed in navigating the high seas or on tide-waters within the admiralty jurisdiction, with a proviso that all the issues of fact might be tried by a jury.

The court decided that the Act was not a regulation of commerce between the States, and that the jurisdiction conferred on the District Court could not be sustained as a regulation of commerce among the States, and that the judicial power of the United States could not be extended by such legislation. The court, after this sound constitutional argument, proceed to say: "If the meaning of these terms in the Constitution was now for the first time brought before this court, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other; a great and growing commerce between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered in them, and prizes have been made; and every reason which exists for the grant of admiralty jurisdiction to the General Government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance power, and for the prize power of the admiralty court to administer admiralty law; and if the one cannot be established, neither can be the other."

All the considerations mentioned in this argument applied to the Mississippi River in 1789, and some of them do at this time.

I have stated the entire argument of the court upon the precise question, whether the court had jurisdiction of the cause for damage in that locality. The court say, "the only objection made to the jurisdiction is, that there is no tide in the lakes, or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the Constitution was adopted, was confined to the ebb and the flow of the tide." The Chief Justice combats this objection to the jurisdiction of the court in that cause, and pronounces for the court that "tide" does not form the criterion of jurisdiction. In my opinion, the argument of the court in favor of jurisdiction is imposing; and also that the objection taken by the appellants, as reported in the opinion, does not embody the strength of the objection to the jurisdiction. To ascertain the scope of the opinion, it is necessary to examine the argument of the court, and the worth of the objection taken to the jurisdiction and combated.

*The lakes are certainly not seas ac- [*340 cording to the signification of that word in the law of nations or the Admiral's commission. They are not common highways for all nations, open to the ships of all and exempted from the municipal regulation and control of any. The sovereignty over them belongs to the riparian proprietors, in the same manner as over the Rhine or Rio Grande rivers; and the American States and British Queen have respectively courts to administer their laws within the limits of their several titles, to the middle of the lakes, against those who may offend against them. The jurisdiction of the Court of Admiralty cannot be supported upon the lakes as seas. But the lakes form an external maritime boundary of the United States, and are a commercial highway, which by treaty is common to the inhabitants of the two maritime and commercial countries whose possessions border them. The commerce of these countries is great and growing, and exposed to depredation; and in the absence of a navy, and without defined boundaries, the police of the States on this exposed frontier may be inefficient for the protection of the interests of the Union. I shall not inquire whether these considerations, or those among them which are applicable to the River Mississippi, authorized the decisions in The Genesee Chief v. Fitzhugh, 12 How.; and Fretz v. Bull, 12 How. 466; Walsh v. Rogers, 13 How. 283. I have yielded to the principle of stare decisis, and have applied the decisions as I found them when I came into this court.

But not one of these considerations has any application to the case before this court. The Alabama River is not an inland sea. Its navigation was not open to a single foreign vessel when this collision took place. No port had been established on it by the authority of Congress. The commerce that passes over it consists mainly of the products of the State, and the objects received in exchange, at the only seaport of the State. For its whole length it is subject to the same State government, and its police does not involve a necessity for a navy.

The objection noticed in the opinion of the court in The Genesee Chief, as opposed in the argument against the jurisdiction of the court, I have said does not meet the force of the adversary opinion. In France, the domain of the Admiral was limited to the sea, its coasts, ports, havens, and shores to the high water mark, and his seignioral right to dispense justice was confined to his domain. The contest there was as to the extent of rival seignories. But in Great Britain the contest had a more profound significance than is to be found in a controversy merely between rival feudatories.

The Admiral's jurisdiction there had no relation to the saltness *or freshness of [*341 the waters nor whether the rivers were public or private, navigable or floatable. The question was, whether Englishmen should be governed by English laws, or "whether contracts, pleas and

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quarrels should be drawn ad aliud examen, and be sentenced per alium legem." The English Commons abhorred the summary jurisdiction of the courts of civil law, their private examination of witnesses, their rejection of a jury of the vicinage, the discretion they allowed to the judge, and their foreign code. They erected a barrier of penal statutes to exclude them from the body of any county, either on land or water.

The people of the several States have retained the popular element of the judicial administration of England, and the attachment of her people to the institutions of local self-government. In Alabama, "the trial by jury is preserved inviolate," that being regarded as "an essential principle of liberty and free government." In the court of admiralty the people have no place as jurors. A single judge, deriving his appointment from an independent government, administers in that court a code which a federal judge has described as "resting upon the general principles of maritime law, and that it is not competent to the States by any local legislation, to enlarge, or limit, or narrow it." 2 Story, 456.

If the principle of this decree is carried to its logical extent all cases arising in the transportation of property or persons from the towns and landing places of the different States, to other towns and landing places, whether in or out of the State; all cases of tort or damage arising in the navigation of the internal waters, whether involving the security of persons or title to property, in either; all cases of supply to those engaged in the navigation, not to enumerate others, will be cognizable in the District Courts of the United States. If the dogma of judges in regard to the system of laws to be administered prevails, then this whole class of cases may be drawn ad aliud examen, and placed under the dominion of a foreign code whether they arise among citizens or others. The States are deprived of the power to mold their own laws in respect of persons and things within their limits, and which are appropriately subject to their sovereignty. The right of the people to self-government is thus abridged—abridged to the precise extent, that a judge appointed by another government may impose a law, not sanctioned by the representatives or agents of the people, upon the citizens of the State. Thus the contest here assumes the same significance as in Great Britain, and, in its last analysis, involves the question of the right of the people to determine their own laws and legal institutions. And surely this objection 342*] *to the decree is independent of any consideration whether the river is subject to tides, or is navigable from the sea.

This decree derives no strength from the legislation of Congress, but a strong argument is to be deduced from the Act of 1845 in opposition to it. The learned author of the opinion in Delovio v. Boit, and in the case of The Thomas Jefferson (Justice Story), has the reputation of being the author of the Act. He proposed to bring under the judicial administration of the United States, cases that did not belong to the jurisdiction of the admiralty under the authoritative exposition of the Constitution by this court. The first suggestion of the feasibility of such a law is to be found in the opinion given in the case of The Thomas Jefferson, in 1825, and is enough to relieve this court from the imputation of having decided that case without a proper appreciation of the magnitude of the question.

The Act of 1845 involves the admission, that cases arising on waters within the limits of the United States other than tide-waters were cases at common law, and that a jury, under the 7th Amendment of the Constitution, must be preserved. It was framed on the hypothesis that Congress might increase the judicial power of the United States, so as to comprise all cases arising on, or which related to, any subject to which its legislation extended. It is apparent that this court in 1847, and afterwards in 1848, when the suits of Waring v. Clarke, and The New Jersey Navigation Co. v. The Merchants' Bank, were so elaborately discussed, were wholly unconscious of the fact that this Act contained a recognition of any jurisdiction in admiralty, additional to what had been previously exercised.

The only inference that can be drawn properly from the Act of 1845, in my opinion, is, that Congress recognized the limit that the decisions in the earlier cases in this court had established for the admiralty and maritime jurisdiction, and its own incapacity to confer a more enlarged jurisdiction of that kind.

I have performed my duty, in my opinion, in expressing at large my convictions on the subject of the powers of the courts of the United States under the clause of the Constitution I have considered.

There have been cases, since I came into this court, involving the jurisdiction of the court on the seas and their tide-waters, the lakes, and the Mississippi River. I have applied the law as settled in previous decisions, in deference to the principle of stare decisis, without opposing any objection—though in a portion of those decisions the reasons of the court did not satisfy my own judgment. I consider that the present case carries the jurisdiction to an incalculable extent beyond any other, and all others, that have heretofore been pronounced, *and that it must create a revolution in [*343 the admiralty administration of the courts of the United States; that the change will produce heart burning and discontent, and involve collisions with State Legislatures and State jurisdictions. And, finally, it is a violation of the rights reserved in the Constitution of the United States to the States and the people.

PATRICK C. SHANNON, Appt.,

v.

RAFALL GARCIA CAVAZOS, Maria Josefa Cavazos, his Wife, and Estafana Gozearcochea De Cortina.

One of several defendants cannot appeal, without severance.

Where there is a joint decree against several co-defendants, one of them alone cannot appeal therefrom, without summons and severance from the rest of his co-defendants.

Argued Feb. 12, 1858. Decided Apr. 19, 1858.

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APPEAL from the District Court of the United States for the District of Texas.

Mr. Benjamin, for appellants.

Messrs. Robinson and Hale, for appellees.

Mr. Chief Justice Taney made the following order:

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and it appearing to the court here upon the motion of Messrs. Hale and Robinson, of counsel for the appellees, that the decree of the said District Court in this cause is a joint decree against several co-defendants, and that Patrick C. Shannon has alone appealed therefrom, without any summons and severance from the rest of his co-defendants, it is the opinion of this court that the case is improperly brought here. On consideration whereof, it is now here ordered, adjudged and decreed by this court, that this appeal be and the same is hereby dismissed, with costs.

CYRUS H. McCORMICK, Appellant,

v.

WAITE TALCOTT, Ralph Emmerson, Jesse Blinn and Sylvester Talcott, Survivors of John H. Manny.

(See S. C. 20 How. 402–412.)

Manny's patent held good, and no infringement.

The reaping machine constructed under Manny's patent is a distinct improvement, and no infringement of McCormick's claim.

It is substantially different, in form and in combination, from that claimed by the complainant, and is consequently no infringement of his patent.

Argued Feb. 16, 1858. Decided Apr. 22, 1858.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case filed in the court below, by the appellant, charges the appellees with the infringement of certain patents, and prays for an injunction and an accounting.

The court below having entered a decree dismissing the bill, the complainants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Reverdy Johnson and E. N. Dickerson, for appellant.

Messrs. Edwin M. Stanton and George Harding, for defendants.

The elaborate arguments of counsel in this case, being almost entirely devoted to the facts and evidence, are not here given.

Mr. Justice Grier delivered the opinion of the court:

The bill charges the defendants with infringing two several patents granted to complainant, for improvements in the machine known as "McCormick's Reaper." One of these patents bears date the 31st of January, 1845; the other on the 24th of May, 1853, being the reissue of a previous one, dated 23d of October, 1847. The defendants are charged with infringing the fourth and fifth claims of the patent of 1845, and the second claim of the reissued patent of 1853.

I. The first infringement charged is that of the divider, or that part of the reaping machine which is defined "as an arrangement, *or [*404 apparatus, for separating the grain to be cut from that which is to be left standing."

The claim is as follows: "4th. I claim the combination of the bow L and the dividing-iron M, for separating the wheat in the way described."

The description referred to is as follows:

"The divider K is an extension of the frame on the left side of the platform, say three feet before the blade, for the purpose and so constructed as to effect a separation of the wheat to be cut from that to be left standing, and that whether tangled or not. E is a piece of scantling, say three feet long and three inches square, made fast to a projection of the platform by two screw bolts. To the point of this piece, at K, is made fast by a screw or bolt, a bow L of tough wood, the other end of which is made fast in the hinder part of the platform at R, and it is so bent as to be about two and a half feet high at the (left) reel post, and about nine inches out from it, with a regular curve. The dividing-iron M is an iron rod of peculiar shape, made fast to the point of the same piece E, and by the same screw bolt that holds the bow L. From this bolt this iron rises towards the reel S, at an angle of say 30°, until it reaches it, then it is bent so to pass under the reel as far back as the blade, and to fit the curve of it (the reel). From the bolt in the point aforesaid, the other end of this iron extends, say nine inches, along the inside of the piece E, where it is held by another screw bolt M and where it has a groove (or slot) in it to admit the other ends being raised or lowered (turning on the point screw K as a pivot) to suit the height of the reel. By means of the bow to bear off the standing wheat, and the iron to throw the wheat to be cut within the powers of the reel, the required separation is made complete."

The answer denies that the arrangement of the divider used by defendants for separating the grain to be cut from that to be left standing is the same in construction or mode of operation as that claimed by complainant, or a colorable evasion of said claim, and avers that it is a different and distinct arrangement, invented by J. H. Manny, after several years' experiments.

It would be a difficult task to make intelligible to the uninitiated the construction of a very complex machine, without the aid of models or diagrams. But, for the purposes of the case, the divider, although a component part of the great complex machine called the "reaper," may be considered by itself as a machine, or combination of devices, attached to the reaper to perform certain functions necessary to complete the whole operation. In order to ascertain whether the divider used by dedefendants *infringes that of the com- [*405 plainant, we must first inquire whether McCormick was the first to invent the machine called a divider, performing the functions required, or has

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merely improved a known machine by some peculiar combination of mechanical devices which perform the same functions in a better manner.

If he be the original inventor of the device or machine called the "divider," he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first.

That portion of a reaping machine called the divider or separator may be described as a pointed, wedge formed instrument, which is attached by its butt at that extremity of the cutting apparatus which runs in the grain, in such a manner that its point projects in advance of the cutting apparatus, and enters the standing grain. Its functions, where the grain stands erect, are to divide it into two portions, one of which is borne inwards by the inner side of the wedge-formed implement within the range of the cutting apparatus and of the reel, in case the machine is fitted with a reel; the other portion of the grain is borne outwards by the outer side of the divider, so as to be passed by that portion of the machine which lies behind the cutting apparatus. When grain is inclined outwards, the function of the divider is not only merely to divide the grain into portions, but also to raise up the inclined stalks of the grain, below which the divider passes. When the grain inclines inwards, the function of the divider is not only to divide the mass, but also tends to raise up the inclined stalks of grain beneath which the divider passes, and to bear them outwards without the range of the reel, if the machine has a reel, and of the cutting apparatus. When grain, in addition to being inclined, is also entangled, the divider not only separates and raises the stalks, but also tends to disentangle them. The lower face of a divider performs the functions of a shoe or runner, to prevent the cutting apparatus from digging into the earth, when, by an accidental movement of the machine, it would 406*] *otherwise do so. The divider also performs the function of limiting or regulating the width of the swath, by raising up and turning inwards those stalks of grain which, from their inclination outward, would otherwise escape the action of the cutter; and by raising up and turning outwards those stalks of grain which, from their inclination inwards, would otherwise be within the range of the cutter. All dividers perform those functions in a greater or less degree. The English patent of Dobbs, in 1814, had dividers of wood or metal. The outer diverging rod rose as it extended back, and diverged laterally from the point, to raise the stalks of grain inclining inwards, and to turn them off from the other parts of the machine. The patent of Charles Phillips of 1841 had a divider shaped like a wedge, performing the same functions, turning the grain aside on both sides of the machine, and raising it up. Ambler's machine had a triangular divider performing the same functions, as also the machines of Hussey, Schnebly, and that of McCormick, patented in 1834, which is now public property. The present claim is for the combination of this bow with a dividing iron of a certain form, and for nothing more. This dividing iron is but a new form or substitute for that side of the triangle or wedge which in other machines performed the function of separating the inside grain, and raising it to the cutters.

It is described in the patent as having these peculiarities to distinguish it from those that preceded it:

1. It rises at an angle of about thirty degrees till it reaches the reel.

2. It is curved under the reel.

3. It is made adjustable by means of a slot, so as to suit the different heights of the reel.

Its function is to raise and support the grain along the inner edge of the divider, at the maximum elevation consistent with the employment of the reel. As a form or combination of devices it is new, and no doubt an improvement, and therefore the proper subject of a patent. But as a claim for a combination of mechanical devices or parts, it is not infringed by one who uses a part of the combination. Nor can it challenge other improvements of the same machine, different in form or combination, as infringements, because they perform the same functions as well or better by calling them equivalents. The machine constructed under defendant's patent has a wooden projection, somewhat in the form of a wedge, extended beyond the cutting sickles some three feet, and which, from the point in front rises as it approaches the cutting apparatus, with a small curve (not approaching to an angle of thirty degrees) so *as to raise the lean- [*407 ing grain. It has no dividing iron, nor substitute or equivalent, possessing the peculiar qualities of that instrument. It more resembles the wedges in use before McCormick's patent of 1845. As an improvement on former machines, it has some peculiarities of form and construction, but it does not adopt the combination of complainant's patent. It is a distinct improvement, probably inferior to McCormick's, but certainly no infringement of his claim.

II. The fifth claim of complainant's patent of 1845, which the bill charges the defendants with infringing, is as follows:

"5. I claim setting the lower end of the reel post R behind the blade, curving it at R^2, and leaning it forward at top, thereby favoring the cutting, and enabling me to brace it at top by the front brace S, as described, which I claim in combination with the post."

In the reaping machine of M'Cormick's original patent of 1834, he had placed the reel post in front of the cutters. This position of the post interfered with the action of the reel in drawing the grain to the cutters, especially in gathering tangled grain. In order to remedy this defect of his own machine, he set the post farther back, and braced it as described.

Defendant does not support his reel by posts

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as was done by McCormick. He uses the horizontal reel bearer, connected by a frame with the hinder part of the machine. This device for supporting the reel was invented and used many years before McCormick's first patent of 1834. It had no reel post situated as in his patent, and encountered none of the evils remedied by the change in its position. This attempt to treat the earlier and better device used by defendant as an infringement of a later device to obviate a difficulty unknown to the first, is an application of the doctrine of equivalents which needs no further comment.

III. The bill charges defendants with infringing the second claim of the reissued patent of 1853. This claim is as follows:

"2. And I also claim the combination of the reel for gathering the grain to the cutting apparatus, and depositing it on the platform, with the seat or position of the raker arranged and located, as described, or the equivalent thereof, to enable the raker to rake the grain from the platform, and deliver and lay it on the ground at the side of the machine, as described."

If this claim be construed to conclude all machines which have a reel and a raker's seat, it is void, for want of novelty. Hite, Woodward, Randall and Schnebly had invented and publicly used reaping machines which had reels and a place for the raker on the machine. But the true construction of this claim, and the only one which will support its validity, is to 408*] treat it *as a claim for a combination of the reel with a seat "arranged and located as described." And such was the construction given to it by the defendant himself, when the Commissioner had refused to grant him a patent claiming the mere combination of a reel and a raker's seat, "because such a combination was not patentable, the functions of each device having no necessary connection with the other."

This arrangement for the location of a raker's seat was made "by placing the gearing and crank forward of the driving wheel, and thus carrying the driving wheel further back than heretofore, and sufficiently so to balance the rear part of the frame and the raker thereon."

By this device he obtained a place for the raker over the finger bar, just back of the driving wheel, and at the end of the reel, where he could have free access to the grain, and rake it off the machine at right angles to the swath. It was by limiting his claim to this arrangement, location and combination, that the complainant obtained his patent; and without this construction of it, the claim is neither patentable nor original.

The arrangement, combination and location of the raker's seat, by defendants, has been patented to Manny as an independent contrivance, and distinct invention. The place for the raker is obtained by a change in the shape of the platform, different from any before employed. It differs from the complainant's device in principle as well as in form and combination. The raker's seat is on a different part of the machine, where he may stand without destroying the balance of the machine or tilting it up. It requires no modification of the reel. It requires no such combination or modification of parts of the machine in order to find a place for the raker, which is an essential part of complainant's claim.

It is substantially different, both in form and in combination, from that claimed by the complainant, and is consequently no infringement of his patent.

Concurring, as we do, in the opinion and decision of the court below on these several points, the decree is affirmed, with costs.

Mr. Justice **Daniel**, dissenting:

In the opinion of this court just delivered, I do not concur. Protracted as the discussion by counsel in the case has been, the real grounds for controversy between the parties are obvious, and comprised within quite a limited compass. The unusual display of mechanical ingenuity, and the comment upon its progress exhibited in the conduct of this cause, whilst they evince great zeal and industry, and may afford entertainment to the *curious on [*409 such subjects, are in a great degree irrelevant to and beside any legitimate inquiry which an adjustment of the claims of the parties either imposes or warrants. In the decree of the court below, as well as in the arguments in this court, it has been conceded, that the patent of the appellant is strictly legal. This concession necessarily excludes, and in legal acceptation concludes, all inquiry as to the right of the appellant to the full benefit of his invention, either as an original or a combination, and renders unnecessary, and irregular and improper, any and every comparison between that invention and previous claims to discovery and improvement, having in view the same results, and the same or merely equivalent modes of producing them. This concession, therefore, narrows down and confines the proper investigation before this court, as it should have restricted that before the Circuit Court, to the single question, whether the machine complained of as an infringement, either in theory, in construction, or in operation, was the same with the improvement invented by the appellant, for the benefit or the reward for which the law had given its guarantee. This was the proper inquiry before the court below, and is the only regular inquiry here. All others connected with previous inventions were and must be irregular, and are excluded and forbidden by the concession that the patent of the appellant is legal and valid. To guide them in this, the only legitimate inquiry, this court has had before them a species of evidence of all others best calculated to conduct them to the truth—evidence superior to, and unaffected by, the interests or prejudices of partisans, or by the opinions (the reveries, they may often be called) of a class of men styled experts; men as often skillful and effective in producing obscurity and error, as in the elucidation of truth. No witnesses can testify so clearly and so impartially as do the subjects (though mute) concerning which a controversy about identity or dissimilarity is pending. These witnesses have been produced, and their testimony eagerly and keenly scrutinized; and that testimony establishes, in my judgment, with a force and certainty which no ingenuity can either withstand or evade, that the machine put in operation by the appellees is a palpable infringement of the rights of the appellant; that in theory or principle, in structure, in the modes of operation, and in the results proposed, it is essentially,

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and with some insignificant and merely apparent diversity, formally identical, at least in one important particular, with the invention secured by the government to the appellant, and admitted by the appellees, and by the court, to have been rightfully and legally guaranteed to him.

That portion of the machines put in operation 410*] by each *of the parties to this controversy, and which constitutes the most material subject of contention in this cause, consists of what in the description and specification of the respective patents is called a "divider." The function and the value of this divider are experienced in separating the stalks of wheat designed to be immediately severed by the cutters, from those which do not come within their immediate and regular operation, but which it is desired should be left to the future or succeeding action of the machine. It frequently happens in fields of luxuriant growth, that from high winds, heavy rains, and even from its own weight, wheat is pressed down, and becomes in rustic phrase "lodged." In this condition, the stalks and heads of the wheat, on both sides of the line described by the track of a machine, will become entangled, and inclined in various and opposite directions, accordingly as the momentum which displaces the natural position of the growing crops has been applied. In such a condition of the wheat, any process by which a portion of the crop should be torn apart from portions with which it was intertwined, would prove highly detrimental, inasmuch as it would necessarily increase the irregularity in the position of the wheat not cut, and standing outside of the regular track of machine; and, by violently and rapidly rending apart the tangled straw, would shatter and waste the grain in each division; creating thereby a serious diminution in the yield or product. In order to prevent these mischiefs by disentangling the wheat, by separating that designed to be immediately severed from that reserved for the succeeding action of the machine, and by raising up the former, and bringing it within the scope and operation of the reel and the cutters, was devised an addition or appendage to the reaper, called the "divider." The importance of this appendage, both to the success of the reaper and on account of its real utility in practice, cannot be with reason called in question. Its essential importance is sufficiently evinced by the zeal and industry displayed, and the extraordinary expense which must have been incurred in this controversy. The divider of McCormick may be thus substantially described: A pointed instrument or structure, called by the patentee a "bow," formed of strong hard wood, confined in front, and projecting so far in advance of the cutters as to enter the wheat in time to effect its preparation for the approach of the cutters. This bow is extended in a curvilinear form on the outer side of the machine, next the grain to be separated from the cutters, and is gradually elevated from the point in front to a degree increasing towards the rear of the machine, sufficient to disentangle the straw, and place it in a position proper for the sweep or action of the returning machine. On the interior side 411*] of *the machine, or that on which the grain is to be severed, the divider of McCormick is constructed of a bar of iron, confined at the same point with the wooden bow above mentioned as operating externally; and this iron bar is capable of being so adjusted as to disentangle and raise the wheat separated from that standing on the exterior of the machine; and by a lateral and angular direction given this adjustable bar, as well as by its vertical extension, it embraces and secures the wheat on the interior side of the machine, and presses it to the action of the reel and the cutters.

Such as has just been described, I hold to be McCormick's divider, and such, too, its operation and effects. Let us now compare them with the structure and operation of the structure complained of as an infringement, in order to ascertain how far the rival claims of the parties are identical or reverse. And this comparison will be most fairly and satisfactorily accomplished, and the results most clearly established, by a recurrence to that silent, but irresistible testimony already referred to, the testimony of the machines themselves.

On Manny's machine, the divider on the exterior side, or the side of the standing grain, is formed of a piece of timber which, according as fancy shall dictate, may be denominated a bow, or by any other appellation which may be preferred. This piece of timber, like the divider of McCormick's machine, is confined in front, and penetrates the standing grain in advance of the cutters. Like McCormick's divider, it rises obliquely from the stationary point in front, towards the rear of the machine, to a degree intended to be sufficient to separate and support the straw, and in the same manner diverges in an angle supposed to be great enough to secure that separation, and to prevent the breaking down of any portion of the straw by being pressed to the earth, or by being torn away by the machine in its progress. On the interior side or section of Manny's divider, there is no adjustable iron bar or rod, as the part of the divider; but for this is substituted a piece of timber or a board, connected and confined in the front of the machine with the wooden fixture extended on the outside next the standing grain; and from that point of connection this substituted board is protracted in a diverging angle, and to a length corresponding exactly with those of McCormick's adjustable iron bar, and, like the latter, it is gradually carried to a vertical elevation intended to be great enough to separate and raise up the wheat designed to be immediately severed by the cutters from that reserved for farther action of the machine. The only differences between this fixture and the adjustable bar of McCormick (and they are merely pretended and deceptive) *are these: that [*412 the former, instead of being of iron, is made of wood; that instead of being movable or adjustable, it is stationary; that it is broader on its lateral surface than is that of the iron portion of McCormick's divider, and on that lateral surface is somewhat curved. But these differences, correctly apprehended, are mere disguises, and were indispensable to shelter the possession of property evidently pirated from the rightful owner. Had the appellees openly taken McCormick's iron instrument, adjusted it so that it could be graduated in practice to the quality or height of the grain in which the

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machine was to operate, and placed it at an angle suited to the conducting of the grain within the action of the reel and cutters, there would, in so bold a piracy, have been left no ground, no pretext even for contest or cavil. Hence the effort at distinctions or differences attempted in this case. To my mind, it seems impossible not to perceive that they are entirely unfounded, and cannot for one instant conceal these truths, viz.: that the instrument or structure called a "divider," introduced and practiced by the appellees, is in theory or principle, in manner of its operation, in its effects or results, and it may almost be said in its minute constituent portions and formation, identical with the instrument invented by and patented to the appellant, and therefore an infringement of the rights guaranteed to him by the government.

Entertaining this opinion, I must dissent from the decision of the court in this cause, and declare it as my opinion that the decree of the Circuit Court should be reversed, and this cause remanded with instructions to reinstate the injunction formerly awarded by the Circuit Court, and to direct an account between the parties. The only legitimate inquiry for the court is this: Whether the improvement of McCormick called a "divider," and the instrument claimed and put in operation by Manny, are essentially the same, or are essentially or substantially different. All that has been said (and a great deal has been said) about the comparative superiority or inferiority of inventions or improvements previous to those patented to McCormick, is wholly irrelevant, and out of this cause; and is calculated only to confound and divert the attention from the only proper subject of investigation here, which is the rightfulness of the claims advanced by the appellant and appellees in this cause, relatively to themselves, and to no others.

TIMOTHY S. GOODMAN, Plff. in Er.,
v.
JOHN SIMONDS.

(See S. C. 20 How. 343-372.)

Instructions to jury must be supported by evidence—signature to blank paper, when authority to fill up same—bona fide holder, for value, of negotiable paper, can recover, unless has actual knowledge of facts to defeat it, or bad faith—what is good consideration—holder of collateral securities, when unaffected by prior equities.

When a prayer for instructions is presented to the court, and there is no evidence in the case for the consideration of the jury, it ought always to be withheld.

And as a general rule, if it is given under such circumstances, it will be error in the court.

If one party, intending to accommodate another, signs his name to a blank paper, he authorizes the other to whom he delivers it, and for whose accommodation it was made, to fill up the blank.

To impeach the title of a holder, for value of negotiable papers, by proof of any facts and circumstances outside of the instrument itself, it must be first shown that he had knowledge of such facts and circumstances at the time the transfer was made.

If the jury find that he had not such knowledge, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen.

A suspension of an existing demand is a sufficient and valid consideration.

The surrender of other instruments, although held as collateral security, is also a good consideration.

If there was a present consideration at the time of the transfer, independent of the previous indebtedness, the party acquiring a negotiable instrument before its maturity as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business.

And his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt, for which it is held as collateral.

Argued Feb. 2, 1858. Decided Apr. 26, 1858.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This was an action of assumpsit, brought in the Circuit Court of the United States for the District of Missouri, by the plaintiff in error against the defendant, as acceptor of a bill of exchange for $5,000, dated at Cincinnati, Ohio, Sept. 12, 1847, drawn by Wallace Sigerson in favor of John Sigerson, and accepted by the defendant at St. Louis, Missouri.

The defendant claimed in defense, that the bill in question was accepted by him and delivered to Wallace Sigerson, without any consideration, and for the purpose of enabling Wallace Sigerson, by obtaining its discount in Cincinnati, to raise money for the benefit of the defendant; that he had no authority to use it for any other purposes; that it was in fact misapplied by him, and that the plaintiff was not a bona fide holder for value, without notice of the defendant's rights. The court charged the jury, that if Wallace Sigerson never had any interest in the bill, nor in its proceeds, nor any authority to use the same for his own benefit, and dispose of it to the plaintiff's house for his own benefit, such facts and circumstances then being known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that said Wallace had no interest in the bill and no authority to use it for his own benefit, and by ordinary diligence the plaintiff could have ascertained that said Wallace Sigerson had no interest in said bill, and no authority to use the same for his own benefit, then they should find for the defendant.

Is this the correct rule applicable to the case?

The verdict and judgment in the court below having been for the defendant, the plaintiff brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Messrs. G. E. Pugh and Worthington & Matthews, for plaintiff in error:

I. The title of a holder of negotiable paper acquired before it was due, for valuable consideration, is not affected by the fraud of a prior party, in the absence of actual notice,

NOTE.—Rights of purchaser of bill or note, before maturity. See note to Mandeville v. Welch, 5 L. ed. U. S. 87.

Blanks filled in negotiable paper executed in blank; rights of bona fide holder—see note, 16 L. ed. U. S. 323.

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without proof of bad faith on the part of the holder.

This was the original rule declared in England.

Miller v. Race, 1 Burr. 452; Price v. Neale, 3 Burr, 1355; S. C. 1 Bl. 390; Grant v. Vaughan, 3 Burr. 1516; S. C. 1 Bl. 485; Anon. 1 Ld. Raym. 738; Peacock v. Rhodes, 2 Doug. 633; Lawson v. Weston, 4 Esp. 56; Morris v. Lee, 2 Ld. Raym. 1396; S. C. 1 Str. 629.

This rule was afterwards varied, and it was declared that the title of the holder of negotiable paper would not be protected, where it had been acquired under circumstances which ought to have excited the suspicions of the prudent and careful man.

Gill v. Cubitt, 3 B. & C. 466; Down v. Halling, 4 B. & C. 330; Snow v. Peacock. 2 Car. & P. 215; Beckwith v. Corrall, 2 Car. & P. 261; Snow v. Leatham, 2 Car. & P. 314; Slater v. West, 3 Car. & P. 325; Strange v. Wigney, 6 Bing. 677.

The rule was again modified, and it was held that the want of care necessary to impeach the title of the holder of negotiable paper, must have been gross.

Crook v. Jadis, 5 B. & Ad. 909; Backhouse v. Harrison, 5 B. & Ad. 1098.

Finally the original rule was restored, and it was decided that his title would be good unless the holder was guilty of bad faith. Lord Denman said: "We have shaken off the last remnant of the contrary doctrine."

Goodman v. Harvey, 4 Ad. & E. 870; Uther v. Rich, 10 Ad. & E. 784; Arbouin v. Anderson, 1 Ad. & E. N. S. 498; Stephens v. Foster, 1 Cromp. M. & R. 849; Palmer v. Richards, 1 Eng. L. & Eq. 529; Marston v. Allen, 8 Mees. & W. 494; Raphael v. Bank of England, 33 Eng. L. & Eq. 276.

The rule is understood in this country according to the latest cases in England.

Story, Bills Exch. 194, 416; Hall v. Wilson, 16 Barb. 550; Saltmarsh v. Tuthill, 13 Ala. 390.

Mr. H. S. Geyer, for defendant in error:

I. It having been established by the evidence at the trial that Wallace Sigerson, the drawer, had no interest in the bill sued on, and no authority to use, transfer, or otherwise dispose of it for his own benefit; that he transferred it to the plaintiff fraudulently, in violation of a special trust, the burden devolved upon him to prove that he acquired the bill in good faith, for a valuable consideration, in the usual course of trade; failing in that, he was not entitled to recover.

Baily v. Bidwell, 13 Mees. & W. 73; Harvey v. Towers, 6 Wels. H. & G. 656; Munroe v. Cooper, 5 Pick. 412; Bissell v. Morgan, 11 Cush. 198; Sandford v. Norton, 14 Vt. 228; Bertrand v. Barkman, 13 Ark. 150; Thompson v. Armstrong, 7 Ala. 256; Snyder v. Riley, 6 Pa. 164; McKesson v. Stanberry, 3 Ohio St. 156; Ware v. Boydell, 3 M. & S. 148; Beltzhover v. Blackstock, 3 Watts, 26; Vallett v. Parker, 6 Wend. 615; Catlin v. Hansen, 1 Duer, N. Y. 322.

II. The bill was not transferred absolutely and unconditionally, in the usual course of trade, for a valuable consideration. It was delivered to the plaintiff and received by him merely as collateral security for an antecedent debt, the general property remaining in the drawer, not in the plaintiff; there was no money, goods or credit given, or liability incurred; no security or valuable right relinliquished by the plaintiff, nor any new and distinct consideration of any kind for the transfer of the bill. Therefore the plaintiff was not a bona fide holder for value as against the defendant, so as to exclude the defenses which he had against the drawer.

Jenness v. Bean, 10 N. H. 266; Williams v. Little, 11 N. H. 66; Coddington v. Bay, 20 Johns. 637; Wardell v. Howell, 9 Wend. 170; Clark v. Ely, 2 Sandf. Ch. 166; White v. Springfield Bank, 1 Barb. 225; Stalker v. McDonald, 6 Hill (N. Y.) 93; Petrie v. Clark, 11 Serg. & R. 388; Jackson v. Polack, 2 Miles (Pa.) 362; Evans v. Smith, 4 Binn. 366; Napier v. Elam, 6 Yerg. 108; Nichol v. Bate, 10 Yerg. 429; Kimbro v. Lytle, 10 Yerg. 417; Van Wick v. Norvell, 2 Humph. 192; Prentice v. Zane, 2 Gratt. 262; Bank of Mobile v. Hall, 6 Ala. 639; Andrews v. McCoy, 8 Ala. 920; Bertrand v. Barkman, 13 Ark. 150; Anderson v. Long, 1 Mo. 365; Goodman v. Simonds, 19 Mo. 106.

III. It was fully proved and found by the jury, that the drawer (Sigerson) never had any interest in the bill or its proceeds, and no authority to dispose of it for his own benefit; that at the time of the transfer, facts and circumstances were known to the plaintiff which caused him to suspect, or would have caused a person of ordinary prudence to suspect, the defect of the title and authority of the drawer, and that by ordinary diligence he might have ascertained that the drawer had no interest in the bill, or authority to use it for his own benefit. The plaintiff must, therefore, be held to have taken the bill subject to all the defenses which the defendant had against the drawer.

Peacock v. Rhodes, 2 Doug. 633; Down v. Halling, 4 B. & C. 330; 2 Car. & P. 11; Snow v. Peacock, 3 Bing. 406; 2 C. & P. 215; Slater v. West, 3 Car. & P. 325; Solomans v. Bank of England, 13 East, 135; Gill v. Cubitt, 3 B. & C. 466; De La Chaumette v. Bank of England, 9 B. & C. 208; Haynes v. Foster, 4 Tyrw. 65; Hatch v. Searles, 31 Eng. L. & Eq. 219; Ayer v. Hutchins, 4 Mass. 370; Cone v. Baldwin, 12 Pick. 545; Hall v. Hale, 8 Conn. 336; Beltzhover v. Blackstock, 3 Watts, 25; McKesson v. Stanberry, 3 Ohio St.; Russell v. Hadduck, 3 Gilm. (Ill.) 233; Nicholson v. Patton, 13 La. 216; Lapice v. Clifton, 17 La. 152; Lanfear v. Blossman, 1 La. Ann. 156; La. State Bank v. N. O. Nav. Co. 3 La. Ann. 294; Fowler v. Brantley, 14 Pet. 318; Andrews v. Pond, 13 Pet. 79.

According to the established rule of law governing the rights and liabilities of parties to negotiable instruments which have been unlawfully or fraudulently put in circulation, the bona fide holder may recover thereon, provided he took it bona fide before it became due, in the usual course of trade or business, for a valuable consideration, and without notice of the facts which impeach its validity; and he need not account for his possession, or show what consideration he gave for it, until its validity is impeached by evidence. The policy of sustaining the credit and circulation of negotiable paper requires (and it is but just), that if one of two equally innocent parties must sustain

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loss he who has suffered a negotiable security to get into circulation, ought to bear the loss.

Chit. on Bills, ch. 3, sec. 1, p. 79 (10 Am. ed.); Bayley on Bills, 544 (2 Am. ed.); 3 Kent's Com. pp. 93–98 (8th ed.); Bay v. Coddington, 5 Johns. Ch. 54; S. C. 20 Johns. 637.

The principle and policy of the rule requires that a bona fide holder shall recover only the amount actually advanced for the transfer of the paper.

Wiffen v. Roberts, 1 Esp. 261; Robbins v. Maidstone, 4 Ad. & E. N. S. 811; Edwards v. Jones, 7 Car. & P. 633; S. C. 2 Mees. & W. 414; Alaire v. Hartshorne, 1 Zab. 665; Holeman v. Hobson, 8 Humph. 127; Vallette v. Mason, 1 Smith, Ind. 89; Chit. Bills, 79; Story Bills, sec. 188.

The adjudged cases in England exhibit the concurrent authority of all the decisions in bank, in support of the doctrine that the holder of a negotiable instrument who has taken it without reasonable caution, and under circumstances which ought to have excited the suspicion of a prudent and careful man that it was not good, is not protected against the defenses of prior parties.

Haynes v. Foster, 4 Tyrw. 65; Beckwith v. Corrall, 3 Bing. 444; Snow v. Saddler, 3 Bing. 610; Strange v. Wigney, 6 Bing. 677; Easley v. Crockford, 10 Bing. 243; Snow v. Peacock, 3 Bing. 406; Down v. Halling, 4 B. & C. 330; Egan v. Threlfall, 5 Dowl. & R. 326; Gill v. Cubitt, 3 Barn & C. 466; overruling Lawson v. Weston, 4 Esp. 56; Peacock v. Rhodes, 2 Doug. 633; Miller v. Race, 1 Burr. 452. It is claimed, however, that this doctrine has been overruled by more recent decisions (Crook v. Jadis, 5 B. & Ad. 909; Backhouse v. Harrison, 5 B. & Ad. 1098 and Goodman v. Harvey, 4 Ad. & E. 870), and it must be conceded that they do in terms repudiate that doctrine so long and firmly established; but it may well be questioned whether they are of sufficient authority to overturn it and change the law in England, or induce the American courts to abandon it.

The case of Crook v. Jadis was an action by an indorsee against the drawer of an accommodation bill; it was tried at the Middlesex sittings, after Michaelmas Term, 1833, before Denman, Ch. J., who told the jury to find for the plaintiff, if they thought he had not been guilty of gross negligence in taking the bill under the circumstances given in evidence. The jury having found for the plaintiff, the counsel for the defendant moved for a new trial, citing Down v. Halling, 4 B. & C. 330. The motion was disposed of in a very summary way by the court in bank. Denman, Ch. J., said: "I used the expression 'gross negligence' advisedly, because I thought nothing less ought to have prevented the plaintiff recovering on the bill." Littledale, J. who had approved the existing doctrine in Rothschild v. Corney, 9 B. & C. 388. said: "There must be gross negligence at least in a case like the present, to deprive the party of his right to recover on a bill of exchange."

Taunton, J., said: "I think the case was properly submitted to the jury. I cannot estimate the degree of care which a prudent man should take. The question put by the Lord Chief Justice whether the plaintiff was guilty of gross negligence, was more definite and appropriate." Patteson, J., said: "I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man." In Backhouse v. Harrison, decided at the same term, the same doctrine was held on the authority of Crook v. Jadis; no additional reasons are given for the opinion except that Patteson, J., had "no hesitation in saying that the doctrine first laid down in Gill v. Cubitt, and acted upon in other cases, has gone too far and ought to be restricted." In Goodman v. Harvey, decided in 1836, a non-suit was taken, and the case came before the court in bank on a rule nisi for a new trial. The only opinion reported was by Lord Denman, Ch. J., who said: "The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of mala fides, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

The ruling in the last case is at variance with the decisions in the two preceding, made by the same court only two years before, and is coincident with the doctrine urged by Mr. Denman, as counsel in Down v. Halling, without success. In all of them it is assumed that the holder is not affected by constructive notice of the defect or infirmity in the title. In neither of them is the decision placed upon principle or authority, or sustained by any intelligible judicial reasoning. Decisions so arbitrary and inconsistent, cannot be regarded as of sufficient authority to overturn the doctrine established by an uninterrupted series of decisions by the courts of King's Bench, Common Pleas, and Exchequer, and founded on principle as well as authority.

The more recent cases cited in support of the doctrine of Lord Denman are Stevens v. Foster, 1 Cromp. M. & R. 849; Uther v. Rich, 10 Ad. & E. 784; Arbouin v. Anderson, 1 Ad. & E. N. S. 498; and Masters v. Ibberson, 8 Com. B. 100. In the first of these cases the question was not made, but the case was considered by the court in bank, together with Foster v. Pearson, arising out of the same transaction; and it was in reference to the direction given to the jury at the trial of the latter case (as in Gill v. Cubitt), that Baron Park, in delivering the judgment of the court, expressed a doubt of its propriety, especially since the decisions of the King's Bench in Crook v. Jadis and Backhouse v. Harrison, but said it was unnecessary to decide the question then, and, assuming the directions to be correct, decided the case on other grounds.

In the other cases, the questions arose on the pleadings under the new rules.

It does not appear that the doctrine in the case of Goodman v. Harvey has been held by any court except the King's Bench, and in the case of Hatch v. Searles, decided in 1854 (31 Eng. L. & Eq. 219), the doctrine repudiated by the King's Bench was distinctly asserted.

The American courts do not appear to have had much difficulty at any time in determining

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what facts and circumstances would amount to actual or constructive notice of any defect or infirmity in a bill. In every case in which the question was presented (with the exception of one in Georgia), the language of the judges, as to the necessity of caution on the part of the holder, and of inquiry when he had cause to suspect the title to a bill, has been explicit. Before the decision of the case of Gill v. Cubitt, the doctrine it recognizes had been held in two of the States, by courts of as high authority on questions of commercial law as any of the courts of England, or any other country.

As early as 1808, the Supreme Court of Massachusetts held, in Ayer v. Hutchins, 4 Mass. 370, that "where the indorsee receives the note under circumstances which might reasonably excite suspicion, he ought, before he takes it, to inquire into its validity; and if he does not, he takes it subject to any legal defense that could defeat a recovery by the payee. In 1815 the Supreme Court of New York, in Wiggin v. Bush, 12 Johns. 306, where the note sued on was dated 24th May, and it appeared by an indorsement that it was in fact made 22d April, held, that by the indorsement on the note of the real date, the plaintiff (indorsee) had information which ought to have led to inquiry into the manner in which the note had been obtained by the payee; the past dating a note which was indorsed, was an extraordinary circumstance and ought to have excited suspicion; and that their neglect to make the inquiry subjected them to all the consequences of the transaction between the immediate parties.

See, also, Brown v. Taber, 5 Wend. 566; Hall v. Hale, 8 Conn. 336; Hunt v. Sandford, 6 Yerg. 387; Bentzhoover v. Blackstock, 3 Watts, 25; Nicholson v. Patton, 13 La. 216; Lapice v. Clifton, 17 La. 152.

In Andrews v. Pond, 13 Pet. 65, Chief Justice Taney said: "A person who takes a bill which, upon the face of it, was dishonored, cannot be allowed to claim the privileges which belong to a bona fide holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it."

See, also, Fowler v. Brantley, 14 Pet. 318; Sandford v. Norton, 14 Vt. 228; McConnell v. Hodson, 2 Gilm. 640; Russell v. Hadduck, 3 Gilm. 233; Mathews v. Poythess, 4 Ga. 287; Louisiana State Bank v. N. O. Nav. Co. 3 La. Ann. 294; McKesson v. Stanberry, 3 Ohio St. 156; Holbrook v. Mix, 1 E. D. Smith, 154.

It is a well established principle that whatever is notice enough to excite attention, and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed to have notice of it.

Kennedy v. Green, 3 Myl. & K. 719; Sugd. V. & P. 1052; Pringle v. Phillips, 5 Sandf. 157.

The decisions which have been cited of all the courts of England in bank, prior to 1834, and of the American courts at all times, with a single exception, are but the application of the general principles to particular cases. That principle applied to this case is decisive against the plaintiff, as well upon the undisputed facts proved at the trial as those found by the jury.

It was proved beyond controversy that the plaintiff took the bill with a full knowledge of several facts and circumstances, each one of which has been held deficient to charge a holder of negotiable paper with notice of defects or infirmities in the title. He took the bill which he had refused to discount, from his debtor known to be insolvent, merely as a pledge to secure a desperate debt.

See Eagan v. Threlfall, 5 Dowl. & R. 326; Bay v. Coddington, 5 Johns. Ch. 54.

He received it with a knowledge that it had been a long time in the hands of his debtor in blank, while he was in pecuniary difficulties.

Hatch v. Searles, 31 Eng. L. & Eq. 219.

He not only knew the bill to be falsely dated, but he himself filled the blank with the false date it bore.

Wiggin v. Bush, 12 Johns. 306.

He attempted to pass it off, not only without the indorsement of his firm or his own (Holbrook v. Mix, 1 E. D. Smith, 154), but gave a false reason for refusing to indorse. Neither the plaintiff nor his firm had authority to sell the bill for another; on the contrary, they had stipulated not to dispose of it nor put it into circulation before the maturity of the notes of their debtor. The demand by the debtor of such a stipulation was alone sufficient to put the plaintiff and his firm on their guard. Under these circumstances the plaintiff cannot complain, if he is held to have taken the bill subject to the defenses of the defrauded acceptor.

Mr. Justice Clifford delivered the opinion of the court:

This was a writ of error to the Circuit Court of the United States for the District of Missouri.

Timothy S. Goodman, a citizen of the State of Ohio, complained in the court below of John Simonds, a citizen of the State of Missouri, in a plea of trespass on the case upon promises. The declaration was filed on the 1st day of March, 1854. It contained two counts—one upon a bill of exchange, and the other upon an account stated. At the April Term following, the defendant appeared and pleaded the general issue, which was joined, and several special pleas in bar of the action. The special pleas were held bad on demurrer, and at the October Term, 1855, the parties went to trial on the general issue, Robert M. Nesbit, a witness called for the plaintiff, testified that he was a notary public of the County of St. Louis; and that, as such, on the 15th day of January, 1848, he presented the bill in suit for payment to John Simonds, the acceptor, who refused to pay it, and that he afterwards gave due notice of the presentment and refusal to both indorsers. And the witness further testified, that he was well acquainted with the signatures of all the parties to the bill, except that of the drawer, and that they were genuine. Whereupon the plaintiff read in evidence the bill of exchange described in the first count of the declaration, together with the indorsements thereon, as they appear in the record. W. Nesbit & Co. were merely nominal holders *of the bill, never having had any inter- [*357 est in it, and only indorsed it to the plaintiff for the greater convenience in bringing the suit. Evidence was then introduced on the

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part of the defendant, exhibiting substantially the following state of facts: On the 21st day of June, 1847, the defendant addressed a letter to Wallace Sigerson, who resided at Cincinnati, informing him that he wished to avail himself of banking facilities in that place, to carry on certain business, in which he and John Sigerson had determined to engage, and asking his assistance, as a correspondent, to negotiate discounts, inclosing at the same time, his letter of credit for $10,000, and two bills of exchange, each for the sum of $5,000, and suggesting in the same letter that they should require some $20,000 to $25,000 during the next four or five months, in sums of about $5,000, as the same could be used from time to time. In the same letter also he instructed his correspondent to negotiate $5,000 immediately, authorizing him to use for that purpose either the letter of credit or the bills of exchange. When those bills were transmitted to Cincinnati, they were in all respects perfect bills of exchange, except that the name of the drawer was wanting, and they were without date. They were both made payable to the order of John Sigerson, and by him indorsed in blank, and were accepted by the defendant. Soon after their receipt, Wallace Sigerson, as drawer, procured one of the bills to be discounted according to his instructions, and remitted the proceeds, or a part thereof, to the defendant; and it also appeared that, during that season, he procured other bills of the same kind, to be discounted for the same parties, to the amount of $25,000. The other bill forwarded at that time is the one now in suit. Wallace Sigerson had also large transactions of his own, the same season, amounting to $400,000. Many of his own transactions were with his brother, John Sigerson, who was the payee and indorser of this bill, and was jointly engaged in the same business with the defendant. He and his brother interchanged accommodation paper, and some of their acceptances were regularly discounted in bank, and it did not appear that any complaint was made, either by the acceptor or indorser, that this bill had not been accounted for or returned. There were dealings, also, the same season, between T. S. Goodman & Co. and Wallace Sigerson. They made a settlement on the 12th day of October, 1847, when it was ascertained that the amount due to T. S. Goodman & Co. was about $5,600, arising principally from notes discounted, secured by bills of exchange as collat-
358*] erals, on which nothing *had been realized. At the settlement, the debt was divided into two notes, one having sixty and the other seventy-five days to run; and Wallace Sigerson testified that he gave his two notes in payment of the debt, and left this bill as collateral security to the notes, fixing the dates so that the notes would mature twelve or fifteen days before the bill. Two drafts on Ravisess, Bulock & Co., previously held as collaterals, were embraced in the settlement, and formed a part of the indebtedness for which the notes were given; and McDonald, who was the bookkeeper of the plaintiff's firm, and a witness for the defendant, testified he knew of no other collateral security than this bill, which the firm held for those notes. It would seem, therefore, that all the prior collaterals were surrendered to the defendant at the settlement. There is some confusion, and perhaps uncertainty, in the evidence reported, respecting the history of the bill from the time it went into the possession of Wallace Sigerson till it was thus placed in the hands of T. S. Goodman & Co., as collateral security to the above mentioned notes. It may, however, be gathered from the testimony of Wallace Sigerson, that he first offered it for discount to the Ohio Life and Trust Company, and shortly afterward to the plaintiff, for the same purpose, and that the plaintiff declined to discount it, but soon after took it as collateral security for temporary loans. How long the bill remained in the possession of the plaintiff as collateral security for temporary loans does not appear, nor for whose benefit the money was obtained. When the settlement took place, Wallace Sigerson told the plaintiff that he had a right to use the bill, and the plaintiff agreed that it should not be sent to St. Louis for collection till after the maturity of the notes to which it was collateral. Nothing of the kind was agreed when it was left as collateral security for temporary loans. Wallace Sigerson became the drawer of this bill, as he had previously done with respect to the other, which was sent him at the same time, and filled up the date, but whether at the time of the settlement, or previously, was not entirely certain. He failed in business in November, 1847, and on the twentieth day of the same month, T. S. Goodman & Co. addressed a letter to C. W. Clark & Brothers, inclosing this bill, and requesting them to pass it at the least rate, not exceeding twelve per cent. interest, saying, "We do not indorse it, as we are selling it for another; and when L. C. Clark, one of that firm, a few days afterward offered the bill for sale to the defendant, "he said it was a forgery of his name; that Wallace Sigerson had no authority to use it." At the trial, the court, on the prayer of the plaintiff, instructed the jury to the effect, that if the plaintiff acquired the bill of Wallace Sigerson as *collateral [*359 security without notice of his want of authority to transfer it, that the plaintiff was unaffected by such abuse of trust, and that the defendant was precluded from setting it up as a defense in this suit, to which no exceptions were taken. We pass over the first instruction given to the jury on the prayer of the defendant, for the same reason that it was not excepted to, and proceed to examine the second, as amended by the court, which presents the principal subject of controversy at the present time. It was to the effect, that "if such facts and circumstances were known to the plaintiff as caused him to suspect, or would have caused one of ordinary prudence to suspect, that Wallace Sigerson had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts, then the jury will find for the defendant."

I. The general question which the bill of exceptions presents, arising upon that instruction, is certainly one of very considerable importance, especially to the mercantile community, as it affects the transfer and free circulation of bills of exchange and promissory notes, which, by virtue of their negotiable quality, constitute the principal medium for the trans-

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action of their business affairs. There is, however, some reason to doubt whether the evidence at the trial furnished any proper basis for the application of the instruction in this case, even supposing the principle announced to be correct as an abstract proposition; and this gives rise to a preliminary question, which will be first considered, whether the instruction ought not to be regarded as objectionable on that account. When a prayer for instruction is presented to the court, and there is no evidence in the case for the consideration of the jury, it ought always to be withheld; and as a general rule, if it is given under such circumstances, it will be error in the court, for the reason that its tendency may be and often is to mislead the jury, by withdrawing their attention from the legitimate points of inquiry involved in the issue. All that was shown at the trial, in addition to the description of the bill, was the refusal of the plaintiff to discount it when it was offered for that purpose, his possession and control of it shortly after, as a pledge for temporary loans, and the subsequent transfer of the bill to him as collateral security at the settlement, together with the circumstances of that transaction, and what appeared in the letter of T. S. Goodman & Co., transmitting the bill to St. Louis for sale. Other circumstances are adverted to in the printed argument for the defendant; but as they do not appear to be sustained by the evidence in the case, they are omitted. Nothing transpired when the bill was 360*] offered for discount, more than *what occurs on similar occasions in the daily transactions among business men. It was offered and declined, and that was the whole transaction, so far as it was disclosed in the evidence. No reasons were assigned by the plaintiff for declining, and none were asked for by the holder, who offered the bill. Mere speculative inferences are never allowable, and cannot be regarded as evidence. The refusal to discount the bill might have been for the reason supposed in the instruction; and so also it might have been for a very different reason, such as a prior obligation to other customers, want of available funds, or from a desire for farther information as to the pecuniary standing of the parties to this bill; and whether it was for any one of the reasons suggested, or some other, in the absence of any explanation, was a mere naked conjecture. Another answer may also be given to this suggestion, which is equally decisive, and that is the subsequent conduct of the plaintiff in taking the bill as a pledge for temporary loans, which seems to negative the supposition altogether that the previous refusal to discount it was on account of any suspicion he entertained, either as to the genuineness of the paper or of the authority of the holder to pass it. Some time elapsed, after the bill was offered for discount, before it was finally transferred to the plaintiff, and that fact undoubtedly was well known to the plaintiff at the time of the transfer; and so also was the more important one in this investigation, that during all that time the bill remained in the custody or under the control of Wallace Sigerson, as the ostensible owner, and that he claimed and exercised over it all the rights of a holder for value. If these circumstances are taken in connection with each other, as they unquestionably should be, there can be no doubt they were far better suited to inspire confidence in the title of the holder than to excite suspicion in regard to his authority to pass the bill; and if they had that effect, it was plainly the fault of the defendant in executing and forwarding the bill to his correspondent, and in intrusting it to his control, and suffering it to remain in his custody without inquiry or complaint. The want of date to the bill at the time it was offered for discount, under the circumstances disclosed in the evidence, was entirely an immaterial consideration. When the defendant sent the bill to Wallace Sigerson, indorsed in blank and without date, and intrusted it to his care and discretion, to be used for his own benefit, he thereby empowered him to fill the blank, as a necessary incident to the trust conferred, just as effectually as if the authority had been expressly delegated by the terms of the letter in which it was sent. Nor was it of any consequence that it was antedated, as compared with the time *when it was passed to [*361 the plaintiff, inasmuch as it was filled up by his own correspondent, before he parted with its possession and control, and was actually made to bear date subsequent to the time when it was received from the defendant. In filling it up, he but carried into effect one of the purposes for which it had been forwarded, as is plainly indicated from the general scope and design of the letter. He was authorized to use the bill to raise money for the benefit of the defendant; and in order to use the bill for that purpose, it must have been expected that he would become the drawer, and fill up the date at his discretion. Independently, however, of the terms of the letter, it may be asserted as a general principle, that where a party to a negotiable bill of exchange or promissory note intrusts it to the custody of another, when it is without date, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such bill or note carries on its face an implied authority to fill up the blank; and, as between such party to the bill or note and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such bill or note to his custody, and as acting under his authority, and with his approbation. Mitchell v. Culver, 7 Cow. 336, and note.

The general doctrine on this subject, and the reasons on which it is founded, are stated by Shaw, Ch. J., in Androscoggin Bank v. Kimball, 10 Cush. 373, as follows: "The rule is very clear, that if one party, intending to accommodate another, signs his name to a blank paper, he authorizes the other to whom he delivers it, and for whose accommodation it was made, to fill up the blank; and the filling up, being done by his authority, is his act, and he is bound by it; and we concur in the principle, and think it applies with even more force when it was done for his own benefit, as in this case." Violet v. Patton, 5 Cranch, 142; Russell v. Langstaffe, 2 Doug. 514; Collins v. Emett, 1 H. Black. 313; Montague v. Perkins, 22 Eng. L. & Eq. 516.

The circumstances thus far considered, we think, afforded no ground of inference whatever to support the theory of fact assumed in

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the instruction. But it is more difficult to dispose of those that follow in the same way, on account of the extremely indefinite nature of the inquiry arising under the instruction. One man is more readily influenced to suspect fraud in matters of business than another, and the same individual may be differently impressed by similar transactions occurring at different times under precisely similar circumstances; so that in some cases, where the evidences to ex-
362*] cite suspicion were *slight, it might be impossible to determine whether they were or were not of a character to be regarded as tending to support an issue like the one presented under the first branch of the instruction, without first ascertaining the general characteristics of the mind of the individual who was the subject of the inquiry, and his usual habit in conducting his business affairs. A striking illustration of the difficulty attending the investigation is to be found in the instruction itself, assuming for the present that it must be understood according to the usual import of the language employed. Under its first branch it was necessary, in order to relieve the defendant, that the jury should find that such facts and circumstances were known to the plaintiff as caused him to suspect the title or authority of the holder to transfer the bill. But the jury might come to the conclusion that the plaintiff was thoughtless, confiding, or inattentive on the occasion, and that he in fact took the bill without any such suspicion; and to guard against the effect of such a finding, the second branch of the instruction was framed, and under that it was of no consequence whether the plaintiff himself suspected the title of the holder or not, as the defendant was, nevertheless, to be fully exonerated if the jury found that such facts and circumstances were known to him as would have caused one of ordinary prudence to suspect, and by ordinary diligence he could have ascertained, the true state of the title. Here was an attempt to prescribe a standard in the investigation, by which the degree of suspicion intended to be required to defeat the claim of the plaintiff could be ascertained and measured by the jury; but under the first branch of the instruction no such attempt was made, and no other criterion was furnished to guide the jury in their deliberations, than mere naked suspicion; and consequently, if the jury believed, from the evidence in the case, that the plaintiff at the time of the transfer suspected the title or authority of the holder to pass the bill, no matter how slight his suspicions were, they were directed to return their verdict for the defendant. With this explanation as to the nature of the present inquiry, we will proceed to notice the remaining circumstances relied on as evidence in the case to support the instruction. They consist of the knowledge that the plaintiff is supposed to have acquired at the settlement, that Wallace Sigerson was embarrassed in his business affairs, and of the subsequent conduct of his firm, in forwarding the bill to St. Louis before the maturity of the notes, and the remark in their letter that they did not indorse the bill, as they were selling it for another. These circumstances are consistent with the proposition of fact assumed in the instruction; and though they are susceptible of an en-
363*] tirely *different explanation, yet perhaps it would be going too far to say, as matter of law, that they afforded no ground of inference in the direction supposed by the defendant. We think, therefore, that the judgment ought not to be reversed on the ground that there was no evidence in the case to authorize the instruction. We say so, however, in reference to the peculiar issue arising under that instruction, and the form of the questions submitted to the jury, and not in respect to any different issue which may properly arise hereafter in cases of this description. There is a wide difference between suspicion and knowledge in respect to the subject matter under consideration, and even as between the evidences of suspicion, and such as would show gross negligence on the part of a banker or business man when discounting or purchasing negotiable paper transferable by delivery. A person may often suspect in matters of business what in fact he does not believe, and experience teaches that he will sometimes suspect what he has no reason to believe, and that, too, when the evidences to excite suspicion are so slight that he himself would scorn to acknowledge them as the basis of his action in the premises. Evidence merely tending to show, as in this case, that a party, in acquiring a negotiable bill of exchange or promissory note, suspected the title of the holder at the time of the delivery, would clearly be insufficient to authorize the conclusion that he was guilty of gross negligence when the transfer was made, and it would hardly constitute an approach towards proof that he had knowledge that such holder, who was known to be dealing in such paper, and claimed the right to use it, was guilty of any breach of trust in passing it.

II. The more important question, whether the instruction was correct, remains to be considered; and in approaching that question it becomes necessary, in the first place, to ascertain what the instruction was, and to deduce from it the principle of commercial law which was applied to the case. It was somewhat peculiar in its language, and, in fact, contained two distinct propositions, differing essentially in certain aspects, and not entirely reconcilable with each other; and yet we cannot doubt that the Circuit Court, in giving the instruction to the jury, intended to apply the doctrine to the case, that the title of the holder of a negotiable bill of exchange acquired before maturity is not protected against prior equities of the antecedent parties to the bill, where it was taken without inquiry, and under circumstances which ought to have excited the suspicions of a prudent and careful man. Such was certainly the general scope of the instruction, especially its second proposition; and such, it may be presumed, was the general *principle [*364 intended to be embodied in the questions submitted to the jury. They have been so treated here in the oral argument for the plaintiff, and were treated in the same way in the printed argument filed for the defendant. Whether either or both of the questions, in the form in which they were submitted, were objectionable as involving a departure from the doctrine intended to be applied, it will not become necessary to inquire. One thing is certain —if the general principle cannot be sustained, there is nothing in the features of the departure from it, or the

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particular phraseology of the questions submitted, to benefit the defendant. Undoubtedly the same general idea pervaded the instruction, though the questions were submitted to the jury in different forms, in order to meet the different aspects of the evidence in the case. It was to the effect, that if the plaintiff had acquired the bill under the circumstances described in either branch of the instruction, then he had acted without due caution, and was not entitled to recover. All the other grounds of defense had been provided for in other prayers for instruction. This one was obviously prepared to raise the single question, whether the plaintiff had acted with due caution in acquiring the bill, and consequently assumed all the other requisites of a good title in favor of the plaintiff. The only question, therefore, arising under the instruction, is, whether the rule of commercial law applied to the case was correct.

Bills of exchange are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by indorsement; or when indorsed in blank, or made payable to bearer, they are transferable by mere delivery. The law encourages their use as a safe and convenient medium for the settlement of balances among mercantile men; and any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy. Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world. A well defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in Swift v. Tyson, 16 Pet. p. 1, as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion; as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, 365*] and we *now repeat, that a bona fide holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fundamentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the court, and we see no reason to qualify or change it in any respect. Such being the settled law in this court, it would seem to follow as a necessary consequence from the proposition as stated, that if a bill of exchange, indorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no knowledge of these facts, for a valuable consideration, and in the usual course of business, his title would be good, and that he would be entitled to recover the amount. The law was thus framed, and has been so administered, in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this principle is so comprehensive in respect to bills of exchange and promissory notes, which pass by delivery, that the title and possession are considered as one and inseparable, and in the absence of any explanation the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title. These principles are certainly in accordance with the general current of authorities, and are believed to correspond with the general understanding of those engaged in mercantile pursuits. The word "notice," as used by this court on the occasion referred to, we think must be understood in the same sense as "knowledge," and indeed that is one of its usual and appropriate significations. Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether a party who took it had notice or not, is in general a question of construction, and must be determined by the court as matter of law; and so it was understood by this court in Andrews v. Pond et al. 13 Pet. 65, where it is said that "a *person [*366 who takes a bill which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a bona fide holder. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." And the same doctrine was adopted and enforced in Fowler v. Brantly, 14 Pet. 318, where, in speaking of a promissory note so marked as to show for whose benefit it was to be discounted, this court held that all those dealing in paper "with such marks on its face, must be presumed to have knowledge of what it imported." See Brown v. Davis, 3 T. R. 80.

Other cases of like character, where the defect appears on the face of the instrument, are referred to in the printed argument for the defendant as affording a support to the instruction under consideration; but it is so obvious that they can have no such tendency, that we forbear to pursue the subject. Ayer v. Hutchins, 4 Mass. 370; Wiggin v. Bush, 12 Johns. 306; Cone v. Baldwin, 12 Pick. 545; Brown v. Taber, 5 Wend. 566.

But it is a very different matter when it is proposed to impeach the title of a holder for value, by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had

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knowledge of such facts and circumstances at the time the transfer was made. Nothing less than proof of knowledge of such facts and circumstances can meet the exigencies of such a defense; else the proposition as stated is not true, that a party who acquires commercial paper in the usual course of business, for value and without notice of any defect in the title, may hold it free of all equities between the antecedent parties to the instrument. Admit the proposition, and the conclusion follows. And the question whether the party had such knowledge or not, is a question of fact for the jury, and, like other disputed questions of scienter, must be submitted to their determination, under the instructions of the court; and the proper inquiry is, did the party, seeking to enforce the payment, have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? and if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen. Every one must conduct himself honestly in respect to the antecedent parties, 367*] when he takes negotiable *paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke, in May v. Chapman, 16 Mees. & W. 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith. Mere want of care and caution, which was the criterion assumed in the instruction, falls so far below the true standard required by law, which is knowledge of the facts and circumstances that impeach the title, that we feel indisposed to pursue the general discussion, and proceed to confirm the views we have advanced as to what the law is, by referring to some of the decisions in the English courts, from which, as an important source of commercial law, most of our own rules upon the subject have been derived.

The leading case among the more modern decisions in that country, is that of Goodman v. Harvey, 4 Ad. & E. 870. That was a case in bank, on a rule nisi, which was made absolute. Lord Denman, in delivering judgment, said: "We are all of opinion that gross negligence only would not be a sufficient answer, where a party has given consideration for the bill; gross negligence may be evidence of mala fides, but it is not the same thing. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." That case was followed by Uther v. Rich, 10 Ad. & E. 784, which was also argued before a full court, and the same learned judge held that the only proper mode of implicating the plaintiff in the alleged fraud by pleading was to aver that he had notice of it, leaving the circumstances by which that notice was to be proved, directly or indirectly, to be established in evidence; and he further held, that an averment that the plaintiff was not a bona fide holder was not equivalent. According to the rule laid down in Goodman v. Harvey, which indubitably is the settled law in all English courts, proof that the plaintiff had been guilty of gross negligence in acquiring the bill, ought not to defeat his right to recover; and if not, it serves to exemplify the magnitude of the error assumed in the instruction, that any facts and circumstances which would excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect; both cannot be upheld. Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover—and clearly it would *not, un- [*368 less attended by bad faith—it cannot require any farther reasoning to demonstrate that the instruction was erroneous. Several cases have been decided in England upon the same subject, and to the same effect, and the rule laid down in Goodman v. Harvey is now adopted and sanctioned by the most approved elementary treatises upon commencial law. Raphael v. The Bank of England, 33 Eng. L. & Eq. 276; Stephens v. Foster, 1 Cromp. M. & R. 849; Palmer v. Richards, 1 Eng. L. & Eq. 529; Arbouin v. Anderson, 1 Ad. & Ell. N. S. 498; May v. Chapman, 16 Mees. & Wels. 355; Chitty on Bills, 12th ed. 257; Story on Bills, 3d ed. sec. 416; Byles on Bills, 4th Am. ed. 121 to 126; Smith's Mer. Law, ed. 1857, 255; Edwards on Bills, 309; 1 Saund. Pl. & Ev. 591; Wheeler v. Guild, 20 Pick. 545; Brush v. Scribner, 11 Conn. 388; Backhouse v. Harrison, 5 Barn. & Ad. 1098; Gwynn v. Lee, 9 Gill. 138.

These cases, beyond controversy, confirm the rule laid down by this court in Swift v. Tyson, and they also furnish the fullest evidence, by their harmony each with the other, as well as by their entire consistency with the principal case, that the law has been uniform since the decision in Goodman v. Harvey, which was decided in 1836; and we think it will appear, upon an examination, that it has always been the same, at least from a very early period in the history of English jurisprudence down to the present time, except for an interval of about twelve years, while the doctrine prevailed which is now invoked in support of the instruction in this case. That doctrine had its origin in Gill v. Cubitt, 3 Barn. & C. 466, and it was followed by the other cases referred to in the printed argument for defendant. It was decided in 1824, and it is true, as the cases cited abundantly show, that it was acquiesced in for a time, as a correct exposition of the commercial law upon the subject under consideration. At the same time, it is proper to remark, that there is not wanting respectable authority that it had been much disapproved of before it was directly questioned; and it is certain, that nearly two years before it was finally overruled Parke, Baron, in delivering judgment in Foster v. Pearson, 1 Cromp. M. & R. 849, regarded it as a mere dicta, rather than the decision of the judges of the King's Bench." See Raphael v. The Bank of England, per Cresswell, 33 L. & Eq. 276. The reasons assigned for that departure from the long established rule upon the subject are as remarkable and unsatisfactory as the change was sudden and radical, and yet their particular examination at this time is unnecessary. It is a sufficient answer to the case to say, that it has been distinctly overruled in

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the tribunal where it was decided, and has not been considered an authority in that court 369*] *for more than twenty years. The doctrine, says Mr. Chitty, in his treatise on bills, is now completely exploded, and the old rule of law that the holder of bills of exchange, indorsed in blank and transferable by delivery, can give a title which he does not possess, to a person taking them bona fide for value, is again re-established in its fullest extent. It was not, however, accomplished at a single blow, but the error, so to speak, was literally broken up and destroyed by installments. The foundation of the superstructure was severely shaken in Crook v. Jadis, 5 Barn. & Ad. 909, when the full bench first came to the conclusion that want of due care and caution were insufficient to constitute a defense, and that gross negligence, at least, must be shown, to defeat a recovery. But it was left to the case of Goodman v. Harvey, 4 Adol. & E. 870, to announce a complete correction of the error, when Lord Denman declared, we have shaken off the last remnant of the contrary doctrine.

A brief reference to some of the earlier cases will be sufficient to show that the decision in Gill v. Cubitt, 3 Barn. & C. 466, was a departure from the well known and long established rule upon the subject under consideration. One of the earliest cases usually referred to is that of Hinton's case, reported in 2 Show. 235. It was an action of the case against the drawer upon a bill of exchange payable to bearer. The court ruled that the holder must entitle himself to it on a consideration: "for if he come to be bearer by casualty or knavery, he shall not have the benefit of it;" and so in Anonymous, 1 Salk. 126, where a bank note payable to A, or bearer, was lost, and found by a stranger, and by him transferred to C, for value. Holt, Ch. J., held that "A might have trover against the stranger, for he had no title to it, but not against C, by reason of the course of trade, which creates a property in the bearer." And again in Miller v. Race, 1 Burr, 452, where an inn-keeper received a bank note from his lodger in the course of business, and paid the balance, Lord Mansfield held that he might retain it, as he came by it fairly and bona fide, and for value, and without knowledge that it had been stolen. And on a second occasion, in Grant v. Vaughan, 3 Burr, 1516, where a bill payable to bearer was lost, and the finder passed it to the plaintiff, the same court left it to the jury to find whether he came to the possession fairly and bona fide. But a still stronger case is that of Peacock v. Rhodes, 2 Doug. 633, where a bill of exchange, indorsed in blank, was stolen and passed to the plaintiff by a man not known. It was argued for the defendant, that a holder should not in prudence take a bill unless he knew the person. Lord Mansfield answered, "that the law is well settled, that a holder coming fairly by a bill has nothing to do with 370*] the transaction between *the original parties. . . . The question of mala fides was for the consideration of the jury." And lastly, and to the same effect, is Lawson v. Weston et al. 4 Esp. 56, where a bill of exchange for £500 was lost or stolen, and was discounted by plaintiff for a stranger. It was insisted for the defendant, that "a banker or any other person should not discount a bill for one unknown without using diligence to inquire into the circumstances." Lord Kenyon replied, that "to adopt the principles of the defense would be to paralyze the circulation of all the paper in the country, and with it all its commerce; that the circumstance of the bill having been lost, might have been material, if they could bring knowledge of that fact home to the plaintiff." The cases cited, commencing in 1694 and ending in 1801, are sufficient to show what the state of the law was in 1824, when Gill v. Cubitt, 3 Barn. & C. 466, was decided, especially as the judges of the King's Bench, in giving their opinions on that occasion, did not pretend that there were any later decisions in which it had been modified.

III. But assuming that the instruction was erroneous, it is still insisted, by the course of the argument for the defendant, that it was immaterial; and the argument proceeds upon the ground that the case, as made in the bill of exceptions, shows that the plaintiff was not the holder of the bill for a valuable consideration, in the usual course of business. On the contrary, it is insisted that he held it merely as a collateral security for a pre-existing debt, without any present consideration at the time of the transfer, and that a party who takes negotiable paper under such circumstances does not acquire it in the usual course of business, and consequently takes it subject to prior equities. Whatever may be our impressions in a case like the one supposed, we think the question does not arise in the present record, assuming the facts to be as they are exhibited in the bill of exceptions; and the answer to the argument will be based entirely upon that assumption, without prejudice to what may hereafter appear. When the settlement was made, the new notes were given in payment of the prior indebtedness, and the collaterals previously held were surrendered to the defendant, and the time of payment was extended and definitely fixed by the terms of the notes, showing an agreement to give time for the payment of a debt already over-due, and a forbearance to enforce remedies for its recovery; and the implication is very strong, that the delay secured by the arrangement constituted the principal inducement to the transfer of the bill. Such a suspension of an existing demand is frequently of the utmost importance to a debtor, and it constitutes one of the oldest titles of the law under the head of forbearance, and *has [*371 always been considered a sufficient and valid consideration.

Elting v. Vanderlyn, 4 Johns. 237; Morton v. Burn, 7 Ad. & El. 19; Baker v. Walker, 14 Mees. & W. 465; Jennison v. Stafford, 1 Cush. 168; Walton v. Mascall, 13 Mees. & W. 453; Com. Dig. action Assumpsit, B. 1; Wheeler v. Slocum, 16 Pick. 52; Story on Prom. Notes sec. 186, and cases cited.

The surrender of other instruments, although held as collateral security, is also a good consideration; and this, as well as the former proposition, is now generally admitted, and is not open to dispute.

Dupeau v. Waddington, 6 Whar. 220; Hornblower v. Proud, 2 Barn. & Ald. 327; Ridout v. Bristow, 1 Cromp. & J. 231; Bank of Salina v. Babcock, 21 Wend. 499; Youngs v. Lee, 2 Ker. 551,

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It seems now to be agreed, that if there was a present consideration at the time of the transfer, independent of the previous indebtedness, that a party acquiring a negotiable instrument before its maturity as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt, for which it is held as collateral. White v. Springfield Bank, 3 Sand. S. C. 222; New York M. Iron Works v. Smith, 4 Duer, 362. And the better opinion seems to be, in respect to parol contracts, as a general rule, that there is but one measure of the sufficiency of a consideration, and consequently, whatever would have given validity to the bill as between the original parties, is sufficient to uphold a transfer like the one in this case. We are not aware that the principle, as thus limited and qualified, is now the subject of serious dispute anywhere, and that is amply sufficient for the decision of this cause. Whether the same conclusion ought to follow where the transfer was without any other consideration than what flows from the nature of the contract at the time of the delivery, and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt, is still the subject of earnest discussion, and has given rise to no small diversity of judicial decision. It seems it is regarded as sufficient in England, according to a recent case. Poirier v. Morris, 20 Eng. L. and Eq. 103; Byles on Bills, pp. 96 and 127. A contrary rule prevails in New York, as appears by several decisions. Coddington v. Bay, 20 Johns. 637; Stalker v. McDonald, 6 Hill, 93; and also in Tennessee, Napier v. Elam, 6 Yerg. 108. It is settled that it is a sufficient consideration in Massachusetts, Vermont, and New Jersey, and such was the opinion of the late Justice Story, as appears from his 372*] remarks *in Swift v. Tyson, 16 Pet. 1, and in his valuable treatise on Bills of Exchange, Stoddard v. Kimball, 6 Cush. 469; Story on Bills, sec. 192; Chicopee Bank v. Chapin, 8 Met. 40; Blanchard v. Stevens, 3 Cush. 162; Atkinson v. Brooks, 26 Ver. 569; Allaire v. Hartshorne, 1 Zab. 665. We think, however, that the point does not arise in this case, for the reasons before stated, and, consequently, forbear to express any opinion upon the subject.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings, with directions to issue a new venire.

413*] *THE UNITED STATES, Appts.,

v.

CHARLES FOSSAT.

(See S. C. 20 How. 413–427.)

Grant to Justo Larios confirmed—words "a little, more or less" rejected from grant—grant, not varied by evidence.

This court concurs in the opinion of the Board of Commissioners, and of the District Court, that affirms the validity of the grant of the Governor of California, to Justo Larios.

This court rejects the words "a little, more or less," and holds that the claim of the grantee is valid for the quantity clearly expressed.

There is no rule of law to authorize this court to depart from the grant, to obtain evidence to contradict, vary or limit its import.

(Mr. Chief Justice Taney, being indisposed, did not sit in this case.)

Argued Feb. 26, 1858. Decided Apr. 30, 1858.

APPEAL from the District Court of the United States for the Northern District of California.

Under the Act of Congress of March 3, 1851, to ascertain and settle the private land claims in the State of California (9 U. S. Stat. 631), Charles Fossat, filed before the Commissioners, on Sept. 13, 1852, his petition for confirmation of his title to three fourths of a certain tract of land lying in the County of Santa Clara, in the State of California, known as the "Cañada des los Capitancellos," contained within certain natural boundaries, granted on Sept. 1, 1842, to Justo Larios, by Juan B. Alvarado, Governor of California.

Upon this petition proofs were taken, and such proceedings had according to the course and practice of said Board, that by the decree of said Board filed and entered on Feb. 28, 1853, the claim of the petitioner was adjudged valid, and it was decreed that the same be confirmed.

An appeal was taken by the United States from this decree to the District Court of the United States for the Northern District of California.

In that court further proofs were taken, and the cause came on to be heard at a stated term in June, 1857, and on Aug. 17, 1857, it was, among other things, ordered, adjudged and decreed:

1st. That the grant made to Justo Larios, from whom the appellee, Charles Fossat, derived his title, is a good and valid grant of the place known by the name of "los Capitancellos," bounded and described as set forth in the decree, a copy whereof is hereto annexed.

2d. That the claim of the appellee to a portion of the said described tract of land, is a good and valid claim; and that the same be, and is hereby confirmed.

3d. That the land of which confirmation is made, is the whole of the tract of land in the decree described, which was granted to Justo Larios, with the exception of two adjacent parcels at the westerly end of the tract, which are claimed by the Guadaloupe Mining Company—the line dividing the land confirmed from the land of the Guadaloupe Mining Company, being the same expressed and designated as the eastern line of the lands of the Guadaloupe Mining Company, by the survey made

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NOTE.—Effect of words "more or less" or "by estimation" in a deed.

The words "containing so many acres, be the same more or less," are merely words of description, and if deliberately inserted in a deed without fraud, chancery will not relieve for deficiency of

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by John Lacroze, certified by John C. Hays, Surveyor-General, and attached to the deposition of Lacroze as an exhibit; to which map, exhibit, deposition and field notes, reference is made for a more full description of the said line, which is the western line of the land confirmed to the appellee.

From the foregoing decree an appeal has been taken, on behalf of the United States, to this court.

The Cañada de los Capitancellos, or the Valley of the Little Captains, is in the county of Santa Clara, about ten miles from San Jose, and lies between the range of low hills (Lomas Bajos), called the Puebla hills, on the north and the range of the Santa Cruz Mountains on the south, called the Sierra Azul, or Blue Mountains, which range at this point is sometimes designated by the name of Sierra del Encino, or Sierra of the Live Oak. The sierra takes this latter name from the great live-oak tree ("Encino") on the side of the mountains, which is separated from and distinguished above all others, by its great size, is visible twenty-five miles off, and is a public landmark. Between the Puebla hills and the Sierra del Encino, is a range of low hills known in the neighborhood as Lomas Bajos, also called Cuchilla de la Mine de Luis Chabroya, in which range are the New Almaden, San Antonio and Guadaloupe mines of quicksilver. This Cuchilla, or range of mine hills, is separated from the Sierra Azul or Sierra del Encino by a narrow valley, and an arroyo or creek, which, rising between the mine hills and Sierra, flows westward for some distance, turns to the north and forms the boundary between the Cañada de los Capitancellos and the establishment of Santa Clara. This stream is called by some witnesses the Arroyo de los Capitancellos, and drying up in the summer, it is designated on the map as Arroyo Seco, that being a common name given to streams which disappear in the dry season. Near the head springs of this stream, between the mine hills Cuchilla de la Mina and the Sierra Azul, another stream takes its rise which is called the Arroyo de los Alametos, or Creek of the Poplars, which, flowing some distance eastwardly between the Sierra Azul and the mine hills skirting the New Almaden range, makes a circuit and joins the Arroyo de los Capitancellos. At some distance below their junction the name of Arroyo de Guadaloupe is given to the stream formed by their united waters.

Near the center of the valley or cañada apart by itself, is a small hill called Lomita, near which a small creek, also called Arroyo Seco, joins with the Arroyo de los Alametos.

The whole valley or cañada, De los Capitancellos, was estimated in 1831, by the Mexican authorities as three or four leagues in extent. By survey it is found to contain about that quantity.

In June, 1842, there was in the western part of this cañada, a rancho called "Los Capitancellos," occupied by Justo Larios, and in the eastern part of the cañada, there was another rancho called "San Vincente" occupied by José R. Berreyesa. Each party claimed his rancho by virtue of some official authority or grant, but neither had a regular and perfect title. Both parties had been in possession of their respective settlements for several years.

A dispute having arisen between these parties as to their division line, it was carried before the public authorities for settlement. After the adjustment of the controversy, Larios obtained from the Governor the following grant:

Juan B. Alvarado, Constitutional Governor of the Department of the Californias.

Whereas, the citizen, Justo Larios, has asked, for his own benefit and that of his family, the land known by the name Capitancellos, bounded by the Sierra, by the Arroyo Seco, on the side of the establishment of Santa Clara, and by the rancho of citizen José R. Berreyesa, which has for boundary a line running from the junction of the Arroyo Seco and the Arroyo de los Alametos, southward to the Sierra, passing by the eastern base of the small hills situated in the center of the cañada; the necessary steps having been taken, and inquiries made according to the law and regulations on the subject, by virtue of the powers conferred upon me, in the name of the Mexican nation, I have granted him the said land, declaring it his property by these presents, subject to the approval of the Departmental Assembly, and to the following conditions:

First. He may enclose it without injury to the passes, roads and servitudes; he may enjoy it freely and exclusively, using or cultivating it as may best suit him, but within one year he shall build a house, and it shall be inhabited.

Second. The land herein referred to is one league of the greater size, a little more or less, as is explained by the map accompanying the expediente. The judge who shall give the possession shall have it measured in conformity to

quantity. Mann v. Pearson, 2 Johns. 37; Thomas v. Perry, 1 Pet. C. C. 49; Mervin v. Bennett, 8 Paige, 312. The seller may not, however, knowing the quantity, insert a false quantity in fraud, and protect himself by adding "more or less." Duke of Norfolk v. Worthy, 1 Camp. 337. The number of feet mentioned as the length of a boundary line is to be taken as the true length, though "more or less" be added, unless either the deed or the situation of the land in some way controls this construction. Blaney v. Rice, 20 Pick. 62.

Where a deed contains precise boundaries, and also mentions a certain quantity of land, the former controls the latter description. Nor does the latter amount to a warranty that there is that quantity of land, but is merely a part of the description; even though worded somewhat in the form of a covenant, as "the lot to contain 200 acres by measure." Barksdale v. Toomer, 1 Harp. 290; Large v. Penn, 6 S. & R. 488; Powell v. Clark, 5 Mass. 355; Perkins v. Webster, 2 N. H. 287; Peden v. Owens, Rice, 55.

This principle applies to an agreement for a conveyance which is accordingly afterwards made. Thus, if the agreement states the quantity of land, and the deed states it in the same way, with the addition of "more or less," in a suit upon a note given by the purchaser of the land, it is no defense that the quantity fell short of the amount specified, although this fact would have been a defense to a suit upon the agreement. The agreement is merged in the conveyance. Haggerty v. Fagan, 2 Pa. 533; Smith v. Evans, 6 Binn. 102; Crotzer v. Russel, 9 S. & R. 80; McLelland v. Cresswell, 13 S. & R. 143; Houghtaling v. Lewis, 10 Johns. 297; Stebbins v. Eddy, 4 Mason, 414.

Equity will rescind an executory contract in case of mistake of quantity, in spite of the words "more or less" added, when mistake was caused by misrepresentation of vendor, though not fraudulently made, and mistake essentially affects value, and no contract would have been made had it been known. Belknap v. Sealey, 14 N. Y. 143.

But where the deed mentions a certain number

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law, leaving the surplus which remains, to the nation, for the purposes which may suit it.

Third. He shall solicit the proper judge to give him juridical possession in virtue of this decree, by whom the boundaries shall be marked out, and upon which he shall put the proper landmarks.

Fourth. If he should violate these conditions, he shall lose his right to the land, and it shall be open to be denounced by another.

Wherefore I order that this title, being held firm and valid, shall be registered in the proper book, and be delivered to the grantee for his protection and other purposes.

Given at Monterey, the 1st of Sept. 1842.

Juan B. Alvarado.

Messrs. J. S. Black, R. Johnson and J. A. Rockwell, for appellants:

I. The decree of the District Court confirming this claim to the entire amount included in the boundaries of the tract, without regard to the quantity, is erroneous.

It appears from the terms of the grant itself, and the antecedent proceedings, that the design was not to convey the whole tract within the boundaries, but a specific quantity, viz.: one league.

II. By the law in force in Mexico when this grant was made, and for a long time prior to that time, a grant like the one in question was regarded as a grant of a certain quantity of land within the boundaries named, to be ascertained by measurement and separated from the residue of the tract, which residue or surplus continued to be the property of the nation.

Book 4, tit. 12, of Recopilacion de Indias. Laws, 15 & 19; Escriche Verb. "Amojonamiento"; Art. 8, Royal Ordinance of Oct. 15, 1754. —Ordenanzas de Tierras y Aguas, 89.

2. The uniform practice in California, while under Mexican authority, was to regard grants of precisely this character as conveying only the quantity of land specified in the grant.

3. The decision of the Commissioners has been uniform, that a grant like the present was only a grant of a quantity of land to be ascertained by measurement, and not a grant by metes and bounds. The same has been the decision of the Circuit Court and in most cases by the District Court, and these decisions of the Commissioners and District Court have been sustained by the Supreme Court of the United States.

IV. In this very case of Fossatt, the Commissioners in their opinion regard the grant in this case as one of quantity, and only for one league.

The "laws, usages and customs" prevailing in California under the former government, constitute the rule for deciding on the character and construction of these grants.

This has been too well settled by the repeated decisions of the Supreme Court to require a reference to cases.

Case of Frémont, 17 How. 557.

V. Such we claim is the rule according to the law governing the case, yet these views are, we think, strengthened by the principles which prevail at common law as to the construction of a grant like the one in question.

Wood Inst. p. 21; 8 Bacon, 148; 2 Bl. Com. 347; 6 Pet. 738, 739; 5 Pet. 82; 8 Pet. 473; 10 Price, 412; 4 Shep. 343; 11 La. O. S. 587; 3 Rob. La. 293; 2 Greenl. Cruise, 595, and note, and cases cited.

VI. It is true as a general rule, that in conveyances between individuals, monuments and definite boundaries are to control in preference to quantity, where the difference of quantity named in a deed does not greatly vary from the amount included within the boundaries, especially when the words "more or less" are used; but this rule does not prevail where the grant was from the government, nor in a case like the present, where the words are "a little more or less."

In the present case there is a surplus of 3150 acres. It is submitted that in no court at common law or otherwise, under a grant like this, would this surplus have passed, even if that surplus had not been reserved in terms in the grant itself to the nation.

Hoffman v. Johnson, 1 Bland, 103; Townsend v. Strangroom, 6 Ves. 340; Winch v. Winchester, 1 Ves. & B. 376; Hill v. Buckley, 17 Ves. 394; Gentry v. Hamilton, 3 Ired. Ch. 376; Blaney v. Rice, 20 Pick. 62; Davis v. Rainsford, 17 Mass. 210; Williston v. Morse, 10 Met. 26.

VII. The rule in relation to the survey of confirmed claims under the statute, and the practice adopted by the Executive Department of the government show that the decree of the District Court is erroneous.

9 Stat. at L. 633.

Frémont v. U. S. 17 How. 565; Stanford v. Taylor, 18 How. 409; 18 How. 473.

VIII. Aside from the laws and practice of Mexico in relation to grants of this character, this grant would be held to be void for uncer-

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of acres, sets out the bounds, and then adds "the nine and a half acres I warrant, be the same more or less," this is a warranty of the quantity. Crawford v. Crawford, 1 Bailey, 128.

The words "more or less" will not cover a distinct lot. 24 Mo. 574.

An excess of fifty quarters over three hundred quarters of grain, is not covered by the words "three hundred, more or less." 2 Barn. & Ad. 106.

Specific performance will be enforced without changing the price, if the excess or deficiency is very small. 17 Ves. 394; 24 Miss. 597; 13 Tex. 223.

A Mexican grant described the land by definite boundaries, and then stated the quantity to be "one square league, a little more or less." There was considerable more, but it was held that the whole quantity of land embraced should pass, and the grant ought to be construed as embracing the excess over a league. U. S. v. Estrudillo, 1 Hoffm. L. Cas. 204.

Where two parcels of land had been granted from a parcel known by a particular name, and a petition for the surplus remaining was presented to Governor of Department of California, and to the description was added the words, "the extent of which is about five leagues, more or less," it was held that these words were not a limitation upon the quantity, but a mere estimate of the surplus sought. U. S. v. D'Aguirre, 1 Wall. 311.

So where the grant could not be deemed a grant by distinct metes and bounds, and it described the land as "a little more than three leagues," and the attendant circumstances indicated no intent to grant more than the specified quantity unless for convenience of boundary, the claimant was limited to three leagues. Marsh v. U. S. 1 Hoffm. L. Cas. 301; Gonzales v. U. S. 22 How. 161.

Where the deed contains the words "about so many acres, more or less," both grantor and grantee will be deemed to consider those words as a representation of the quantity which the grantee expects to purchase and the grantor expects to

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tainty, and from the terms of the grant, one which could not be located.

Counsel here reviewed the description given and the evidence at considerable length, and concluded by quoting the language of Judge Felch, in the opinion of the Board of Commissioners in the case of claim No. 236.

"If upon a true construction of this grant the premises described in it embrace not only the valley, but the foot hills and the surrounding mountains to their very tops, the quantity of land not only by far exceeds the eight square leagues intended to be granted, but it also exceeds eleven square leagues, the maximum quantity which, under the Colonization Law of 1824, could be granted to any one person. If the Surveyor's construction of the terms of description are as the claimant's counsel here contends, correct, I do not see as we can do other than reject their claim. But in my judgment the survey embraces more land than the description warrants. A valley surrounded by hills cannot be regarded as embracing the hills or the declivity extending from their summits. The rule is well settled in regard to boundaries, that the words "to," "from" and "by" are terms of exclusion, unless by necessary implication they are used in a different sense.

2 Hill. 349.

"Where lands are bounded by a road or a stream above the navigable waters, the rule of law recognizes the right of the owners to the center of the road and the thread of the stream; but the courts have uniformly refused to extend the rule beyond the cases mentioned."

Bradley v. Rice, 13 Me. 201; Revere v. Leonard, 1 Mass. 91; Nash v. Atherton, 10 Ohio, 163.

Messrs. **Badger & Carlisle, James A. Bayard, Henry L. Magraw** and **Edwin M. Stanton**, for appellee:

The questions arising upon this appeal, relate to the official authority and genuineness of the grant—the boundaries called for—and the quantity of land that passed by the grant.

1. The claimant derives title under the decree and grant made to Justo Larios at Monterey, by Juan B. Alvarado, constitutional Governor of the Californias. The Governor's authority for such purpose, under the Mexican laws, has been recognized by the Supreme Court of the United States, in the following cases:

U. S. v. Ritchie, 17 How. 525; Frémont v. U. S. 17 How. 542; Larkin's case, 18 How. 557, Arguello's case, 18 How. 539; Cruz Cervantes' case, 18 How. 553; Pena's case, 18 How. 556; Reading's case, 18 How. 1; Peralta's case, 19 How. 343; Pedrorena's case, 19 How. 363.

2. As to the genuineness of the grant. The counsel referred to the evidence in the case, and said the grant was accompanied by the regular expediente and the genuineness and official regularity of the original grant and the conveyances under it, through which claimant derives title, have never been denied or questioned in any stage of the proceedings.

3. As to the boundaries. The argument of counsel upon this point consisted principally of a quotation from the opinion of the District Court, and a review of the testimony of the different witnesses.

4. As to the quantity of land that passed by the grant.

The point made by the New Almaden Company, rests upon the following condition annexed to the grant:

"2d. The land herein referred to is one league of the larger size, a little more or less, as is explained by the map accompanying the expediente. The judge who shall give the possession, shall have it measured in conformity to law, leaving the surplus which remains to the nation, for the purposes which may best suit it."

To this point it is answered:

I. The direction to the judge to "have it measured in conformity to law, leaving the surplus which remains to the nation," is a formal direction accompanying most, if not all, California grants, and does not in this case limit or define any precise quantity. This direction is annexed to grants, whether there be or be not any surplus, and it does not import that any surplus will remain.

No principle of law is better settled, than that designated boundaries called for in a grant, control in general the quantity of land that passes by the grant.

Of the multitude of cases on this point, reference to a few only need be made. "Where the boundaries of land are fixed, known and unquestionable monuments, although neither courses, nor distances, nor the computed contents correspond, the monuments must govern."

16 Mass. 131; 2 Mass. 380; 5 Pick. 135–6; 6 Wheat. 582; 8 Wend. 183; U. S. Dig. "Boundaries," 474, and cases cited.

"Where a deed describes land by its admeas-

sell, and the words "more or less" are intended to cover a reasonable excess or deficiency. Thomas v. Perry, Pet. C. C. 49.

It has been held that the words "more or less" should be restricted to a reasonable or usual allowance for small errors in surveys and variations in instruments. Quesnel v. Woodlief, 2 Hen. & Mun. 173, 174; Day v. Finn, Owen, 133; in which case a lease of a house and ten acres, sive plus sive minus, was held not to pass thirty acres, but only a reasonable quantity more or less; and in Portman v. Mill, 2 Russ. 570, it was held that "more or less" would not cover a deficiency of 100 acres. But in a conveyance where, with regard to the quantity, the words "by estimation" or "more or less" are added, if there be a small portion more than the quantity the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency. Twyford v. Warcup, Finch, 310; Marquis of Townshend v. Strangroon, 6 Ves. 328; Rus-

worths' case, Clay, 46; Neale v. Parkins, 1 Esp. 229. It would seem as if such words threw upon the purchaser the necessity of satisfying himself about it, and that the rule of caveat emptor applies. Nelson v. Matthews, 2 Hen. & Mun. 164; Winch v. Winchester, 1 Ves. & B. 375; Boar v. McCormick, 1 S. & R. 166; Glen v. Glen, 4 S. & R. 488; Anon. 2 Freeman, 106, in which case purchaser had no relief from a deficiency of 40 acres in 100.

See, also, on this subject, Grantland v. Wight, 2 Mun. 179; Jollife v. Hite, 1 Call, 301; Snow v. Chapman, 1 Root, 528; Howes v. Barker, 3 Johns. 506; Plowe v. Bass, 2 Mass. 380; Jackson v. Barringer, 15 Johns. 471; Jackson v. Defendorf, 1 Caines, 493; Dayne v. King, 1 Yeates, 322; Fleet v. Hawkins, 6 Mun. 188; Pringle v. Wisten, 1 Bay, 259; Gray v. Handkinson, 1 Bay, 278; Wainwright v. Read, 1 Dess. 573; Jones v. Carter, 4 Hen. & Mun. 184; Hull v. Cunningham, 1 Mun. 330; Hill v. Buckley, 17 Ves. 394; 1 Sugden on Vendors, marg. p. 525, et seq.

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urement, and at the same time by known and visible monuments, these latter shall govern."

4 U. S. Dig. "Boundary," and cases cited; Cleveland v. Smith, 2 Story, 278; Nelson v. Hall, 1 McLean, 518.

"In locating lands, well ascertained natural or artificial boundaries are to prevail over course, distance and quantity; and although the boundaries included 136.000 acres, instead of 14,900, the number called for by the deed, the boundaries were held to govern.

Sturgeon v. Floyd, 3 Rich. 80.

An illustration of this rule is furnished by an early decision of the Supreme Court of the United States (Lodge's Lessee v. Lee, 6 Cranch, 237), where a grant of an island by name, superadding courses, distances and quantity, which were found to exclude a part of the island, was held to pass the whole island without regard to the courses, distance and quantity called for by the deed.

6 Cranch, 237.

But it is deemed needless to multiply authorities upon a rule of law so well established.

3. It is urged as a ground for restricting this grant to one league and no more, that it being a grant by the sovereign, it is to be strictly construed. While this proposition is admitted, it is also true that sovereign grants are not to be defeated, in whole or in any part, by unreasonable and strained construction. Grants by the sovereign, as well as grants by individuals, are to be construed according to their manifest intent. This is shown by the authorities cited on the other side.

The authorities adduced to show that the District Court of California erred in the decree of confirmation, belonged to three classes: 1st. Elementary rules of the common law, as to the construction of grants. 2d. Decisions of the Supreme Court on California land cases. 3d. Decrees of the Board of Commissioners and the District Court of California. In respect to these authorities there need be no controversy, for the principle established or illustrated by all the citations, is that clearly expressed in 2 Bl. Com. 347: "The King's grant shall not inure to any other intent than that which is precisely expressed in the grant."

And the proper application of this rule was illustrated by the Supreme Court in the Arredondo grant. 6 Pet. 738. In that case, the grant was construed according to the intention evident from all the terms of the grant. It appears from the argument of the counsel for the Almaden Company, that this is the rule of interpretation established by all the elementary authorities, by the Supreme Court, and by the Board of Land Commissioners. The question then turns upon the intention expressed in the grant under which Fossat claims. That intention is to be ascertained, as in the case of Arredondo, by a consideration of all the terms employed.

It is to be noticed that the rule of interpretation adopted by the learned judge of the District Court is the very rule sanctioned by all the authorities, and by its application, the proper extent of the grant was ascertained and confirmed.

The intention of the grantor expressed on the face of the grant, was the very rule of interpretation adopted by the District Court, and that intention was reached by taking together all the terms of the grant, giving a reasonable effect to all the words of the instrument.

Mr. Justice Campbell delivered the opinion of the court:

The appellee presented to the Board of Commissioners, appointed under the Act of Congress of the 3d March, 1851, 9 Stat. at L. 632, ch. 41, to settle private land claims in California, *a claim for three fourths of a league [*424 of land, known as part of the Cañada de los Capitancellos. He produced to the Board satisfactory evidence of the authenticity of a grant from the Governor of California, bearing date in 1842, to Justo Larios, for a parcel of land having that name; also that Larios had occupied, improved, and cultivated it, conformably to the conditions of the grant; that in 1845 he had sold it to a person from whom the appellee deduced his title to an undivided three fourths interest, and that his share had been set apart to him by a valid conveyance. The board pronounced in favor of the validity of the grant, and rendered a decree of confirmation in favor of the claimant for land included in specific and well defined boundaries, but adding as a part of the description, the quantity that was embraced in them. It is somewhat doubtful whether the Board designed to impose a limitation to the claim for the quantity thus declared. From this decree the United States appealed to the District Court. In that court the appellee confessed that the decree of the Commissioners was erroneous, because it did not describe in a manner sufficiently certain the boundaries of the tract of land intended to be confirmed to the claimant, and consented that the decision should be reversed, and such decree be entered in the District Court as might be lawful and proper upon the whole evidence.

The claimant proceeded to examine a number of witnesses to identify the locative calls of the grant to Larios, and produced documentary evidence from the archives disclosing the circumstances under which the grant was asked for and obtained, in order to determine with exactness the subject on which it was designed to operate. He also procured a survey from the Surveyor-General of California, to exhibit the extent and description of the land included in the claims of those who now represent the rights of Larios. Much counter evidence was adduced under the direction of private and adversary claimants, to whom the law officers of the Government of the United States in California seem to have committed the preparation of the case on the appeal to the District Court, and who were allowed to maintain, in the name of the United States, the alternative of the issue tendered by the claimant.

The District Court confirmed the claim of the appellee to land limited by specific boundaries, and ascertained those boundaries, as they exist on the land, with precision. Under this decree, the grant to Larios includes seven thousand five hundred and eighty-eight and ninety hundredths acres.

It is the opinion of the court that the intervention of adversary *claimants in the [*425 suit of a petitioner, under the Act of 3d March, 1851, for the confirmation of his claim to land in California, is a practice not to be encouraged.

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The Board of Commissioners was instituted by Congress to obtain a prompt decision on the validity of private land claims, to enable the government to distinguish the public land from that which had been severed from the public domain by Mexico; and that it might fulfill the obligation assumed at the time of the cession of California, to secure and protect the property of its inhabitants. The jurisdiction of the Board of Commissioners in the first instance, and the appellate jurisdiction of the courts of the United States, are limited to the making of decisions on the validity of the claim, preliminary to its location and survey by the Surveyor-General of California, acting under the laws of the United States. This officer is required to survey and to furnish plats of the claim that may be confirmed.

In reference to interfering and conflicting claims, he is authorized to decide by adopting the lines agreed to by the claimants; and in the absence of an agreement, to follow the rule of justice. The Acts of Congress provide, that neither the decisions of the Commissioners, nor of the District or Supreme Court, nor of the Surveyor-General, nor the surveys or patents made in pursuance of them, shall preclude a legal investigation and decision, by the proper judicial tribunal, between parties having such interfering claims; and provision is made in the Act of 3d March, 1851, for a contest of the right of the confirmee before the issue of the patent, but after the location and survey; and a patent under the Act is only conclusive between the United States and the claimant, and does not affect third persons. 9 Stat. at L. 631, ch. 41; 4 Stat. at L. 492, ch. 116, sec. 6. The language and policy of these enactments limit a controversy like the present to the United States and the claimant.

We concur in the opinion of the Board of Commissioners and of the District Court, that affirms the validity of the grant of the Governor of California to Justo Larios, and the regularity of the conveyances through which the claimant deduces his title.

The papers in the record show, that in 1842 the proprietors of adjacent ranches in the Valley de los Capitancellos (Larios and Berreyesa) had a dispute concerning the location of their line of separation, which was carried before the public authorities for settlement; that Larios, after the adjustment of the controversy, represented to the Governor that, since 1836, he had occupied his place in the cañada under a purchase from a former proprietor; that the rec-426*] ords of his title had been lost, *and that he desired to obtain a grant which would declare his right. This petition was accompanied by a sketch of the property, and its contents were represented to be one league, a little more or less. The Governor made the necessary order for the issue of the grant, in conformity to the prayer of the petition, and the grant itself was issued in August, 1842. In the grant, the petition for the land known as Capitancellos—bounded by the Sierra, by the Arroyo Seco on the side of the establishment of Santa Clara, and by the rancho of the citizen José R. Berreyesa, which has for boundary a line running from the junction of the Arroyo Seco and Arroyo de los Alamitos, southward, to the sierra, passing by the eastern base of the small hill situate in the center of the cañada—is recited; and the Governor granted it to Larios, to be his property, subject to the approval of the Departmental Assembly, and to the performance of four conditions. The second and third of these conditions are:

"2d. He shall solicit the proper judge to give him judicial possession, in virtue of this decree, by whom the boundaries shall be marked out, and he shall put on the boundaries, in addition to the landmarks, some fruit trees or useful forest trees.

"3d. The land herein referred to is one league of the larger size, a little more or less, as is explained by the map accompanying this expediente. The judge who shall give the possession shall have it measured, in conformity to law, leaving the surplus which remains to the nation, for the purposes which may best suit it."

The southern, western and eastern boundaries of the land granted to Larios are well defined, and the objects exist by which those limits can be ascertained. There is no call in the grant for a northern boundary, nor is there any reference to the diseño for any natural object, or other descriptive call, to ascertain it. The grant itself furnishes no other criterion for determining that boundary than the limitation of the quantity, as is expressed in the third condition. This is a controlling condition in the grant. The delivery of juridical possession, an essential ceremony to perfect the title in the land system of Mexico, was to be accommodated to it. The diseño presented by the donee to the Governor, to inform him of his wants, represents the quantity to be one league, a little more or less. This representation is assumed to be true by the Governor, and it forms the basis on which his consent to the petition is yielded. He prescribes to the officer to whom he confided the duty of completing the title, to measure a specified quantity, leaving the surplus that remains to the nation, as preparatory to the delivery of juridical possession to the *grantee. The obligation of [*427 the United States to this grantee will be fulfilled by the performance of the executive Acts, which are devolved in the grant on the local authority, and which are declared in the two conditions before cited. We regard these conditions to contain a description of the thing granted, and, in connection with the other calls of the grant, they enable us to define it. We reject the words "a little more or less," as having no meaning in a system of location and survey like that of the United States, and that the claim of the grantee is valid for the quantity clearly expressed. If the limitation of the quantity had not been so explicitly declared, it might have been proper to refer to the petition and the diseño, or to have inquired if the name Capitancellos had any significance as connected with the limits of the tract, in order to give effect to the grant. But there is no necessity for additional inquiries. The grant is not affected with any ambiguity. The intention of the government of California is distinctly declared, and there is no rule of law to authorize us to depart from the grant to obtain evidence to contradict, vary, or limit its import.

The grant to Larios is for one league of land,

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to be taken within the southern, western and eastern boundaries designated therein, and which is to be located, at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the Executive Department of this government. The external boundaries designated in the grant may be declared by the District Court from the evidence on file, and such other evidence as may be produced before it, and the claim of an interest equal to three fourths of the land granted is confirmed to the appellee.

The decree of the District Court is reversed, and the cause is remanded to that court, with directions to enter a decree conforming to this opinion.

Rev'g—Hoff. L. C. 211.

FRANCIS WARNER, Plff. in Er.,
v.
CEPHAS H. NORTON et al.

(See S. C. 20 How. 448–461.)

Fraud, question of fact—Secrecy evidence of fraud—also possession in vendor.

The question of fraud is a question of fact for the jury under the instruction of the court.

Secrecy in making a contract is a circumstance connected with other facts, from which fraud may be inferred.

If a sale is made by a party, and the vendor remains in possession, it is ordinarily a badge of fraud, and requires explanation.

Argued Apr. 5, 1858. Decided May 3, 1858.

THIS was an action of trespass brought in the Circuit Court of the United States for the Northern District of Illinois, by the defendant in error against Warner, Sheriff of La Salle County, for an alleged wrongful levy on certain goods claimed by the plaintiffs.

The trial resulted in a verdict and judgment for the plaintiffs; whereupon the defendant brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Messrs. E. B. Washburne and T. L. Dickey, for the plaintiff in error:

Warner insisted that such a sale as his proof tended to show, was fraudulent in law—for want of an actual, open, notorious and avowed change of possession; but the court ruled otherwise and charged the jury inter alia,

1st. That whether the sale was or was not fraudulent, was a question of fact for the jury.

2d. That if the sale was secret, and no means were taken to make it known these facts threw suspicion upon the transaction, but did not make the sale fraudulent in law as against creditors.

3d. If Atherton's possession was the possession of Anderson, and not of Haskins, the sale was not necessarily fraudulent.

4th. The court left it to the jury to determine whether, under the facts in evidence, the sale was in good faith, and for an honest purpose.

The question whether the sale of goods unaccompanied by a change of possession is good as against creditors, has been a vexed question in England and in many of the United States. The weight of American authority is thought to be against the validity of such sales.

See 3 Kent's Com. 515 to 529, where the subject is fully discussed.

The decisions of the federal courts are against the validity of such sales, and this is considered "a settled principle in federal jurisprudence."

2 Kent, 521; Hamilton v. Russell, 1 Cranch, 309.

This sale was made in Illinois, and the Supreme Court of that State have adopted and adhered to what Chancellor Kent calls the more wise, sound, wholesome and true doctrine, and have held in Thornton v. Davenport, 1 Scam. 296, that where the possession of goods is permitted to remain with the vendor, the sale is fraudulent unless the retaining is consistent with the deed. The same doctrine is recognized in Powers v. Green, 14 Ill. 386, so that there is no debate about the law in that State on this question; the decision of the Supreme Court of the U. S. and of the Supreme Court of that State concurring.

This change of possession to be effective must be actual and not colorable.

2 Kent's Com. 525.

It must be substantial and exclusive.

2 Kent's Com. 518.

It must be an apparent, open, avowed, notorious change of possession. The purpose must not only be honest, but appearances must agree with the real state of the case.

2 Kent's Com. 553; Burr. on Assts. 303.

This change of possession must also be continued.

There is no direct evidence that John L. Phelps or Isaac N. Phelps were members of the firm.

Whether there is any evidence on a point is a question of law for the court. Whether the evidence is sufficient to convince and satisfy, is a question for the jury.

1 Greenl. Ev. p. 63, sec. 49.

Messrs. George E. Badger and J. M. Carlisle, for the defendant in error:

First. It is insisted for the defendant that the bill of exceptions sent up with the record cannot be noticed by this court. It appears that no exception was taken upon the trial, or at the term of the trial, to the rulings of the court. However this may be, it is certain that the bill of exceptions was not reduced to form and signed by the judge, at any time during the term at which the trial was had.

If there be any case in which a bill of exceptions can be reduced to writing and signed after the term and after judgment, it must be by reason of consent given by the parties, or an order of the judge to that effect, appearing on the record.

Ex parte Bradstreet, 4 Pet. 102; Walton v. U. S. 9 Wheat. 651.

On the part, therefore, of the defendant in error, it is insisted that this objection, now

NOTE.—Fraud in a sale, is to be inferred from want of change of possession of goods. See note to Brooks v. Marbury, 6 L. ed. U. S. 423.

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taken, is fatal to the plaintiff in error; but if, in this, we should be mistaken, it is insisted, secondly, that the rulings of the court on the trial, give the plaintiff in error no ground for complaint upon the state of facts disclosed by the evidence.

The plaintiff in error, as shown by the record, objected to the admissibility of evidence offered, but did not insist upon his objection.

Therefore he cannot raise the objection here: but on the contrary, it must be waived; for in the case of Walton v. The U. S. already cited, the court say: "It is true that the bill of exceptions states that the evidence was objected to at the trial; but it is not said that any exception was then taken to the decision of the court; so that in fact it might be true that the objection was made and not insisted on by way of exception."

Again, in the case of Phelps v. Mayer, 15 How. 160, already cited, the court say, in substance that objections to evidence must be insisted on by way of exception; for if this is done, the opposite party may then supply the defect.

See, also, Hind's Lessee v. Longworth, 11 Wheat. 199.

Therefore the objection to the evidence being waived, by not being insisted upon by way of exception, no objection can now be made, and, therefore, there was evidence to be left to the jury on the point of ownership.

But if there was not, that question cannot be raised upon an instruction formally right, but must have been specially presented to the court below; for in Garrard v. Reynolds's Lessee, 4 How. 123, it was held, that whether there was evidence to be left to a jury, was a question which could not be considered by this court, unless the opinion of the court below had been asked thereon and an exception regularly taken.

The substance of all the other instructions is this:

The court having declined to charge the jury that the sale was fraudulent in law, left it to them, under all the circumstances, to say whether the sale was or was not made to delay, hinder or defraud creditors; telling them that if the sale was secret, suspicion was thrown upon it thereby, but it did not thereby become fraudulent in law; and leaving them to decide as to the possession after the sale, instructed them that if the possession of Atherton was the possession of the plaintiffs (defendants in error), the sale was not necessarily fraudulent.

And the court did instruct the jury, in effect, that if the possession after the sale was in Haskins, the sale was necessarily fraudulent.

To this instruction the plaintiffs in error cannot object, though the defendants in error, had the verdict been against them, would have had just cause of complaint.

For if it had been necessary to our case, and were allowable for us to question any decision of this court, we should contend that the rule laid down in Hamilton v. Russell, 1 Cranch, 310, founded upon Edwards v. Harben in 2 T. R. 587, cannot be supported. In England, Edwards v. Harben has been long since overruled; first questioned, then impugned and finally denied. The cases fully justify the position of the very learned Mr. Smith, in his Leading Cases, 1 Vol. p. 41, of 4 Am. ed. in these words:

"It may therefore be safely laid down, that under almost any circumstances, the question fraud or no fraud is one for the consideration of the jury;" and again, page 40: "Though in Edwards v. Harben it was laid down in the express terms above stated, that an absolute sale without delivery of possession was in point of law fraudulent, the tendency of the courts has lately been to qualify that doctrine and leave the whole circumstances of each case to a jury, bidding them to decide whether the presumption of fraud deducible from the absence of possession shall prevail."

And the admission of plaintiff's counsel (whose interest it was to maintain that doctrine of Edwards v. Harben, in Wood v. Dixie, 7 Q. B. 894), is in these words: "Some doubt has existed whether upon certain facts, as, for instance, want of possession, fraud is a question of law to be decided by the court, or of fact for the jury; but it seems to be now established that the question is for the jury.

This position of Mr. Smith is further supported by Martindale v. Booth, 3 B. & Ad. 498, in which Parke, J., says: "The dictum of Buller, J., in Edwards v. Harben, has not been generally considered in subsequent cases to have that import. The want of delivery is only evidence that the transfer was colorable." It is fully sustained by the numerous cases cited by him, and especially by Benton v. Thornhill, 2 Marsh. 427, and Latimer v. Batson, 4 Barn. & C. 652, in the former of which Ld. Ch. J. Best dissents from the doctrine of Edwards v. Harben, when assumed by counsel; and in the latter, the court notices and, in effect, repudiates as furnishing a general rule, what was said by Lord Ellenborough in Wordall v. Smith, 1 Camp. 332.

These two cases also show that the question of possession under the circumstances of our case, was for the jury and not for the court, and was, therefore, properly left to them by the court below.

It may, therefore, be assumed with confidence that the stringent rule laid down in Edwards v. Harben, is entirely exploded in England, and there, want of possession by the vendor is only a badge of fraud, to be considered by the jury.

But whether the rule in Edwards v. Harben be maintained in all its strictness or not, is in our case immaterial. Here possession was taken by the purchaser. It was so found by the jury. There was evidence proper to be left to the jury of that fact; but if there was not such evidence, no objection can be made therefor, because there was no special prayer for an instruction that there was not such evidence as required by this court in the before-cited case of Garrard v. Reynolds' Lessee, 4 How. 123, and consequently the whole case was for the jury on the question of fraud.

As to the alleged secrecy of the sale, the court instructed the jury that secrecy threw suspicion on the transaction, but did not make it fraudulent in law.

Now, this is giving to secrecy precisely the effect properly belonging to it according to Twyne's case, dona clandestina sunt semper suspiciosa.

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Of course the exception for error in the refusal to grant a new trial, is merely idle after the decisions of this court in Marine Insurance Company of Alexandria v. Hodgson, 6 Cranch, 206; Barr v. Gratz's Heirs, 4 Wheat. 213, and Blunt's Lessee v. Smith, 7 Wheat. 248.

Mr. Justice McLean delivered the opinion of the court:

This case was brought before us by a writ of error from the Northern District of Illinois.

457*] *An action of trespass was commenced by Norton et al. against Warner, charging him with having seized and carried away personal property of the value of $10,000. The defendant pleaded not guilty, and by several special pleas set up that certain creditors of Augustus A. Haskins, who had left his residence at La Salle, procured a writ of attachment, under the statutes of Illinois, which was directed to the defendant, as sheriff, in virtue of which he had attached the personal property of Haskins, which is the trespass charged, etc.

The bill of exceptions taken on the trial will show the points of law which were made on the facts. The proof of the plaintiffs tended to show that Beman, one of the plaintiffs, had a claim as creditor against Haskins for the sum of $1,200, and that the firm of Norton, Jewett & Busby had also a claim of about $3,000; that each of these claims had been put into the hands of one Anderson for collection, with authority to settle them; that on the 10th of January, 1855, the goods were chiefly in a hardware storeroom and the tin shop attached thereto in the Village of La Salle; that up to that time Haskins had been carrying on the business of a hardware retailer and manufacturer of tinware; that while he was absent the business was conducted by one Atherton, his head clerk, who employed the operatives and superintended their work; that on the 10th of January, 1855, Haskins sold his stock to Beman, and the firm of Norton, Jewett & Busby, through Anderson as their agent, Anderson canceling the aforesaid debts, and giving his notes on time to Haskins for the balance of the price agreed upon; and thereupon, by way of putting the purchaser into possession, Haskins, Anderson and Atherton, being in the storeroom, Haskins got the key of the outer door, and gave it to Anderson, and Anderson gave the key and charge of the store and tin shop to Atherton, who, up to that time, had been carrying on the business for Haskins, but then undertook to act for Anderson.

Anderson and Haskins left La Salle, and did not return until after the attachment was laid on the goods. Haskins never returned to reside there, and exercised no ownership over the goods after the sale. Norton, Jewett & Busby were the ostensible partners of their firm, but they informed Anderson that John C. Phelps and his brother were special partners. There was no further evidence to show the interest of the Phelpses, except the belief of the witness that they were parties, though he could not so state from his own personal knowledge. An objection to this defect of proof was made, but not insisted on.

The plaintiffs' proof further tended to show that the Sheriff, on the 9th of February, did 458*] take property attached, and *removed it; and evidence was offered to show that, before and at the time of said sale, Haskins was in failing circumstances, and that certain creditors had sued out writs of attachment, as set forth in defendants' special pleas, against the goods of said Haskins, and that the taking of the property complained of was by legal process.

Defendant offered further evidence, tending to prove that said sale was made secretly, but several of the plaintiffs' witnesses stated the sale was not made secretly, and that, while the invoice was being made out, people were coming in and going out of the store as usual; that no steps were taken by anyone to make the sale known until after the attachment was laid; that from the time of the sale, Atherton continued to control the goods and the business as before, and to all appearance was doing so for Haskins; that sales were made to customers as formerly, without notice to any one of the change of proprietors, and, in some instances, the bills and receipts of sales to customers were made out in the name of Haskins. No change was made in keeping the books; that the servants and operatives about the store and tin shop continued to work under the direction of Atherton, with no knowledge of any sale, and supposing the business was being carried on as formerly, and for the use of Haskins; but it did not appear that any of these things were authorized by the plaintiffs or known to them; and that this condition and course of things continued until the goods were seized by the Sheriff.

After the testimony was closed, the court charged the jury: First, they must be satisfied, from the evidence, that the plaintiffs named in the declaration had a joint interest in the property sued for, or they must find for the defendant.

The jury found for the plaintiffs; which shows they were satisfied with the evidence on the point made, or considered the objection abandoned. If it were not insisted on in the court below, it cannot be raised here. There is no error in this charge of the court.

The second, third and fourth charges were, "that if the jury believe from the evidence the sale was made for the purpose of hindering, delaying, or defrauding creditors, it was invalid as against the defendant; and that whether the sale was or was not fraudulent was a question of fact, to be determined by the jury under all the circumstances of the case. That if the sale were secret, and no means taken to apprise the public of it, these were facts which threw suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant."

It is insisted that the sale was void as matter of law against *creditors, and should [*459 have been so held by the court; and the case of Hamilton v. Russell, 1 Cranch, 310; (5 U. S.) is cited as sustaining this position. In that case, Hamilton made an absolute bill of sale for a slave on the 4th of January, 1800, which was acknowledged and recorded on the 14th of April, 1801. The slave continued in the possession of the vendor until the execution was levied on him as the property of the vendor. Trespass was brought against the plaintiff in the execution, who directed the levy to be made. The

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court held, under the Statute of Virginia against frauds, that an absolute bill of sale, unless possession "accompanies and follows" the deed, is fraudulent; and the case of Edwards v. Harben, 2 T. R. 587, was cited. It is admitted that the Statute is in affirmance of the common law.

In his 3d volume of commentaries, Chancellor Kent has an interesting chapter on this subject, in which the case of Edwards v. Harben, and many other authorities are cited; and he favors the doctrine, that unless the possession of goods follows the deed, it is fraudulent per se. But he states many exceptions to this rule, as where the possession of the vendor is consistent with the deed or the circumstances of the case. And he says, in Steward v. Lombe, 1 Brod. & Bing. 506, the Court of C. B. questioned very strongly the general doctrine in Edwards v. Harben, that actual possession was necessary to transfer the property in a chattel, and the authority itself was shaken. And he observes, the conclusion from the more recent English cases would seem to be, that though a continuance in possession by the vendor be prima facie a badge of fraud, yet the presumption of fraud may be rebutted by explanations.

In the case of Wood v. Dexie, 7 Q. B. 894, the counsel, who was interested in maintaining the doctrine of Edwards v. Harben, admitted that "some doubt has existed whether upon certain facts, as, for instance, want of possession, fraud is a question of law to be decided by the court, or of fact for the jury; but it seems to be now established that the question is for the jury." In Martindale v. Booth, 3 B. & Ad. 498, Parke, Justice, says, the dictum of Buller, Justice, in Edwards v. Harben, has not been considered in subsequent cases to have that import; the want of delivery is only evidence that the transfer was colorable. In Benton v. Thornbell, 2 Marsh. Eng. C. Pr. 427; Latimer v. Batson, 4 B. & C. 652; and in Wardall v. Smith, 1 Campb. 332, the same doctrine is laid down. In the more modern English cases, the stringent doctrine of Edwards v. Harben, 2 T. R. 587, has been departed from; and the want of possession of chattels purchased is considered evidence of fraud before the jury. 460] In Kidd v. Rawlinson, 2 *B. & P. 59, Lord Eldon admitted that a bill of sale of goods might be taken as a security on a loan of money, and the goods fairly and safely left with the debtor. And this decision conformed to Lord Holt's view, in Cole v. Davis, 1 Ld. Raym. 725; and Lord Eldon, many years afterwards, declared, in Lady Arundell v. Phipps, 10 Ves. Jr. 145, that possession of goods by the vendor was only prima facie evidence of fraud. In Eastwood v. Brown, 1 Ryan & M. 312, Lord Tenterden held, want of possession was only prima facie evidence of fraud.

It would seem to be difficult, on principle, to maintain that the possession of goods sold is, per se, fraud, to be so pronounced by the court, as that cuts off all explanation of the transaction, which may have been entirely unexceptionable. If circumstances, at law, may be proved to rebut the presumption of fraud, the case must be submitted to the jury.

But the case before us is not similar to that of Hamilton v. Russell. There was a change of possession in the goods purchased by Anderson, by the delivery to him of the key of the outer door of the storehouse, which he delivered to Atherton, who had agreed to continue in the business as the agent of the purchasers. From the time of the purchase, Haskins had no possession of the property, nor did he exercise any acts of ownership over it. He was absent from La Salle from the time of the sale until after the attachment was laid.

Now, whether this was a colorable delivery or not, was a matter of fact for the jury, and not a matter of law for the court. It is clearly not within the case of Hamilton v. Russell.

Few questions in the law have given rise to a greater conflict of authority than the one under consideration. But for many years past the tendency has been, in England and in the United States, to consider the question of fraud as a fact for the jury under the instruction of the court. And the weight of authority seems to be now, in this country, favorable to this position. Where possession of goods does not accompany the deed, it is prima facie fraudulent, but open to the circumstances of the transaction, which may prove an innocent purpose. But if such explanation may be given, it is a departure from the stringent rule in the case of Edwards v. Harben.

It is urged that the fourth instruction is fraudulent per se, as the jury were told, though the sale was secret, and no means taken to make it public, it was not fraudulent in law against the defendant. Whilst in the old cases it was held that the possession of the vendor of goods sold was fraudulent against creditors, no case, it is believed, has been so held by the court, on the ground of secrecy alone in making the contract. It is *a circumstance con- [*461 nected with other facts from which fraud may be inferred. But if the secrecy supposed amounted to absolute fraud, yet the court could not have so pronounced in this case, as there was evidence controverting the supposition of secrecy, which the court could not properly take from the consideration of the jury.

The fifth and sixth charges that the jury were to determine the facts as to the possession after the sale; and that, if a sale is made by a party, and the vendor remains in possession, it is ordinarily a badge of fraud, and requires explanation; and under the sixth they left the case to the jury, to determine whether the sale was in good faith and for an honest purpose; which instructions were, as we think, correct, and in accordance with the general doctrine on the subject.

A decision on a motion for a new trial, being addressed to the discretion of the court, is no ground for a writ of error.

The judgment of the Circuit Court is affirmed.

HORACE C. SILSBY, Washburn Race, Abel Downs, Henry Henion, and Edward Mynderse, Appts.,

v.

ELISHA FOOTE.

(See S. C. 20 How. 378-393.)

Divided court precludes opinion—interest, when not allowable—disclaimer, when necessary to recover costs.

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This court being equally divided in respect to the amount of profits that should be allowed to complainant, Foote, for his patent on stoves, precludes any written opinion on this branch of the case.

There was error in the allowance of interest on the profits, found for the complainant.

If judgment or decree be rendered for the plaintiff, he shall not recover costs against the defendant, unless he shall have entered a disclaimer in the Patent Office, of the thing patented, to which he has no right, prior to the commencement of the suit.

Argued Jan. 29, 1858. Decided May 4, 1858.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The bill in this case was filed in the court below on the 9th of Oct. 1848, by Elisha Foote, against defendants, claiming damages for the infringement of a certain patent. On Feb. 22, 1849, the defendants filed a joint and several answer to the bill.

On March 2, 1849, a replication was filed. July 12, 1850, complainants filed a supplemental bill of complaint. Jan. 14, 1851, the defendants filed a joint and several answer to the supplemental bill.

Jan. 28, 1851, a replication to said last named answer was filed.

April 13, 1851, an interlocutory order was made, that the feigned issues allowed by a former order be made up and tried.

Upon the trial of the feigned issue, the jury returned an answer in the negative to the following questions:

First. Was the plaintiff the original and first inventor of the application of the expansive and contracting power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove in which it may be used, by which a more perfect control over the heat is obtained, than can be by a damper in the flue?

Second. Was plaintiff the original and first inventor of the combination described in his patent, by which the regulation of heat of a stove in which it may be used is effected?

Subsequently, on Aug. 29, 1853, the said cause having been previously brought to a hearing an interlocutory order was entered, in which the court held that the complainant was the first and original inventor of the application of the expansion and contraction of the inflexible metallic rod to the regulation of the heat of stoves, as described and claimed in his patent; that the defendants had infringed the said patent in making and vending the regulators of stoves, as charged in the bill of complaint; and that the complainant was entitled to have a perpetual injunction against said defendants, their agents, servants, and all claiming or holding under or through them, from making, vending or using, or in any manner disposing of any regulator or regulators of stoves embracing the invention or improvements described in said letters patent.

"And it is further adjudged and decreed that the cause be referred to Augustus A. Boyce, the Clerk of this court, to ascertain and report the number of regulators for stoves embracing the principles aforesaid that have been made, and also the number sold by the said defendants or either of them, since the 23d day of March, 1847, and the damages complainant has sustained, or use and profits the defendants, or either of them, have derived by such infringements since the time last aforesaid.

And upon the coming in and confirmation of the said report, that said complainant have a decree and execution for the amount found due to him, and also for the costs in this suit to be taxed."

On June 17th, 1854, the report of said Boyce was filed. Both parties filed exceptions, some of which were sustained by the court, and a further examination of the evidence taken before the Master was made by the court, and a final decree was entered against the defendants for $23,644.20, with costs. The decree also made provision as to the joint and several liability of said defendants.

From this decree the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court, and in the dissenting opinion of Mr. Justice Grier.

Messrs. **Charles M. Keller, Samuel Blatchford** and **William A. Sackett**, for appellants:

The answer insists that the first claim of the plaintiff's patent is void, because it is a claim to the application of an abstract principle or natural property of metals to certain purposes, and is not a claim for the invention of any mechanical structure or process by which such principle may be applied, and is not a fit subject for a patent. It is impossible to distinguish the first claim of the plaintiff's patent from the eighth claim of Morse's reissued patent of 1848, which was adjudged by this court in O'Reilly v. Morse, 15 How. 62, 112, 120, to be void.

This objection strikes at the very foundation of the interlocutory decree, and if that cannot be maintained, the reference and all proceedings thereon, and the final decree, must fail.

The counsel then reviewed the case of O'Reilly v. Morse, and attempted to show that the present case was parallel.

2. The answer insists that the said alleged disclaimer is insufficient, invalid, and void in law as a disclaimer, because the part of the claim of the specification which is not intended to be disclaimed, is not capable of being distinguished from the part of the claim which is intended to be disclaimed.

And also that the first claim is void, for the reason that it is immaterial whether the expansive and contracting properties of a metallic rod be applied to open and close a damper that regulates the admission of air into a stove, or to open and close a damper in the flue. The substitution of the one for the other does not involve invention. In his disclaimer, the plaintiff admits the want of novelty in the application of the device claimed by him to regulate the defect in structures other than the stove, and to govern the admission of air into other than stoves, instead of regulating the damper in the flue; and the claim of the plaintiff, as limited by the disclaimer, admits that such a device has been used to govern the damper in the flue.

3. If the alleged disclaimer be regarded as a valid disclaimer, then it is submitted that the specification must be construed and limited by the terms of such disclaimer. The disclaimer must be considered in two aspects: 1st. As affecting all the claims of the patent, which was

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the view taken by the court below, as shown by the manner in which it presented the issues of the first and third claims to the jury. 2d. As affecting the first claim only. The disclaimer either affects all the claims of the patent, or the patent is void on its face for multiplicity of invention. One part of the patent would be for an improvement in stoves only, and the other parts for improvements in stoves and other structures. On the assumption, however, that the disclaimer applies to all the claims of the patent, then it is contended by the defendants, that the admissions of the disclaimer avoid the patent in judgment of law, for want of invention. In substance the disclaimer imports that, prior to plaintiff's invention the expansive and contracting power of an inflexible metallic rod had been applied to operate the damper which governs the admission of air into a structure not a stove; and all he can claim as new is the mere application of this to a structure called a stove. If, therefore, the disclaimer applies to all the claims, it is contended that in view of such limitation of the claims, the patent is void on its face, as being merely for the double use of a known invention, or what is termed the application of a known thing to another and an analogous use, which, in judgment of law, is not the subject matter of letters patent.

Winans v. R. R. Co. 2 Story, 412; Bean v. Smallwood, 2 Story, 408; Howe v. Abbott, 2 Story, 190; Losh v. Hague, Web. Pat. Cas. 207; Corning v. Burden, 15 How. 252, 270; Curtis on Patents, secs. 4, 26, 27, 86–88.

The purpose for which an invention is used or to which it is applied, makes no part of the invention. It is a necessary consequence that if the varying heat will expand and contract a metallic rod to open and close a damper which governs the admission of air to the fire in any structure, it will do so in a stove; and that if this mode of regulating the admission of air to the fire in any structure will regulate heat, it will do so in a stove.

Hotchkiss v. Greenwood, 11 How. 248.

The counsel then reviewed the evidence in reference to the novelty of the plaintiff's invention, and also the exceptions to the Master's report.

Mr. Elisha Foote, in person, and Mr. R. H. Gillet, for appellee.

The argument for the appellee, being confined to the facts and evidence concerning the invention, is not here given.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Northern District of New York.

The bill was filed in the court below by Foote against the defendants for an alleged infringement of a patent for an improvement in regulating the draught or heat of stoves. The bill, among other things, set out a trial at law between the parties upon the patent, and a verdict for the plaintiff; that the defendants since the trial and verdict continued their infringement, and have even increased the business of making and vending the complainant's stove regulators.

The complainant prayed for an account, and that the defendants be restrained by injunction from further infringements.

The defendants put in an answer, to which there was a replication. Afterwards feigned issues were ordered by the court, to try the questions whether or not the patentee was the first and original inventor of the application of the expansive and contracting power of the metallic rod, by different degrees of heat, to open and close the damper which governs the admission of air into a stove; and also, whether or not he was the first and original inventor of the combination described in his patent, by which the regulation of the heat of a stove in which it might be used was effected.

The jury, after hearing the proofs upon these issues, returned a verdict in the negative. Afterwards the cause come before the court upon the pleadings and proofs, and the case made upon the trial of the feigned issues; and after hearing the arguments of counsel for the respective parties, held, that the patent was valid, notwithstanding the verdict of the jury on the feigned issues, and also that the defendants had been guilty of an infringement, and referred the cause to a master, to ascertain and report the profits which the defendants had derived by reason of said infringement. A most voluminous record *of testimony was tak- [*386 en before the Master, and on the 17th June, 1854, he reported profits made by the defendants to the amount of $2,650. Thirty exceptions were filed to the report by the counsel for the complainant, and eighteen by the defendants, and were argued before the court. The view the court has taken of the case here, renders it unimportant to refer particularly or specially to the decision of the court below, upon each of these exceptions. After disposing of them, the court, agreeably to an earnest request of the counsel that the cause should not be again sent down to the Master, but that the court, upon the evidence before it, should ascertain the amount of profits to which the complainant was entitled, entered upon the inquiry, and, after a laborious and minute examination of a record of some six hundred closely printed octavo pages of proofs, found an aggregate of profits to the amount of $17,980.40, and an aggregate of interest, averaged, of $5,663.32, making a total of $23,644.22. And on the 28th of August, 1856, a final decree was entered for the complainant against the defendants for this amount with the costs to be taxed.

The cause is now before this court on appeal.

The difference of opinion among the judges of this court in respect to the amount of profits that should be allowed to the complainant, precludes the delivery of any written opinion on this branch of the case. The decree of the court below as to the amount, with the exception of the interest, is affirmed by a divided court. A majority of the court are of opinion that there was error in the allowance of interest on the profits, found for the complainant. That amount, therefore, which is $5,663.82, must be deducted.

This court is also of opinion that the court below erred in awarding costs of the complainant against the defendants.

The first claim of the patentee in his patent was disproved by the prior construction and use of what is called in the case the Saxton stove, and no disclaimer was entered according

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to the requirements of the Act of Congress 3d March, 1837. By the 9th section of that Act it is provided, that when a patentee by mistake shall have claimed to be the inventor of more than he is entitled to, the patent shall still be good for what shall be truly and bona fide his own, and he shall be entitled to maintain a suit in law or equity for an infringement of this part of the invention, notwithstanding the specification claims too much. But in such case, if judgment or decree be rendered for the plaintiff, he shall not recover costs against the defendant, unless he shall have entered a disclaimer in the Patent Office of the thing patented, to which he has no right, prior to the commencement of the suit. There is also an-
387*] other *condition, namely: that the plaintiff shall not be entitled to the benefits of said section, if he has unreasonably neglected or delayed to enter the disclaimer.

The Saxton stove was produced on the trial of the feigned issues, after this suit had been commenced, and the question has been in controversy from thence to the present time, whether or not the arrangement, construction and use of that stove, had the effect to disprove the first claim in the complainant's patent. It would be going too far, therefore, under these circumstances, to hold that the delay in entering the disclaimer was unreasonable within the meaning of the Statute. A majority of the court is of opinion the delay has not been unreasonable within the meaning of the Act, so as to defeat the recovery.

According to our conclusions, the decree of the court below is reversed as to the $5,663.82 interest, and also as to the costs allowed the complainant, and affirmed as to the residue, without costs to either party in this court; and that the case be remitted to the court below to enter a decree for the complainant against the defendants in conformity to this opinion, and proceed to the execution of the same.

Mr. Justice Grier dissenting:

Although I may occasionally differ in opinion with the majority of my brethren, my usual custom has been to submit to their better judgment without remark. But in this case I feel constrained to protest against a decree which, in my opinion, does great and manifest injustice to the appellants. In doing so, it is proper that I thus state my reasons as briefly as possible, without an attempt at their full vindication by a tedious argument.

I. I believe the patent of the complainant to be void on its face.

The first claim is for the application of the "expansive and contracting power of a metallic rod, by different degrees of heat, to open and close a damper which governs the admission of air into a stove."

388*] *Now, this claim is false in fact. The patentee was not the first to make this application of the different degrees of expansion of metals to open and close a damper to a stove. The evidence is clear, explicit and uncontradicted. Moreover, the jury has so found in an issue ordered in this case, and which verdict does not appear to have been set aside, although it was disregarded in the decision of the case.

This claim, even if it were true in fact, is clearly void in law, unless we agree to reverse the doctrine laid down by this court in the case of O'Reilly v. Morse, 15 How. 62, with regard to the eighth claim of Morse's patent. Besides, at the trial at law, the Circuit Court decided, in 1848, that this first claim could not be sustained. Yet, with ten years' judicial notice of this defect in his patent, the patentee has never amended it, entered a disclaimer, or attempted to avail himself of the privilege offered to him by the Statute to rescue it from this charge, so destructive to its validity.

At common law, a patent having this infirmity was absolutely void. The Patent Act of 1836, sec. 13, provides a remedy, "where a patent is inoperative and void, by reason of a patentee's claiming in his specification as his invention more than he had a right to claim, and when the error has arisen through inadvertence or mistake."

In such a case the patentee is permitted to surrender his patent, and, on payment of a further sum, have his patent reissued as corrected. But he was not permitted to recover any damage for infringement which occurred before the date of the reissued patent.

The Patent Act of 1837, sec. 7, gives a further privilege to the patentee of escaping the consequences of such a defect, "where his patent is too broad," by permitting him to enter a disclaimer, to be taken and considered as part of the original specification. It does not subject him to the costs of a new patent nor to the forfeiture of antecedent damages, where the disclaimer is made during the pendency of a suit, but gives the defendant a right to object to its validity on account of unreasonable neglect and delay in filing it.

The 9th section of the same Act provides for the case where "the patentee, in his specification, has claimed to be the inventor of any material or substantial part of the thing patented, of which he was not the first inventor, and provided it be distinguishable from other parts claimed in his patent. He is permitted to sustain his action for such part as is bona fide his own invention, forfeiting his right to costs where he has not filed a disclaimer before suit brought. But no person, bringing any such suit, shall be entitled to the benefits of this section, *who shall have unreasona- [*389
bly neglected or delayed to enter at the Patent Office a disclaimer, as aforesaid."

Now, the first claim of this patent does not come within the category of the 9th section. It is not for "a material and substantial part of the thing, distinguishable from other parts," but it is the case embraced in the 7th section, where the claim is void, because it is too broad.

Here the claim is for a monopoly of the expansive power of metals when applied to a stove, and this expansive power is a necessary agent in every claim for a combination in the patent.

The 7th section gives the patentee no right to recover at all, unless a disclaimer has been filed before trial or judgment. But, assuming that the privilege given by the 9th section be available to the patentee in this case, has he brought himself within the proviso? He has refused to avail himself of the privilege tendered to him by the law, and stands upon his patent. Notwithstanding the decision of the Circuit

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Court against this claim in 1848; notwithstanding the decision of this court in O'Reilly v. Morse; notwithstanding the verdict in 1853, declaring this claim false, no disclaimer has ever been entered. The pendency of the suit could be no reason, for the Acts contemplate a pending suit. I cannot consent to say that this is not a case not only of unreasonable delay, but of stubborn rejection of the privilege offered by the law.

The case of O'Reilly v. Morse cannot be quoted as a precedent for this. There, Morse was admitted to be the original inventor of the application of an element of nature in his eighth claim; but the court decided that it was void, because it was too broad. Until that decision was read in court, the patentee had not the least reason to suspect his claim to be invalid. The decision was a surprise not only to him, but many others more learned in the law, who had carefully examined this claim and advised the patentee that it was valid. In the present case, the patentee disregarded the judgment of a circuit court, a verdict of a jury, and judgment of this court, all of which warned him of the necessity of a disclaimer many years before final judgment.

I cannot consent to annul the Statute altogether, and allow its benefits to a patentee who has stubbornly refused to submit to the conditions on which they are tendered.

II. The interlocutory decree of the court below does not condemn the defendants for infringing the third claim of the complainant's patent, on which alone it was decided on the trial at law the efendant was liable, and on which it is now attempted to justify this decree. What that decree is, must be judged by the record, and not by any parol explanations or contradictions of it.

390*] *The decree affirms—

1st. That the plaintiff was the first inventor of the application of the expansion and contraction of the inflexible metallic rod to the regulation of the heat of stoves.

2d. That any regulator in which the expansive and contracting power of an inflexible metallic rod, which expansion and contraction is produced by changes in the heat of the stove regulated, is applied to the damper to regulate the heat of the stove, is embraced within the principle of the invention claimed in the patent.

3d. That the defendants have made and sold regulators embracing that principle.

4th. That they must account for all regulators made and sold by them which embrace that principle.

This decree charges the defendant with the infringement of the first claim of the patent, and is in conformity with the doctrines advanced in the charge of the court, on the issue tried before them. where court thus define the claim of the patent.

"Now, in this case, as I understand the claim of the patentee, he claims the application of the principle of expansion and contraction in a metallic rod for the purpose of regulating the heat of a stove. That is the new conception which he claims to have struck out, and, although the mere abstract conception would not have constituted the subject matter of a patent, yet, when it is reduced to practice by any means, old or new, resulting usefully, it is the subject of a patent, independently of the machinery by which the application is made."

Again, speaking of the first claim, he says:

"That claim is not for any mode or method of applying the expansion and contraction of the metallic rod to regulate the heat of the stove, but is for the conception of the idea itself."

The interlocutory decree says, therefore, in effect, that the brass rod regulators, which the defendants admit in their answers they made and sold, are infringements of the plaintiff's patent, because they embrace the principle of the application of the expansive and contracting power of an inflexible metallic rod to the damper of a stove. And the master is directed to take an account of all regulators that fall within the principle specified, no matter what their mechanical structure is or how they may differ from the regulators of which the plaintiff gives a description in his specification, and no matter whether they embrace or not anything that the plaintiff claims in either his second, his third, or his fourth claim. The plaintiff and the court below say, in effect, that they do not care for any proof as to whether any claim of the patent but the first is infringed; and that, as the defendants have been guilty of applying *the expansive and contract- [*391 ing power of an inflexible metallic rod to open and close the damper of a stove in which changes in the heat of a stove produce the expansion and contraction, they must respond for all instances of such application.

The defendants are found guilty of infringing the first claim of the patent alone. No testimony was produced in the case to show that the Race patent infringed the third claim, and this fact was emphatically denied in the answer. Nor was the verdict and judgment at law put in evidence. And if it had been, it is no estoppel in equity to the defendants' putting the truth of that charge of the bill in issue in his answer. That verdict and judgment is put into the bill, as laying a proper ground for the granting of the preliminary injunction. Nor is it true, as now asserted, that this court has decided the question in the case of Silsby v. Foote, 14 How. 218.

On that trial the court below had instructed the jury, "that the defendants had not infringed the plaintiff's patent unless they had used all the parts embraced in the plaintiff's combination," and submitted the question to the jury whether there had been such infringement.

This instruction was adjudged by this court to be correct. The question whether the verdict was correct was not before this court, and could not have been decided.

The third claim which is now alleged to be infringed is as follows:

"I also claim the combination above described, by which the regulation of the heat of a stove or other structure, in which it may be used, is effected."

The law requires that a patent should "particularly specify and point out the part, improvement, or combination, which the patentee claims as his own invention."

This claim does not specify the combination claimed, otherwise than by reference to the

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body of the specification where two distinct and complex combinations of numerous parts and devices are set forth.

After a full and fair trial, the jury have found, on an issue directed for that purpose, that the complainant was not the first and original inventor of the combinations set forth in this claim. But assuming that the court may disregard this verdict, and, without setting it aside or ordering a new trial of the issue, treat it as a nullity; and assuming, that without any testimony whatever being offered in the case, the court may, on view of the models, declare that the defendants' patent infringes that of complainant; and assuming the doctrine affirmed by this court in Silsby v. Foote, and Mc-
392*] Cormick v. Manny, 6 McLean, 539, *to be correct, "that defendant has not infringed plaintiff's patent unless he has used all the parts embraced in plaintiff's combination," I think it is clear to ocular demonstration that the defendants have not infringed either of the combinations claimed, unless we assert that all other combinations which produce the same result are equivalents for the first—a sophism which has just been rejected by this court in the case of McCormick v. Manny. A vindication or demonstration of the correctness of this conclusion could not be made intelligible unless by a long recital from the specification, and an exhibition of models or diagrams. The decree of the court below very properly does not assert or adjudge that defendants have used the complex combination of complainant's specification in any of its numerous parts save one —the expanding rod. On this point, therefore, my objection to the affirmance of any portion of this decree is, because it is founded on a claim admitted to be void in law, and is sustained by presuming, contrary to the record, that it was founded on a claim found by verdict in the case to be void in fact, and without any proof of infringement save ocular demonstration of the contrary.

III. But assuming the verdict of 1848 between the present complainant and some of the defendants to be conclusive as an estoppel on all of them, notwithstanding the denial of the answer and the evidence of our senses, yet that verdict was between the complainant's patent and the Race patent, which is called the "brass rod regulator," then used by the defendants. It had no reference whatever to the "expander patent," afterwards used by defendants. There is no charge in the bill that the combination of this last patent infringes the complainant's patent. There was no evidence offered to prove such to be the fact. The master's report declares it not to be an infringement of the combination of the third claim—it is patent to the eyes of any one who will examine the models that it does not; yet, because it used the expansive power of metals, the defendants are mulcted in the sum of $7,033 damages, not for invading the complainant's right, but for evading his patent by a patented invention for a different combination. I forbear to make any further remarks on this enormity, because it is affirmed by the division of the court, and their opinion has, happily, not been compelled to defend it by argument. As it is without precedent, so neither can it be cited as such hereafter.

IV. Lastly, after a very long and laborious investigation, the Master has found that the profit of making and vending the machine charged as an infringement, is ten cents on each regulator. This finding of the report was excepted to by the *complainant. The [*393 court overruled the exception and confirmed the report on this point; and, nevertheless, assess the damage at tenfold the amount. By what process of reasoning or arithmetic, on what facts or what principle of law, this astonishing and ruinous decree is founded, it does not undertake to explain. I can conceive of no other ground than that the court have calculated the whole profit of the stove, as was done in the case of Seymour v. McCormick, 16 How. 480, and overruled by this court.

Believing, therefore, that the decree of this court, so far as it affirms any portion of the decree of the Circuit Court, is not only unsustained by evidence, but contrary to the law as heretofore established by this court, I cannot give my assent to it.

Mr. Justice Daniel dissenting:

I concur entirely in the views expressed by my brother Grier in this cause. I have always regarded the patent of the complainant void upon its face. I, moreover, consider the decree of the Circuit Court inconsistent with the claim of the complainant, unwarranted by any evidence in the cause, and most unjust and oppressive in its operation.

CHARLES W. GAZZAM, Plff. in Er.,

v.

LESSEE OF ELAM PHILLIPS and Mary, his Wife, and Ashley W. Etheridge.

(See S. C. 20 How. 372-378.)

Court cannot go behind description in patent —power of Surveyor-General—3 How. 650, disapproved.

The court below had no right to go beyond a description of a tract in a patent, and determine the tract and quantity of land under a supposed equity arising out of the pre-emption laws, instead of by the description in the patent.

The Surveyor-General has power to make fractional subdivisions, or fractional sections of public lands, containing more than eighty acres.

Brown v. Clements, 44 U. S. (3 How.) 650, disapproved.

(Mr. Justice Campbell did not sit in this cause.)

Argued April 9, 1858. Decided May 4, 1858.

IN ERROR to the Supreme Court of the State of Alabama.

This was an action in ejectment, brought in one of the State Courts of Alabama, by the defendants in error, to recover certain premises in the City of Mobile. The court charged the jury with reference to the opinion of this court, as expressed in the case of Brown v. Clements, 3 How. 650, remarking that his charge would have been different, were it not for that opinion. The verdict and judgment were for the

NOTE.—Preemption rights. See note to U. S. v. Fitzgerald, 10 L. ed. U. S. 785.

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plaintiffs. The judgment having been affirmed by the Supreme Court of Alabama, the defendants brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Mr. J. Little Smith, for the plaintiff in error:

The Registers of the local Land Offices are mere sale agents of the Government. The survey and division of the lands are intrusted to the surveyors. Their action is conclusive, and the Registers are bound to sell by the plats furnished them. They can sell in no other manner.

Kissell v. St. Louis Public Schools, 18 How. 19; Bagnell v. Broderick, 13 Pet. 450; Barnard v. Ashley, 18 How. 43; West v. Cochran, 17 How. 403; 9 How. 333.

These cases show that the action of the Surveyor-General is conclusive, independent of any judicial decision.

The decision by the Commissioner of the General Land Office, confirmed by the Secretary of the Treasury, is final. The tribunals of the United States cannot set aside, or treat as null, the legitimate decision of other departments.

6 Pet. 691, 709, 729; 13 Pet. 511; 1 Pet. 345; 12 Pet. 410; 9 Pet. 117; 2 How. 338; 7 Cranch, 423; 3 Pet. 193; 6 Cranch, 267; 9 Pet. 8; 12 Pet. 657, 718; 13 How. 40.

Should, nevertheless, the defendant in error be allowed to bring this question before a court of law, still the decision there must be also adverse to him. The action of the Surveyor-General in making the subdivision he did, was in strict conformity with the law.

The law contemplates three different kinds of surveys: one for entire sections, one for fractional sections, and one for private confirmed claims. The policy of the Government, as to the first two classes was to keep them distinct.

Brown v. Clements, 3 How. 650; Act of 1796, sec. 3; Act of 26th March, 1803; Act of 24th April, 1820.

The defendant in error says that, according to the laws regulating the manner in which the public lands are to be surveyed, there is in fractional section 22 the quarter of an entire section, and therefore under the Act of April 24, 1830, such is the "legal subdivision" he takes. I join issue with him as to the fact. There is no such quarter in section 22, if the laws are to be strictly applied.

Act of 1820 referred to; Act of Feb. 11, 1805, 1 Land Laws, 112, 119, 120.

The judge charged, "that it was immaterial whether the Espejo claim crossed the line and reduced the number of acres below a quarter section or not. Etheridge's application being for the southwest quarter section, he takes so much of it as was not taken by the Espejo claim." This charge is clearly erroneous. The defendant in error claims a quarter section, because he says it is to be found in the section.

The evidence tended to show that it could not to be found, because the western boundary, if projected one-half a mile, would, before the attainment of that distance, run into the Espejo grant.

The case of Brown v. Clements was quite different.

The plaintiff in error claims the southeast subdivision of the southwest quarter of the section 22, which he cannot get, if the defendant in error takes the whole of the southwest quarter. This cannot be allowed, for the plaintiff in error's patent is the oldest, and in an action of ejectment the patent is conclusive.

Wilcox v. Jackson, 13 Pet. 516; Bagnell v. Broderick, 13 Pet. 450; Stringer v. Young, 3 Pet. 320; Boardman v. Reed, 6 Pet. 328.

Mr. Charles E. Sherman, for the defendants in error.

The patent to Etheridge in this case, is for a well known legal subdivision of the public land. The descriptive words are as absolute and conclusive as if natural or artificial boundaries had been employed. Quantity is the least certain part of legal descriptions.

Brown v. Clements, 3 How. 650; 2 Story, 282, 288; 18 Wend. 68; 16 Johns. 260.

All patents by the United States are for a quantity of land named therein, "more or less."

Cases cited in Brown v. Clements.

The application to the Executive Department to correct the error in the subdivision in section 22, by making the plat conform to the grant, and the right and refusal of the Executive to correct such errors, cannot affect the legal rights of the defendant in error before this court.

16 Am. Jur. 289, 299, Title, Precedents, Executive Acts.

Holding the patent of the United States for the "confirmation of quarter of section 22," which conveyed the legal title of the United States to that "tract" of land, in satisfaction of his claim to the same under the Pre-emption Act of 1830. Defendants in error ask that the judgment of the Supreme Court of Alabama be affirmed.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Alabama.

The suit was brought in the court below to recover the possession of some four acres of land in the City of Mobile.

The lessors of the plaintiff claimed title to the lot in dispute as heirs of James Etheridge, and gave in evidence a patent from the United States to their ancestor, dated 30th May, 1833, "for the southwest quarter section 22, in township four south, of range one west, in the district of land subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor-General: which said tract has been purchased by the said James Etheridge." The above is a literal extract from the description of the parcel of land in the patent granted to Etheridge.

The defendant claimed under William D. Stone, and gave in evidence a patent to him from the United States, dated the 17th December, 1832, "for the south subdivision of fractional section 22, same township and range, containing one hundred and ten acres and fifty-one hundredths of an acre, according to the official plat of survey of the said lands, returned to the General Land Office by the Sur-

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veyor-General; which said tract has been purchased by the said William D. Stone." Etheridge gave notice to the Register and Receiver of his claim under the Act of 29th May, 1830, on the 28th January, 1831, and produced his proofs. Stone gave notice of his claim to the same section, 25th March, 1831, and furnished his proofs. The claim and proofs in each case were received and filed, but no money was paid, nor certificates given, as the official plat of the survey of the township had not then been received at the office. This plat was returned and filed in March, 1832. There were private claims surveyed and laid down on the plat to this section, so that the portion open to the two preemption claims in question was confined to a fractional part of the section. This fractional part was divided according to the plat by a line running north and south through it, laying off in the west subdivision ninety-two and sixty-seven hundredths acres, and in the east one hundred and ten and fifty hundredths acres. Etheridge purchased the west and Stone the east subdivision.

The certificates of purchase were given to both claimants 30th April, 1832. The one to 375*] Etheridge is for the southwest *quarter of section 22, containing ninety-two and sixty-seven hundredths acres, the quantity in the west subdivision, at the rate of $1.25 per acre, amounting $115.43; the other to Stone is for the southeast subdivision of fractional section 22, containing one hundred and ten and fifty hundredths acres, the quantity in the east subdivision, at the rate of $1.25 per acre, amounting to $138.13.

The sales in each case were made in conformity with the subdivisions, as marked upon the plat of the Surveyor-General then on file in the office, and to which all purchasers of the public land had access, and which constituted the guide of the Register and Receiver in making the sales.

The lessors of plaintiff also gave evidence showing that the premises in question were within the southwest quarter section 22, computing the same according to the usual measurement of quarter sections, and that a full quarter might have been laid off from the fraction, and claimed that the whole of the southwest quarter had been appropriated to their ancestor, Etheridge, under the Preemption Act of 1830, which position was assented to by the court. The court also ruled that the purchase and patent of Stone, under whom the defendant claims, must be restrained to the fraction in the west part of the southeast quarter of section 22, and that it gave him no right to the land in the southwest quarter.

The effect of this ruling, when applied to the case, gave to the heirs of Etheridge one hundred and sixty acres of the fractional section in disregard of the official survey, the purchase, and patent for only the ninety-two acres, and reduced the one hundred and ten which Stone purchased, and had a patent for, to some forty-three acres.

The court is of opinion this ruling cannot be maintained. For, conceding for the sake of the argument that the plat by the Surveyor-General of this section was made contrary to law, the ground upon which the decision is sought to be maintained, and that Etheridge, under the Preemption Act of 1830, was entitled to purchase the whole of the southwest quarter, and to have it surveyed and patented to him, yet it was not so surveyed, nor did he purchase, nor has he obtained a patent for the same. On the contrary, he purchased and paid for the west subdivision only of this fractional section, containing ninety-two acres, and took out a patent for the subdivision. And in addition to this, Stone, at the same time, purchased the east subdivision, as laid down on the official plat, and has received a patent for the same, and which includes the premises in question.

*The patent to Etheridge, as we have [*376 seen, describes the land granted as the southwest quarter, etc., containing ninety-two and sixty-seven hundredths acres, according to the official plat of the survey of said lands returned to the General Land Office. And the patent to Stone is equally specific in the description of the parcel granted to him. The title, therefore, to the premises in question, was never in the ancestor of the lessors of the plaintiff, hut has been in Stone, and those holding under him, since the 17th of December, 1832, the date of his patent.

The case of the claim of Etheridge to the whole of this southwest quarter, some years after the issuing of the patent to him and Stone, was presented to the Commissioner of the Land Office for correction. It was there elaborately examined by the counsel for the applicant, and by the Commissioner of the Land Office, and ultimately disposed of by the Secretary of the Treasury, on the opinion of the Attorney-General; that officer maintaining the regularity of the survey, and of course confining the grants to the subdivisions as laid down on the plat referred to in the patents. But, as we have already said, whether this view of the law be sound or not, it cannot control the question before us. The inquiry here is, in respect to the legal title, whether it was in Etheridge or Stone, under the description of the land in their respective patents. Unless we can hold that it passed to Etheridge under his patent, the plaintiff must fail. And we have seen that without disregarding the plainest terms used in the description of the tract, it is impossible to arrive at any such conclusion. We deny altogether the right of the court in this action to go beyond these terms, thus explicit and specific, and, under a supposed equity in favor of Etheridge, arising out of the preemption laws, to the whole of the southwest quarter, enlarge the description in the grant, or more accurately speaking, determine the tract and quantity of the land granted by this supposed equity instead of by the description in the patent.

But, independently of the above view, which we think conclusive against the plaintiff, we are not satisfied that there was any want of power in the Surveyor-General in making the subdivision of this section according to the plat, and in conformity with which the sales of the land in dispute were made.

The 1st section of the Act of 24th April, 1820 (3 U. S. St. p. 566), after referring to the Act of 1805, provides, "that fractional sections containing one hundred and sixty acres or upwards, shall, in like manner, as nearly as practicable, be subdivided into half quarter sec-

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tions under such rules and regulations as may be prescribed by the Secretary of the Treas-377*] ury, *but fractional sections containing less than one hundred and sixty acres shall not be divided, but shall be sold entire."

The Secretary of the Treasury issued his regulations to the Surveyor-General, through the Commissioner of the Land Office, on the 10th June following, in which he directed that fractional sections containing more than one hundred and sixty acres should be divided into half quarter sections by north and south or east and west lines, so as to preserve the most compact and convenient forms. The fractional section in question was divided by a north and south line, according to these instructions. Under them, some latitude of discretion has been exercised by the Surveyor-General in the division of fractional sections exceeding the quantity mentioned, regard being had to convenient forms, and to avoid the subdivision of the public domain into ill-shaped and unsalable fractions. The question, as we have already seen, came again before the Secretary of the Treasury in the case of Etheridge, before us in 1837, and the construction first given, and also the practice of the Surveyor-General under it, confirmed. The surveys of the public lands under this regulation had then been in operation for some seventeen years, and has since been continued. Attorney-General Butler, upon whose authority the Secretary of the Treasury confirmed the survey of the fractional section in question, in a well considered opinion, observed, that "if Congress had intended that fractional sections should, at all events, be divided into half quarter sections, when their shape admits the formation of any such subdivision, I think they would have said so in explicit terms, and that the discretionary power intrusted to the Secretary would have been plainly confined to the residuary parts of the section; and further, that the clause in the 1st section of the Act of 1820, concerning fractional sections containing less than one hundred and sixty acres (which are not to be divided at all, but sold entire), is decisive to show that Congress, which passed the Act, did not deem it indispensable that regular half quarter sections should, in all practicable cases, be formed by the Surveyors; on the contrary, it shows that they preferred a single tract, though containing more than eighty acres, and though capable of forming a regular half quarter, to small inconvenient fractions." We entirely concur in this construction of the Act.

The only difficulty we have had in this case, arises from the circumstance that a different opinion was expressed by a majority of this court in the case of Brown's Lessee v. Clements, 3 How. p. 650. That opinion differed from the construction of the Act of 1820, given by the head of the Land Department, and disapproved of the practice that had grown up under 378*] *it in making the public surveys; and also from the opinion, subsequently confirming this construction and practice, by the Secretary of the Treasury and Attorney-General, as late as the year 1837. The decision in Brown v. Clements, 3 How. 650, was made in the December Term, 1845.

It is possible that some rights may be disturbed by refusing to follow the opinion expressed in that case; but we are satisfied that far less inconvenience will result from this dissent, than by adhering to a principle which we think unsound, and which, in its practical operation, will unsettle the surveys and subdivisions of fractional sections of the public land, running through a period of some twenty-eight years. Anyone familiar with the vast tracts of the public domain surveyed and sold, and tracts surveyed and yet unsold, within the period mentioned, can form some idea of the extent of the disturbance and confusion that must inevitably flow from an adherence to any such principle. We cannot, therefore, adopt that decision or apply its principles in rendering the judgment of the court in this case,

The judgment of the court below is reversed, and the proceedings remitted to the court, to award a venire, etc.

THE PEOPLE'S FERRY COMPANY OF BOSTON, Claimants of the Steamboat Jefferson, Appts.,

v.

JOS. BEERS and David Warner, Assignees of B. C. Terry.

(See S. C. 20 How. 393-402.)

Admiralty has no jurisdiction of liens for labor or materials, in building vessels—only of maritime contracts.

District Courts of the United States have no jurisdiction to proceed in admiralty to enforce liens for labor and materials furnished, in constructing vessels.

Admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation.

(Mr. Chief Justice Taney, having been indisposed, did not sit in this case.)

Argued Feb. 17, 1858. Decided May 4, 1858.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. Fullerton and Dunning and Charles O'Conner, for appellants:

1. A contract to build and complete a ship or vessel, is not within the admiralty jurisdiction of the United States courts, though it be intended to employ her in navigating the ocean, and even though the employer be a citizen or inhabitant of some other State or country than that in which the work is to be done; much less is a contract merely to construct a hull of an intended vessel within that jurisdiction.

The Constitution and laws of the United States conferred on the courts of the Union the admiralty and maritime jurisdiction, as it existed at our separation from the parent State, under a just view of English jurisprudence.

The attempt to tie down the jurisdiction, as a moral and legal entity, to a definition based upon the instances in which the English court has been able to exercise its powers in despite of judicial rivalry and hostility, may not have succeeded. But there is nothing inconsistent

NOTE.—Admiralty jurisdiction of contracts—see note, 66 L.R.A. 193.

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with the above propositions (1) in any of the decisions of this court, which carry the exercise of admiralty cognizance beyond the limit marked by practice in England prior to, and at the Revolution, nor even in any of the opinions favoring such extension.

Genesee Chief v. Fitzhugh, 12 How. 455; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 392; 18 How. 189.

No one at this day will propose to extend the admiralty jurisdiction to all cases which would fall within it, according to the practice of continental Europe. And unless it is defined by a reference to the true principles of that law on which our whole judicial polity is based, we shall be left without guide or precedent.

1 Kent's Com. 369, notes, 8th ed.

The laws of continental Europe, in respect to claims for repairs and supplies to ships or vessels, and in respect to the question of admiralty jurisdiction, do not discriminate between foreign and domestic vessels. The law of England always has so discriminated, and this court has in like manner discriminated. In English and American law, the admiralty jurisdiction is confined to repairs, etc., furnished in a place other than the home port of the vessel.

The Nestor, 1 Sumn. 79; Justin v. Ballam, 2 Ld. Raym. 806, first resolution; 3 Hagg. 144—3 Knapp P. C. R. 194; Act of 3d & 4th Vic. ch. 65, sec. 6; The Alexander, 1 W. Rob. 288; Ib. 360; Ward v. Peck, 18 How. 267; Ben. Adm. sec. 108; Zane v. The Brig President, 4 Wash. C. C. 456; The General Smith, 4 Wheat. 438; 12th Admiralty Rule of this court; 1 Curt. Com. secs. 51, 52.

The Roman civil law and the law of several modern nations, estimating less highly than the English common law the free and unrestricted circulation of property, gave a lien on solid grounds of natural equity to the producer, preserver and improver of a thing, and to him who lent money for any of these purposes. This policy extended alike to every description of property.

Cush. Domat. secs. 1741, 1745, 1765; The Nestor, 1 Sumn. 79; Bee's Ad. 78; Code Civil of Napoleon, sec. 2103, subs. 4, 5; French Com. Code, book 2, art. 191, sec. 8; Civil Code of Louisiana, art. 3194, 3204 to 3215; Vanleuwen's Roman Dutch Law, book 4, ch. 13, sec. 8.

The English common law, on the contrary, favoring the free negotiation of property, gave no lien in any of these cases, unless the claimant retained possession of the thing. And even those nations of Europe which adopted the civil law as the general basis of their jurisprudence, and yet held intimate relations with England, assimilated their laws to the English policy.

Lickbarrow v. Mason, 1 Smith, L. C. 848; Philad. Law. Reg. 1856, Vol. IV. p. 577; Bell's Com. secs. 1385, 1387, 1397.

According to the principles and policy, both of English and American law, the builder has not any lien by the general law, and cannot prosecute in the admiralty for his compensation.

The General Smith, 4 Wheat. 438; Franklin v. Hosier, 4 B. & Ald. 344; Woods v. Russell, 5 B. & Ald. 942; 2 Story. 462.

Building or constructing a ship for a citizen or a foreigner is not within the reasons on which admiralty jurisdiction is founded.

The St. Jago de Cuba, 9 Wheat. 409; Shrewsbury v. The Two Friends, Bee, 435; Hurry v. The John and Alice, 1 Wash. C. C. 296; 2 Wood. & M. 110.

2. The builders had no lien by any rule of maritime law, nor by the common law, nor by any local law, nor by any contract.

The lien recognized in some of the maritime codes of continenal Europe, is not admissible in this country.

They relinquished their builder's lien, under the common law, by parting with the possession.

There is no Statute or other local law in New Jersey giving a lien to shipwrights.

The laws of New York giving a lien to shipwrights, apply only to the case of debts contracted within the State of New York, and for work done or materials furnished in the State of New York.

2 R. S. 493, sec. 1.

The contract created no lien. The special provision on that subject contained therein was designed for other objects.

It was designed to settle this question in favor of the employer as security for his advances.

Andrews v. Durant, 11 N. Y. 45; Spanish Co. v. Bell, 34 Eng. L. & Eq. 188; Wood v. Bell, 36 Eng. L. & Eq. 148.

The second branch of this clause was designed to save the common law lien of the mechanic from the possible implication of a relinquishment, in consequence of the transfer of the ownership of the employer. The common law lien remained until the mechanic parted with the possession.

3. If any lien existed at common law, by local Statute or by express contract, it was not enforceable in the admiralty.

If there was a lien by force of the contract, it was not a maritime lien.

Leland v. The Medora, 2 Wood. & M. 107 to 113; Hurry v. The John and Alice, 1 Wash. C. C. 296; 2 Browne, Civ. & Adm. L. 116, 95; Bogart v. The John Jay, 17 How. 400; Schuchardt v. Angelique, 19 How. 241.

Where state law, either positive or customary, gives a lien, there is no ground for enforcing such lien by admiralty process.

When the lien is given by the state law, that same law provides adequate means for enforcing it.

1 Pet. Adm. Dec. 228; The Chusan, 2 Story, 462.

Enforcing the lien of the state law by admiralty process, would lead to inconvenient conflicts of power.

The R. Fulton, 1 Paine, C. C. 623.

Furnishing repairs, etc., to foreign vessels, is the only case in which the maritime law gives a lien. That a lien for repairs, etc., in other cases is not needed, proves that such liens, when given by other laws are not in their nature maritime.

Although it has been often decided in the circuits that a lien for repairs, etc., not known to the general maritime law, and merely arising from State legislation, might be enforced in the admiralty, that point has never been conclusively determined in this court.

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Peyroux v. Howard, 7 Pet. 341; The Chusan, 2 Story, 463.

The decrees should be reversed and the libel dismissed with costs.

Mr. E. C. Benedict, for appellees:

1. Liens upon vessels for maritime services to the vessel, are beneficial to the general interests of commerce, are found in natural equity, and are favored in law, especially in the admiralty.

Davies, 38, The Calisto; Crabbe, 442, The Atlantic. Emerigon, Mar. Loans, ch. 12, sec. 3.

2. The building of a vessel and the repairing of a vessel are in principle the same thing. Repairing is reconstruction pro tanto. They are both of them making fit for maritime service as a vessel, what was before unfit for that service. Both furnish to the owner a serviceable vessel for the purpose of commerce. Both are labor and materials made part of, or incorporated in the vessel of another. Both are necessaries in the legal sense of that word.

They are united and classed in the books of maritime law as like maritime causes of action, or services of the same nature, and declared to be a lien upon the vessel by the maritime law from its earliest period, "building, amending, saving, victualling."

Ben. Adm. secs. 95, 270, 271, 272; Fland. Mar. Law, secs. 242, 249; Dig. Lib. 42, tit. 6, sec. 11; 1 Boulay Paty, 121; Consulato, ch. 32; Ord de la Marine, art. 17; Cleirac, 351, 352; Davies, 29; 1 Sumn. 79; The Nestor.

The state laws give liens:

New York, for "building, repairing, fitting, furnishing and equipping."

2 Rev. Stat. N. Y. 491, sec 1, subd. 1.

New Jersey, same as New York.

Laws of New Jersey (1857), 382.

Pennsylvania, "building and fitting ships."

Gilpin 540, The New Brig.

Maine, "building or repairing."

The Calisto, Davies, 29.

Louisiana, "construction or repair."

7 Pet. 341, Peyroux v. Howard.

"All matters that concern owners and proprietors of ships, as such, and shipwrights, are within the admiralty jurisdiction."

Godol. 43; Ben. Adm. 264.

The civil law, the general admiralty law, the British admiralty law, the lien laws of the States, the decided cases in our own courts, all concur. For obvious reasons, cases to enforce the builders' lien are much more rare than those for repairs.

Nothing is so much favored as the price for building a ship; commerce and the State are interested in it. It is just that the builders should enjoy the lien which the law gives them.

Emer. Mar. Loans, ch. 12, sec. 3.

3. Any lien upon a vessel for a maritime service to the vessel, may be enforced in the admiralty.

1 Story, 73, The Marion; Ben. Adm. 270; Fland. Mar. Law, 242.

4. The lien in this case is established as follows:

The vessel, while building in New Jersey, was a foreign vessel, and so there was a lien by the maritime law.

She was in the builder's hands, and so by the common law, which is the law of New Jersey, they had the common law or possessory lien.

There was the express lien given by the contract, "subject to a lien," etc., which was for the maritime cause of materials and labor for building.

For the work and labor done in New York, there was also a lien by the state law.

As the builders had the possession in this State as builders, they had also the common law or possessory lien in New York.

None of these liens ever existed by the mere possession or by the contract alone, but by the beneficial service to the boat, and for all these liens the remedy is complete in admiralty, because the lien has a maritime consideration or cause—the beneficial service in fitting the boat for the maritime service of the owner. No matter how the lien is acquired—if it be of a maritime character—the admiralty has the jurisdiction to enforce it.

1 Story, 68, The Marion.

5. This result of the ancient and modern authorities has, by repeated examination, become more and more clearly and firmly settled every year, for more than half a century.

Ben. Adm. secs. 257–260.

6. The possession of the vessel was never surrendered by Crawford & Terry.

Allowing Small's men to take temporary and divided charge of her to put in the engines preparatory to finishing her, was not a delivery.

Attachment of her by one of the creditors of Crawford & Terry as their property, could have no effect upon the property or possession of the boat. She was the property of Small in the possession of the libelants.

Mr. Justice Catron delivered the opinion of the court:

This was a libel filed by Beers and Warner as assignees of Crawford & Terry, the builders, against a new steam ferryboat, called The Jefferson, for a balance due the builders on account of work done and materials employed in constructing the hull of the vessel. It is alleged that Crawford & Terry contracted to build for Wilson Small, of New York, three ferryboats, at Keyport, New Jersey, for $12,000 each; that they built one of them, to wit: The Jefferson; that they have a lien for the unpaid balance of the price, and that the vessel is now in the Southern District of New York.

Process having been issued, the People's Ferry Company of Boston intervened as owners, and filed their claim and answer, denying the facts alleged.

On the trial, the defendants proved and put in evidence a written agreement for building the hulls of three vessels, between Wilson Small, who was building under a contract for the Ferry Company, and Crawford, by which the latter was to construct, build and deliver at New York City, the hulls of the three vessels. The contract provides that the boats and materials, as soon as the same may be fitted for use, shall be the property of Small, subject only to the lien of Crawford for such sum or sums of money as may be due under the contract.

When The Jefferson was nearly finished, she was taken to New York and delivered to Small, to receive her engine; and afterwards, Craw-

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ford & Terry assigned their claim to the libellants, Beers & Warner. The balance due to the builders was over $7,000, and for this sum the libelants obtained a decree of condemnation.

The only matter in controversy is, whether the District Courts of the United States have 400*] jurisdiction to proceed in *admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends.

The lien reserved by the contract, is not set up in the libel, nor can it avail, as it amounted to nothing more than a mortgage on the vessel for a debt.

Bogert v. John Jay, 17 How. 400. Nor could a maritime lien for work and materials be claimed by the local law, as no statute creating any lien existed in New Jersey when the vessel was built. We have then the simple case whether these ship carpenters had a lien, for work and materials, that can be enforced in rem in the admiralty.

The District Court held: "That it is very clear that the admiralty law creates a lien in favor of a party who does work or furnishes supplies to a foreign ship, and that a ship owned in another State is foreign.

"That in determining the question whether such lien is created also in favor of the builder of a ship, as well as of him who furnishes work and supplies to her after she is built, the court is not controlled by the restricted jurisdiction of the admiralty courts of England, as exercised by them under the supervising power of the common law courts. The rules and principles of the admiralty law, as administered by the Admiralty Courts of this country, are more enlarged—more in conformity to the principles of the civil law, as administered by the maritime nations of continental Europe.

"That, according to the law, the interests of shipping and ships, not only in their creation, but in their preservation, are of paramount importance; that the importance of this consideration is the reason why the material man who furnishes supplies for the preservation of the ship is entitled to a lien; and there is the like reason for giving a lien to him who has furnished necessaries to bring the ship into being.

"That the English law gives only the common law possessory lien to a material man or to a builder; but the maritime law of continental Europe gives a maritime lien to those who build, supply, or repair a ship, at least when she is a foreign ship. This is expressly stated by Boulay Paty, and this principle was acted upon for a long time by the English Admiralty, before it was overthrown by the courts of common law.

"That the right of a material man who has furnished necessaries for the preservation of a foreign ship, has been repeatedly acknowledged by the Admiralty Courts of this country; and as the like reason exists why a carpenter should have a lien on that which by his work and materials he creates, as on that which he preserves, after he has created it; and as by 401*] the general *maritime law a lien exists in the one case, as in the other, the court must hold that Crawford & Terry had a lien upon the boat for the work done and materials furnished in building her."

Foreseeing that the cause would be brought up by appeal to this court, the Circuit judge merely acquiesced *in the decision of the District Court, and affirmed its decree.

The question presented involves a contest between the State and Federal Governments. The latter has no power or jurisdiction beyond what the Constitution confers; and among these, it is declared that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction;" and by the Judiciary Act of 1789, this jurisdiction is conferred on the District Courts of the United States. The extent of power withdrawn from the States, and vested in the General Government, depends on a proper construction of the constitutional provision above cited. Its terms are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the Constitution was formed—for what was meant by it then, it must mean now; what was reserved to the States, to be regulated by their own institutions, cannot be rightfully infringed by the General Government, either through its Legislative or Judiciary Department. The contest here is not so much between rival tribunals, as between district sovereignties, claiming to exercise power over contracts, property, and personal franchises.

How largely these may be involved in the contest is most apparent when we take into consideration that the Admiralty Courts now exercise jurisdiction over rivers and inland waters, wherever navigation is or may be carried on, and extends to almost every description of vessel which may be employed in transporting our products to market. Over all these the admiralty jurisdiction is now exercised in proper cases; and the question is, whether the contract before us is a proper case, and within the grant of federal jurisdiction. The contract is simply for building the hull of a ship, and delivering it on the water. The vessel was constructed and delivered according to the contract, and was in the possession of the party for whom it was built when the libel was filed.

The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation. 1 Conckling. M. L. 19.

In considering the foregoing description, it must be borne in mind that liens on vessels encumber commerce, and are discouraged: *so that where the owner is present, no [*402 lien is acquired by the material man; nor is any, where the vessel is supplied or repaired in the home port. The lien attaches to foreign ships and vessels only in favor of the carpenter who repairs in a case of necessity and in the absence of the owner. It would be a strange doctrine to hold the ship bound in a case where the owner made the contract in writing, charging himself to pay by installments for building the vessel at a time when she was neither registered nor licensed as a sea-going ship. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land,

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to be performed on land. The wages of the shipwrights had no reference to a voyage to be performed; they had no interest or concern whatever in the vessel after she was delivered to the party for whom she was built; they were bound to rely on their contract. It was thus held by the first Judge Hopkinson, in 1781, who then declared, as respects ship builders, that "the practice of former times doth not justify the admiralty's taking cognizance of their suits." Clinton v. The Brig Hannah, Bee's Adm. App. 419. And we feel warranted in saying that at no time since this has been an independent nation, has such a practice been allowed. Turnbull v. Enterprise, Bee's Adm. 345.

It is proper, however, to notice the fact that district courts have recognized the existence of admiralty jurisdiction in rem against a vessel to enforce a carpenter's bill for work and materials furnished in constructing it, in cases where a lien has been created by the local law of the State where the vessel was built; such as Read v. The Hull of a New Brig, 1 Story, 244; and Davis & Lehman v. A New Brig, Gilpin, 473; Ib. 536; Ludington & King v. The Nucleus, 2 Law Jour. 563. Thus far, however, in our judicial history, no case of the kind has been sanctioned by this court.

For the reasons above stated, it is ordered that the decree below be reversed, and the libel dismissed for want of jurisdiction.

TAYLOR BROWN, Plff. in Er.,
v.
LEROY M. WILEY, Hugh R. Banks, Wm. G. Lane, Henry Van Derzee, and Edw'd H. Lane, Merchants trading under the name and style of L. M. Wiley & Co.

(See S. C. 20 How. 442-448.)

Parol contract as to time of presentment of bill of exchange, inadmissible.

Proof of a parol contract, that a bill of exchange should not be presentable till a distant, uncertain, or undefined period, tends to alter and vary, in a very material degree, its operation and effect, and is inadmissible in evidence.

Argued Apr. 28, 1858. Decided May 10, 1858.

IN ERROR to the District Court of the United States for the District of Texas.

This case arose upon a petition filed in the court below, by the defendants in error, to recover on a certain bill of exchange.

The trial resulted in a verdict and judgment in behalf of the plaintiffs, for $2,578.02, with costs; whereupon the defendants brought the case here on a writ of error,

Messrs. Rob. Hughes and Reverdy Johnson, for the plaintiff in error:

The plaintiff in error relies on the error, if any, by reason of the ruling of the court in allowing the exception in the defendants' answer. Those exceptions may be resolved into two grounds:

1. That the defense attempted to be interposed, was not properly set forth in the answer.

2. If properly made, it was no answer to the petition. It is admitted that the first plea to the amended answer is prolix and contains unnecessary matter; but by careful examination it will be found that it has all the requisites of a good defense orderly set forth.

By its terms, the draft was not to be paid until 12 months after March 23, 1854.

It is true that according to the custom of merchants, such drafts may be presented for acceptance, and if not accepted, may be sued on, but this cause of action was intended to be provided against in the agreement set out and attempted to be set up by the amended answer. It must be that the defense is properly set out; but the question now comes up:

Is the defense set forth in the plaintiff's reply, if true, a good bar of the cause of the action of the plaintiffs below?

The draft was a Louisiana contract, subject to the law of that State in regard to its validity, force and effect.

Lynch v. Postlethwaite, 7 Mart. 213.

It is admitted that the general rule of the common law is, that parol evidence is incompetent to alter or vary a written instrument in its essential terms; and this is believed to be the rule of the Louisiana law. But the agreement in question did not, in any sense, propose to alter, vary, or change the written agreement between the parties. It does, however, restrain the holder, in raising a cause by an act to be done by him; which was an act that he might or might not, at his election, perform, and which, of course, it was competent for him upon sufficient consideration, to agree not to do, and such an agreement would be collateral only to the draft.

In a case in Louisiana, evidence was admitted to prove that the defendant's indorsement on the note sued on was merely as security, and that the same was to be paid out of the collection of claims due to the drawer. "The evidence offered was neither to contradict nor explain a written instrument, but to prove a collateral fact in relation to it."

Dwight v. Linton, 3 Rob. La. 57.

The same court have held parol evidence admissible, to prove an agreement that a bill drawn by one of them in favor of the other, should not be negotiated.

Robertson v. Nott, 2 Mart. N. S. 122.

In that case there was nothing to alter, vary or change a written instrument, but an agreement to waive a right conferred by law, by reason of the nature of the instrument, within the reason of which this case is clearly embraced.

Messrs. J. Larocque and Barlow, for defendants in error:

The evidence offered was incompetent and inadmissible. It was to prove a parol agreement made at the time of drawing the draft and not embraced in it, inconsistent with its terms and legal effect. This would be contrary to the well settled rule of law on the subject.

Bank of U. S. v. Dunn, 6 Pet. 51; Bank of Metropolis v. Jones, 8 Pet. 12; Rockmore v. Davenport, 14 Tex. 602; Creery v. Holly, 14 Wend. 30; Thompson v. Ketchum, 8 Johns. 190.

NOTE.—Party to bill or note cannot vary his contract by parol. Parol evidence, admissible for what purposes. See note to B'k of U. S. v. Dunn, 8 L. ed. U. S. 316.

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It is the lex fori which governs as to the admissibility of the defense offered. The effort is not to show that by the law of Louisiana the legal import of the bill in question is different from the signification attached to it by the general commercial law, but that an agreement by parol, contrary to that legal import, was made at the same time.

Story Conf. Laws, secs. 634, 635. Cases cited; Yates v. Thompson, 3 Clark & F. 577, 580; Shewell v. Raguet, 17 La. 457.

The cases cited from Louisiana (Dwight v. Linton, 3 Rob. 57; Robertson v. Nott, 2 Mart. N. S. 122) cannot be sustained. They have not since been followed even in that State, but substantially, though tacitly, overruled.

Police Jury v. Haw, 2 La. 42; Robechot v. Folse, 11 La. 133; Arnous v. Davern, 18 La. 42; Barthet v. Estebene, 5 La. Ann. 315; Gosserand v. Lacour, 8 La. Ann. 75; Williams v. Hood, 11 La. Ann. 113.

2. Nor was the defendant entitled to have the jury instructed as he requested on the trial. The draft being a date, and not a sight draft, no presentment before maturity was necessary; but the holder was entitled, at his election, to present it and insist upon its acceptance at any time before its maturity, and in default of acceptance, to bring his action immediately against the drawer; besides, no such defense was taken.

Chit. Bills, 299, 370; Townsley v. Sumrall, 2 Pet. 178; Evans v. Gee, 11 Pet. 80; Young v. Bryan, 6 Wheat. 146; Union Bank v. Hyde, 6 Wheat. 572; Burke v. McKaig, 2 How. 66.

Fourth. The exception to the charge being a general exception only, to a charge containing several distinct propositions, is entirely unavailable on this writ of error.

The charge is moreover free from error.

Rule 38, Jan. Term, 1832, Magniac v. Thompson, 7 Pet. 348.

Mr. Justice Grier delivered the opinon of the court:

Wiley & Co., plaintiffs below, declared on a bill of exchange drawn by Taylor Brown on Messrs. Campbell & Strong, of New Orleans, to order of plaintiff, dated 23d of March, 1854, and payable on the 1st of May, 1855. It was presented for acceptance on the 10th of June, 1854, and was protested for non-acceptance; of which the drawer had due notice.

It is admitted the bill was given for full value; but the defendant set up by way of special plea, and offered to prove to the jury, a parol agreement between him and the plaintiffs, that this bill should not be presented for acceptance till after a certain other draft, payable in May, 1854, was provided for, by placing funds in the hands of the drawees, who had agreed to accept the last bill after funds had been received to meet their acceptance of the first.

It is the rejection of this defense by the court below that is the subject of exception. It presents the question, whether parol evidence should have been received, to vary, alter or contradict that which appears on the face of the bill of exchange.

When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our States originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule. There is no ambiguity arising in this case which needs explanation. By the face of the bill, the owner of it had a right to demand acceptance immediately, and *to protest [*448 it for nonacceptance. The proof of a parol contract, that it should not be presentable till a distant, uncertain, or undefined period, tended to alter and vary, in a very material degree, its operation and effect.

See Thompson v. Ketchum, 8 Johns. 192.

Any number of conflicting cases on this subject might be cited. It will be sufficient to refer to the decisions of this court, those of Texas, where the suit was brought, and of Louisiana, where the contract was made.

In the Bank of United States v. Dunn, 6 Pet. 56, this court have declared "that there is no rule better settled or more salutary in its application than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement." The case of Brochmore v. Davenport, 14 Tex. 602, a case precisely similar to the present, adopts the same rule. The case of Robishat v. Folse, 11 La. 133, and of Barthet v. Estebene, 5 Ann. Rep. 315, and several others, acknowledge the same doctrine, thereby overruling some early cases in Louisiana which had departed from it.

This being the only point urged by plaintiff in error as a ground of reversal, the judgment of the court below is affirmed.

JAMES STINSON, Plff. in Er.,

v.

HERCULES L. DOUSMAN.

(See S. C. 20 How. 461–467.)

Contract, recovery on failure to perform—time, when essence of—jurisdiction as to amount.

Under a contract for land, containing the clause that in case the vendee fails to perform any covenant on his part, the vendor may declare the contract void, and recover by distress or otherwise, all the interest due on the contract as rent; on failure of payment of the first installment, or of the taxes, or to insure, as agreed, the vendor may recover such interest as rent.

When time is of the essence of the contract.

Although the rent claimed was not of the value of $1,000, yet as the title to land valued at $8,000 was in dispute, this court has jurisdiction.

Argued Apr. 16, 1858. Decided May 10, 1858.

IN ERROR to the Supreme Court of the Territory of Minnesota.

The case appears in the opinion of the court.

Mr. James Cooper, counsel for plaintiff in error:

The promissory note for $2,000 given by Stinson to Dousman, was in payment of the first installment, and the draft drawn by Thomas Stinson was in payment of the note. The draft was prematurely protested by the

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Chicago Bank for non-payment by R. K. Swift. Being in the nature of a sight draft, the latter was entitled to the usual days of grace.

4 T. R. 148; 1 Pet. 31.

It was, however, presented on August 28, 1854, before the note was due, and protested on the same day. The plaintiff in error has always been able and willing to keep his covenants strictly. As soon as he was informed of the non-payment of the draft in consequence of the accidental absence of R. K. Swift from his office at the time it was presented, he immediately made provision to pay the amount due by bill of exchange on New York. On the 7th of September, he procured a bill of exchange from Thomas Stinson on Messrs. Ward & Co., New York, for £530 2s. 4d., which was transmitted to Dousman, whose hands it reached on the 11th of September, several days before he gave notice of his intention to avoid the contract.

While time is material, it was not so far of the essence of the contract as to authorize Dousman to declare it void, especially when it was manifest that there was neither willful laches, negligence, nor want of ability on the part of Stinson to perform the contract. In such a case, equity always affords relief.

2 Story, Eq. Jur. secs. 775, 776, note, 777, 1314, 1315, 1316, 1319; Taylor v. Longworth, 1 McLean, 402; Taylor v. Longworth, 14 Pet. 170; Brashear v. Gratz, 6 Wheat. 528; Bank of Wash. v. Hagner, 1 Pet. 464; 1 Fontb. Eq. 31, 32, note; Newl. Contr. ch. 12, p. 238.

The counsel then reviewed the facts in the case, and said it would be against equity to permit the defendant in error to declare the contract void. The execution of the contract is the best way to place the parties in statu quo, which is the object of equity.

2 Story Eq. Jur. 5, 777, 772; 3 Johns. Ch. 60; Chit. Cont. 642.

Injury must be sustained by a party to authorize him to declare a contract of this kind void.

2 Lead. Cas. in Eq. 2 part, p 3 et seq also, pp. 17, 26, 31.

Messrs. C. Cushing, R. H. Gillet, and Henry J. Horn, for defendant in error:

1. The contract, by its own provisions, provided for the payment of the sum recovered.

2. The answer shows that the defendant did not perform his covenant, in either of the three particulars named in the contract. The money was not paid when it fell due; the defendant did not insure the buildings on the premises, and keep them insured in a good insurance company for $1,500, and have the policy made payable, in case of loss, to the plaintiff; the defendant did not pay all the taxes assessed on the property from the 1st of May, 1853.

3. General expressions used in the answer, which do not set out and specify particular facts, are to be considered as conclusions of law, instead of averments of fact.

A receipt of a note or acceptance of a draft is never deemed payment, without an express agreement to that effect actually cancelling the original indebtedness.

Downey v. Hicks, 14 How. 240; Murray v. Gouverneur, 2 Johns. Cas. 438; Johnson v. Weed, 9 Johns. 310; Olcott v. Rathbone, 5 Wend. 490; 6 Cranch, 253, 264; 16 Johns. 277; 10 Pet. 567; 1 Wend. 424; 8 Cow. 74.

Not having been paid, or agreed to be received as payment, it follows that this portion of the answer forms no defense.

4. A demurrer admits only such facts as are well pleaded.

5. Conditions, upon the non-performance of which a party acquires by the contract special rights or privileges, are not as to those rights and privileges immaterial, and they cannot be relieved against in equity.

At law, the time of performance is a material part of the contract; non-performance, at the very day, is always to be held as a breach. There is no other rule applicable, except the one named in the contract.

In equity, the same rule applies where, in the agreement, the parties evidently contemplated that time would be material, and influence their action or interests.

In the present case it clearly appears, affirmatively, that the parties regarded the time an essential element in their agreement, because they made a special provision to meet that very contingency. They arranged that the plaintiff might elect to annul the contract, if it was not literally fulfilled. In the present case, the parties stipulated for an additional privilege in behalf of the plaintiff. They made a provision for a change in the contract, by which the original agreement to sell was converted by the action of the plaintiff into a lease, with a specified rent. The plaintiff availed himself of this provision on the occurrence of the default by the defendant, as he had the legal and equitable right to do.

Hence, if it be true, under the laws of Minnesota (Laws of March 3, 1853, p. 20, secs. 5 and 6), which we controvert, that the defendant can meet a legal claim by setting up on equity, there is nothing in this case to authorize any such defense, because there is no such equity in favor of the defendant which he can set up.

But if he had any such equity or counterclaim, he has not set up the same in the manner contemplated by law. He cannot deny the plaintiff's legal right, and at the same time state an equitable counterclaim. If he has a legal defense, then he can have none resting in equity growing out of the same facts. The two defenses are inconsistent.

6. This court has no jurisdiction, because the sum recovered is below the amount for which writs of error and appeal can be brought. In the present case, no property is claimed or attempted to be set off. Damages alone were demanded and recovered of the amount of less than a thousand dollars, and it follows that this court has no jurisdiction.

9 U. S. Laws, 406.

The land was not the matter in controversy; the dispute here is as to the judgment, and nothing else.

Gordon v. Ogden, 3 Pet. 33; Peyton v. Robertson, 9 Wheat. 527; Ex parte Bradstreet, 7 Pet. 634; Hagan v. Foison, 10 Pet. 160.

Mr. Justice Campbell delivered the opinion of the court:

This suit was commenced in the District Court of the United States for Ramsey County,

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Minnesota, by Dousman, to recover of Stinson $481.16, as the rent of a parcel of land in the City of St. Paul, under a written contract, executed in February, 1854, by those persons. In that contract, Dousman covenanted to sell and convey to Stinson the same land for the sum of $8,000, which was to be paid, with interest, at the rate of ten per cent. annually, in three installments; the first installment of $2,000, and interest, was to be paid the 1st of September, 1854. The vendee was required to keep the buildings insured, and engaged that the policy in case of loss should inure to the benefit of the vendor; and also agreed to pay all the taxes accruing from May, 1854. The contract concludes with an express condition, "that in case of failure by the vendee to perform either of the covenants on his part, the vendor was at liberty to declare the contract void, and thereupon to recover, by distress or otherwise, all the interest which shall have accrued upon the contract up to the day of declaring the contract void, as rent for the use and occupation of the premises, and to take immediate possession thereof; to regard the person or persons in possession at the time as tenant or tenants holding without permission, and to recover all damages sustained by unnecessary destruction of timber or trees growing on the premises, or by holding over without permission."

It was agreed, that if the vendee paid the en- 464*] tire purchase *money, or secured it to the satisfaction of the vendor, he should have a deed at any time after the payment of the first installment. Contemporaneously with the execution of the contract, under the seals of the parties, the vendee gave his promissory note for the first installment. This installment was not paid according to the note or contract; no insurance was effected on the property within the terms of agreement before September, 1854; nor were the taxes on the lot paid before that date. on the 14th of September, 1854, the plaintiff notified the defendant that the contract of sale was annulled, and he should claim as rent the amount of interest that had accrued on the price stipulated for the property, and demanded immediate possession of the premises, under the conditions of the contract. The object of this suit is to recover that sum as rent.

The statute law of Minnesota provides, "that all equities existing at the commencement of any action in favor of a defendant therein, or discovered to exist after such commencement, and before a final decision, shall be interposed, if at all, by way of defense to the action, by answer or supplemental answer in the nature of a counterclaim, and issue taken thereon, by a reply or supplemental reply thereto, and be determined as other issues in such actions;" and that, "when the party prosecuted has equities, claims, or demands, which could heretofore only be enforced by cross-action or cross-bill, the same shall be interposed by way of answer in the nature of a counter claim, and the plaintiff may reply thereto and put the same in issue; and if the same be admitted by the plaintiff, or the issue thereon be determined in favor of the defendant, he shall be entitled to such relief, equitable or otherwise, as the nature of the case demands, by judgment or otherwise. The Court of Chancery and the right to institute chancery suits are abolished in the Territory. Acts of Minnesota (1853), ch. 9, secs. 5, 6, 14. The answer of the defendant is framed not only to present a legal defense against the claim preferred in the petition, but also to obtain a decree affirmative of the continuing validity of the contract of sale.

He alleges that the note executed for the first installment of the purchase money was accepted and received by the plaintiff for that installment. That, to provide for the punctual payment of the note, he sent to the agents of the plaintiff, who held, and were authorized to collect it, a draft on a merchant of responsibility for its full amount, under a reasonable expectation and belief that the money would be paid. That this draft was presented at the office of the drawee by the agents of the plaintiff, at a time when he was absent, and that his clerk, through mistake *or error, de- [*465 clined to pay it; that, as soon as he heard of the dishonor of the bill, he made other arrangements for the payment of the first installment by a bill on bankers in New York, and that this bill was offered to the plaintiff before the date of his notice to the defendant. That he has tendered the money and interest to the plaintiff, and his tender has been refused, and he now deposits the money in court for his use. He further answers, that the buildings on the lot have been covered by a suitable policy of insurance, but the amount of the loss, if any, was not payable to the plaintiff. That there was a mistake in the contract relative to this stipulation, which needed amendment, and that he deferred the transfer of the policy till the correction was made. That he is now willing to assign the policy to the plaintiff.

He answers, that since the notice of the plaintiff he has attempted to pay the taxes in arrear, but that he had been forestalled by him; that he is ready to pay the amount of taxes paid by the plaintiff into court. The defendant claims that the plaintiff has sustained no injury from any delay on his part, and that he is able and willing to fulfill his contract.

The District and Supreme Court of Minnesota decided that the answer was not sufficient, and judgment was entered for the plaintiff. The admissions of the answer exhibit a case of default on the part of the defendant in respect to his performance of the covenants in the contract of sale. The technical rule, that "accord and satisfaction is no bar to an action for debt certain, covenanted to be paid," is, perhaps, inapplicable in a system like that contained in the Code of Minnesota; and it is probably true, that a debt by covenant may be discharged there by a simple contract or agreement. But the answer of the defendant does not show that the promissory note given for the first installment of the purchase money was designed to be a substitute for the covenant, and was taken in discharge of the debt created by it. Nor can we suppose that the plaintiff intended to release the condition which formed so important a part of his security. The contract and the note bear date of the same day, relate to the same subject, and are consistent with each other. The evidence must be very explicit and unequivocal, to lead to the conclusion that the one was designed to impair or alter the effect of the other.

The excuses rendered by the defendant for

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his non-payment of the taxes due upon the property, and his failure to insure the buildings for the security of the plaintiff, are insufficient. The record discloses a case of inattention and neglect on the part of the defendant, which authorized the plaintiff at law to annul the contract.

466*] *The question arises, whether his answer affords any ground for equitable interposition in his favor. In respect to contracts for the sale of land, a court of equity, in general, does not exact from the parties a punctual performance of their engagements, to entitle them to its aid in obtaining a specific performance. If the contract is silent in respect to the condition of time, or fails to indicate a distinct purpose of the parties to make it an essential consideration, and where no circumstance exists to manifest its importance, it is the habit of the court to relax the stringency of the rules of legal interpretation on that subject, and to decree performance, and direct compensation, even in cases where there has been inattention and neglect. Secombe v. Steele, 20 How. 94 (61 U. S. ante); Roberts v. Berry, 3 De G. M. & G. 284. But if the parties have declared in their contract that time is a material consideration, and have agreed that their rights shall depend upon a scrupulous fidelity to their engagements, it does not belong to that court to make another law for the parties. Where it plainly appears that the sale is conditional, and its completion is dependent upon the fulfillment of any of the terms with punctuality by either party, a court of equity, in general, will not interpose to relieve the party in default, on the principle that time is not the essence of the contract.

In the case before us, the contract recites, that the vendor, in consideration of $1.00, part of the purchase money thereafter mentioned, and then actually paid, and upon the express condition that the defendant do well and faithfully perform the covenants and agreements thereafter mentioned, agreed to execute and deliver a deed of conveyance in fee simple, etc.

To the terms of sale there is the condition, "Provided, always (and these presents are upon this express condition), that in case of failure in the performance of either of the covenants or agreements on the part of the vendee to be performed, the vendor shall have the right to declare this contract void." The contract concludes with a minute descripton of the relations and consequences that were to ensue from the exercise, by the vendor, of the right he had thus reserved.

The contingency, thus foreseen and provided for, occurred. The defendant failed to perform either term of his contract, and his answer contains no valid excuse for his neglect.

The defendant in error objected, that the matter in dispute was not of the value of $1,000, and therefore this court had no jurisdiction of the cause. The objection might be well founded, if this was to be regarded merely as an action at common law.

467*] *But the equitable as well as the legal considerations involved in the cause, are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit.

The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at $3,000. Bennett v. Butterworth, 8 How. 124. We think this court has jurisdiction.

Judgment affirmed.

ENOCH C. ROBERTS, Plff. in Er.,
v.
JAMES M. COOPER.

(See S. C. 20 How. 467-486.)

Second writ of error after decision, brings up only proceedings after mandate—opinions of public officers, when not evidence—Michigan Code—suit by trustee not champerty.

After a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate.

None of the questions which were before the court on the first writ of error, can be reheard or examined upon the second.

Counsel cannot appeal to a jury to decide legal questions, by giving in evidence the opinions of public officers.

By the Revised Code of Michigan, of 1846, no grant or conveyance of lands, or interest therein, shall be void for the reason that at the time of the execution thereof, such lands shall be in the actual possession of another claiming adversely.

Where the legal title to the land was conveyed to plaintiff in trust for himself and others, the suit was necessarily brought in his name. Such a transaction has none of the characteristics of champerty.

Argued Apr. 7, 1858. Decided May 10, 1858.

THIS was an action of ejectment, brought in the Circuit Court of the United States for the District of Michigan, by the defendant in error, for the recovery of certain premises lying within the mineral district, south of Lake Superior.

The first trial resulted in a verdict and judgment for the defendant. This judgment was reversed by this court on error, 59 U. S. (18 How.) 173, and the cause remanded for further proceedings. The new trial in the court below having resulted in a judgment for the plaintiff, the defendant brought the case here on a writ of error.

A further statement appears in the opinion of the court. For the early history and a fuller statement of the case, see 59 U. S. (18 How.) 173.

Messrs. Truman Smith, Reverdy Johnson and Theodore Romeyn, for plaintiff in error:

1. The plaintiff in error, who was the defendant below, should have a rehearing on the whole case, irrespective of the former decision.

The statute of Michigan gives to the defendant in ejectment an opportunity for a new trial before he is dispossessed.

Mich. Rev. Stats. 492.

On a revision of the case the party is to be heard at once, both as to law and fact. Besides, the questions arising in the case appertain to the title to a mineral property believed to be worth a quarter of a million of dollars. The decision of the court will affect titles to other

NOTE.—Champerty, what is. How it differs from maintenance. Purchase of land in suit. See note to Lewis v. Bell, ante, 203.

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property similarly situated, of immense value; hence, the case is of universal importance.

In this case the court was obliged to deal with questions arising under Acts of Congress which treat of a peculiar subject in a new and special manner, and could not avail itself of the aids of familiar practice and analogous adjudication, usually at command in disposing of cases arising under our land laws, and often throwing much light on the path to satisfactory results. New light now appearing on the deposition of the late Commissioner Wilson, and the court being informed that all these lease titles stand on precisely the same footing, it can hardly fail to realize the propriety of giving the Act of March 1st a careful re-examination before it adopts as irreversible a construction which must subvert numerous titles and involve in ruin millions of capital.

On a careful analysis of the record, it will be found to involve—

(a) Two questions arising out of objections, made on the former hearing by the present plaintiff in error, to the title of the defendant in error, based on the contract with Michigan for school lands, or rather on the terms in which that compact is expressed, which objections stand on this record precisely as they stood before; and which having been fully considered and disposed of adversely to the present plaintiff, are not now renewed.

(b) A question arising out of an objection made by the same party to the title of the present defendant, based on the laws of Michigan, which will be renewed for the purpose of submitting Acts of the Michigan Legislature, that escaped notice on the former hearing, and have, it is conceived, a most important bearing on the matter in issue.

(c) A question on the construction, to be given to the compact between the United States and Michigan relative to the school lands, insisted on by the defendant in error at the former hearing, and constituting an objection to the title of the Minnesota Mining Company which was, impliedly, at least, overruled by the court, and will, doubtless, be now renewed: therefore the subject must be re-examined by us (the counsel for the plaintiff in error).

(d) The question on the construction to be given to the Acts of Congress of March 1st, 1857, and Sept. 26th, 1850, which the defendant in error contended, and which a majority of the court held to be fatal to the title of the plaintiff in error, this question will be re-examined in connection with new and very material facts appearing on the record which change, it is conceived, the whole aspect of the case. It will be insisted that if there be anything in this objection, neither the Minnesota Mining Company nor the defendant in error have any title to the lands in dispute, that they remain and are public land, and consequently the defendant in error cannot recover.

(e) A question on the admissibility of the evidence offered by the plaintiff in error on the trial below, to show that the deed by which the defendant in error derived title was void, by reason of a champertous agreement made by and between him (the defendant in error) and John Bacon, in equity the owner of the property in dispute.

(f) A question as to the irregularity of the verdict and judgment below, and whether the former should not be set aside and the latter reversed for reasons which appear of record.

The circumstance that the court was not full on the former occasion, and that there was a divided opinion in connection with the vast interests at stake, constitute strong reasons why there should be a rehearing without prejudice.

2. It is respectfully submitted that even if the defendant is a trespasser, he has a right, notwithstanding, to bring up the Act of April 25, and to allow these lands where "known to contain mines or minerals," to invalidate the title of the plaintiff.

In ejectment, the defendant has, as a general rule, a right to pick a flaw in the title of plaintiff, and the latter must recover, if at all, on the strength of his own title.

3 Bl. Com. 204; Layman v. Whiting, 20 Barb. 559; Cheney v. Cheney, 26 Vt. 606; Hodsden v. Staple, 2 T. R. 684; Hammond v. Inloes, 4 Md. 138; Clarke v. Diggs, 6 Ired. 159; McRaven v. McGuire, 9 Sm. & M. 34; Wright v. Douglass, 2 Barb. 554; Nicoll v. Walworth, 4 Den. 385.

In Scisson v. McLaws, 12 Ga. 166, it was held that to enable a plaintiff in ejectment to recover when his title is disputed, he must prove that he had the legal title to the premises at the time the demise is laid in the declaration.

Laurissini v. Doe, 25 Miss. 177; Baylor v. Neff, 3 McLean, 302; Buxton v. Carter, 11 Mo. 484; see, also, Alden v. Grove, 18 Pa. St. 377.

3. On the trial below, the plaintiff in error offered proof of other facts to lay the foundation for another objection to the title of the defendant in error, to which the latter objected and the court excluded the same, and the plaintiff in error excepted.

The plaintiff in error, on the trial below, produced and offered to prove a deed of release from Alfred Williams and wife to the Minnesota Mining Company, dated June 20, 1856, covering the lands in controversy, and in connection therewith to prove in substance that Cooper obtained his deed of the premises from the same parties, when the Minnesota Mining Company was in actual possession, claiming title; and that such deed was executed by Williams as the naked trustee of John Bacon, and at his (Bacon's) request, on an agreement by and between Bacon and Cooper, that Cooper should take the title and institute an action to recover the land; that by means of the stock of the National Mining Company, they should divide results in such manner and proportion that Cooper should have three fifths, and Bacon two fifths of those results.

To present the case in a vivid light, we offered to prove, with other facts, "that before the conveyance was delivered to him by said Williams, Cooper, in conjunction with the said Bacon, applied to counsel in the City of Detroit to employ such counsel in the litigation aforesaid, which was to be had with the Minnesota Mining Company."

It is difficult to conceive a more aggravated case of champerty. Hence we insist that the deed from Williams and wife to Cooper, executed at the request of Bacon in performance of this corrupt agreement on his part, was utterly void; and therefore the evidence was clearly admissible.

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Lawrence v. Bruckner's Lessee, 1 Doug. Mich. 19, 38; Stockton v. Williams, 1 Doug. Mich. 546, 566; Godfrey v. Desbrow, Walk. Ch. Mich. 260.

Champerty is an offense at the common law, irrespective of the old English statutes on the subject.

Com. Dig. tit. Maintenance, A. 2; 4 Kent's Com. p. 449; Sto. Eq. Com. sec. 1048; 3 Greenl. Ev. sec. 180; 1 Russ. Cr. 180; Wallis v. The Duke of Portland, 3 Ves. 494; Swett v. Poor, 11 Mass. 549; Brinley v. Whiting, 5 Pick. 348, 353, per Parker, Ch. J.; Lathrop v. Amherst Bank, 9 Metc. 489; Small v. Mott, 22 Wend. 403; 22 Wend. 405, 406, per Walworth, Ch.; Key v. Vattier, 1 Ham. (Ohio), 132; Weakly v. Hall, 13 Ohio, 175; Rust v. Larue, 4 Litt. 417; Brown v. Beauchamp, 5 Monr. 416; Sessions v. Reynolds, 7 Sm. & M. 130.

Champerty is malum in se at the common law, and was so held to be by Braiton before the enactment of the statutes.

3 Edw. I. ch. 28, 33; and 28 Edw. I. ch. 11, per Walworth, Ch.; 22 Wend. 406.

The courts in this country have uniformly pronounced against the validity of all contracts or transactions tainted with champerty. In Massachusetts, Swett v. Poor, 11 Mass. 549; Brinley v. Whiting, 5 Pick. 348; Lathrop v. Amherst Bank, 9 Metc. 489. In New York, Satterlee v. Frazer, 2 Sand. 141; Arden v. Patterson, 5 Johns. Ch. 44; Small v. Mott, 22 Wend. 403. In Ohio, Key v. Vattier, 1 Ham. 132. In Kentucky, Thompson v. Warren, 8 B. Mon. 488. In Alabama, Byrd v. Odem, 9 Ala. 755; Elliott v. McClelland, 17 Ala. 206; Wheeler v. Pounds, 24 Ala. 472. In Mississippi, Sessions v. Reynolds, 7 Sm. & M. 130; Doe v. Ingersoll, 11 Sm. & M. 249. In Tennessee, Wilson v. Nance, 11 Humph. 189; Morrison v. Deaderick, 10 Humph. 342. In Illinois, McGoon v. Ankeny, 11 Ill. 558; Deshler v. Dodge, 16 How. 622; 16 How. 632, 645.

Champerty being deemed immoral, and at the common law rendering all contracts or transactions tainted therewith null and void, it is to be presumed that the common law rule on that subject obtains in the State of Michigan. "But if maintenance or champerty," says Ch. J. Parker, Thurston v. Percival, 1 Pick. 417, "is malum in se, or an offense at common law, it is to be presumed, without any statute, that the same law is in force there;" that is to say, in the State of New York. But we are not left to presumption in this case; for the Supreme Court of Michigan have held expressly that the common law is in force in that State, except so far as it is repugnant to or inconsistent with its Constitution or Statutes, Stout v. Keyes, 2 Doug. Mich. 184; Rue High, appellant, 2 Doug. Mich. 515; 2 Doug. Mich. 528, per Wing, J.; and they have particularly recognized and enforced the common law on the subject of maintenance and champerty in that State.

Bruckner's Lessee v. Lawrence, 1 Doug. 38; 1 Doug. Mich. 19; Stockton v. Williams, 1 Doug. Mich. 566.

The Statute of Michigan, rev. 1846, tit. XIV. ch. 67, sec. 7, p. 263, did no more than remove the illegality of the conveyance when there was an adverse possession. It did not touch the illegality of an agreement tainted with champerty, nor make a deed, executed in conformity with such agreement, valid. The Statute merely allows a grantee, in a case of adverse possession, to recover in his own name what the law, as it previously stood, permitted him to do in the name of his grantor.

Stockton v. Williams, 1 Doug. Mich. 546; Brinley v. Whiting, 5 Pick. 348; Ring v. Gray, 6 B. Mon. 368; Wilson v. Nance, 11 Humph. 149.

The authorities show that the offense of champerty is quite distinct from that of the illegality of buying a title in a case of adverse possession.

Cresinger v. Welch, 15 Ohio, 156; Key v. Vattier, 1 Ham. 132.

"No man could purchase any pretense to sue in another's right." Quoted and approved by Catron, J. in 16 How. 633. "I am not aware," says the learned judge, "that this, as a general rule, has been disputed." Certainly not, if the case involves a division of proceeds, and this is exactly what Mr. Cooper has done. The law of champerty does not require an obligation to pay the costs of the suit, or a contribution in cash to the expenses of the litigation, to constitute the offense; but professional or any other aid, in consideration of having a part of the subject or thing in controversy, is sufficient.

The offense of champerty is distinct from that of the illegality of buying a title in a case of adverse possession. This distinction is recognized in this country, both in statutory enactments and by the decisions of the courts.

Cresinger v. Welch, 15 Ohio, 156; Key v. Vattier, 1 Ham. 132.

There can be no champerty without an adverse possession; but in Michigan there may be a sale or conveyance where there is an adverse possession, either with or without champerty. In this case Cooper has made himself liable for all the costs and assumed all the expenses, by taking a deed of the property and instituting a suit in his own name.

The common law on the subject of champerty is in full force in Michigan, and makes all contracts tainted with it void. Champerty, as a crime at common law, is vested with pains and penalties, under and by virtue of a statute of the State of Michigan.

Revision, 1846, tit. 30, ch. 161, sec. 22; see, also, Backus v. Byron, 4 Mich. 535; Supreme Court of Michigan, March 6, 1857.

4. The verdict and judgment in this case were not authorized by facts which appear of record, and for that reason the judgment should be reversed and a new trial had.

The plaintiff of record is John Doe, and verdict and judgment should have been in his favor that he recover his term, but we have a verdict and judgment in favor of James M. Cooper to recover the fee. In actions of ejectment, the plaintiff must recover, if at all, secundum allegata et probata.

Livingston v. Tanner, 12 Barb. 481.

He cannot recover a different estate or a different interest than that claimed in his declaration.

Ballance v. Rankin, 12 Ill. 420; Rawlings v. Bailey, 15 Ill. 178.

Cooper has obtained verdict, judgment, and a writ of possession, when it appears from the

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declaration that he is prepared with the writ of possession. Nothing can be better settled than that the plaintiff, to recover in ejectment, must have the right to the present possession of the land.

Mitchell v. Mitchell, 1 Md. 44; Hammond v. Inloes, 4 Md. 138; Scisson v. McLaws, 12 Ga. 166; Laurissini v. Doe, 25 Miss. 177.

Title, acquired after date of demise, will not sustain an action of ejectment.

Baylor v. Neff, 3 McLean, 302.

It has been held in this court, that if in an action of ejectment the plaintiff cannot count on a lease to himself from a person whom the evidence shows to have been dead at the time, it is bad.

Connor v. Bradley, 1 How. 211, 216; City of Cincinnati v. Lessee of White, 6 Pet. 432.

On all the grounds submitted, it is believed that the plaintiff in error is entitled to a reversal of the judgment below, and to a new trial.

Messrs. S. F. Vinton and A. W. Buell, for the defendant in error:

The decision of this case by this court, reported in 59 U. S. 173, disposes of the case, unless the testimony by the plaintiff in error on the last trial and overruled by the court, would, if given to the jury, have established, or tended to establish, a defense to the action.

The first item of testimony excepted to and rejected, is the testimony of John Wilson, an officer of the General Land Office. The deposition states that witness prepared the report upon which the Attorney-General decided that the mineral leases were void. What the Attorney-General said or thought of these leases prior to the passage of the Act of March 1, 1847, could not be material; and in respect to the claim of the lessees to a pre-emption right, the interpretation of that Act will be the same, whether their leases were in law originally valid or void.

The deposition states certain other facts, which could have in no way affected the verdict.

The bill of exceptions next shows that the plaintiff in error produced and offered in evidence a deed of release from Alfred Williams and wife dated June 20, 1856, conveying the land in controversy to the Minnesota Mining Company; and further offered to prove that at the time said Cooper obtained the deed of the premises in question from said Williams, said Company was in the actual and open possession of the same, claiming title under their patent from the United States, and that said Cooper knew of such claim and occupancy before and at the time of his purchase and of said conveyance; that said purchase and conveyance were made for the following purpose, namely: That said Cooper should hold the same in trust for a Corporation known as the National Mining Company, and by the conditions of said sale the said Cooper was to receive with said conveyance six tenths of the stock of said Company; that said Cooper purchased said stock and took said conveyance with a full knowledge of the claims and occupancy of the said Minnesota Mining Company, and with the intention of prosecuting the title purchased by him for the benefit of the National Mining Company, and that before said conveyance was delivered to him by said Williams, said Cooper applied to counsel in the City of Detroit, to employ such counsel in the litigation aforesaid.

It will be insisted that the foregoing matter, whether considered in the aggregate or in detail, was properly excluded from the jury.

Taking these acts in detail, the first question presented is, whether the deed from Williams to the Minnesota Mining Company was properly rejected.

This deed from Williams bears date since his deed to Cooper, and since the decision of this court affirming the validity of Cooper's title. The record also shows that Williams was a naked trustee of the legal title, and conveyed to Cooper at the request of Bacon, who was in equity the owner of the land.

The subsequent conveyance, therefore, of Williams, without authority to Bacon, to the Minnesota Mining Company, who well knew the fact of the prior conveyance to Cooper and the relation Williams sustained to the title, was in law a fraudulent act of both grantor and grantee, and could pass no title, if his former deed was valid and had conveyed the land to Cooper.

City of New Orleans v. De Armas, 9 Pet. 236; U. S. v. Arredondo, 6 Pet. 738.

A grant is an extinguishment of the right of the grantor, and therefore he and all claiming under him are estopped by the grant.

Fletcher v. Peck, 6 Cranch, 87; Terrett v. Taylor, 9 Cranch, 43; Pollard's Lessee v. Hagan, 3 How. 212.

The next fact offered in proof, in conception, with said deed from Williams to the Minnesota Mining Company, was that said company, when Cooper purchased, was in possession of the land, claiming title to it, and that he, before and at the time of purchase, knew of such claim and occupancy.

It is not necessary to consider whether at common law a deed would be void for maintenance which conveyed land in the adverse possession of another, since the statute law of Michigan expressly recognizes the validity of such conveyance.

Rev. Code of 1846, pp. 262, 263, 490.

The possession of the Minnesota Mining Company, under claim of title, and Cooper's knowledge of it when he purchased, cannot affect the validity of William's conveyance to him.

A short time prior to their passage, and which no doubt gave rise to them, the courts of Michigan had decided that a deed of conveyance of land, held adversely, was void.

Bruckner's Lessee v. Lawrence, 1 Doug. Mich. 38; Godfroy v. Desbrow, Walk. Ch. Mich. 266; Rood v. Chapin, Walk. Ch. Mich. 79; Hubbard v. Smith, 2 Mich. 212.

The remaining fact offered in proof in this connection was, that Bacon, being the owner in equity of the land, sold it to Cooper in trust for the National Mining Company, and that Williams, his trustee, by his direction, conveyed it to Cooper in trust for said Company; and that he, Bacon, was also the owner of the whole capital stock of said National Mining Company, six tenths of which he sold and transferred to Cooper, retaining the other four tenths; and that when he took the conveyance or the land, he intended to bring suit against the Minnesota Mining Company for the benefit of the National Mining Company, [illegible]

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conveyance was delivered to him by Williams, he, in conjunction with Bacon, applied to counsel to employ such counsel in such suit.

When the Statute allowed a purchaser to take a conveyance of land in the adverse possession of another claiming title, it, as incident thereto and by necessary intendment, gave to the purchaser a right to use all lawful means to obtain possession. There are various lawful means of doing this, and by suit is one of them, which in such case is by far the most common.

Was it agreed that Cooper should divide the land in case the suit prevailed? And if so, with whom? This is the first essential ingredient in champerty.

That he was not to divide it with Williams, the grantor, is certain. Nor with Bacon, who was the equitable owner and real vendor, because the conveyance transferred the whole interest in the land, both legal and equitable, to Cooper, in trust for the Corporation called the National Mining Company. There was no agreement or promise, that in case the suit prevailed or in any other event, either Cooper or the Corporation should convey or give back to Bacon any part of the land.

Was there any agreement that if the land was recovered there should be a division of it between Cooper and of the Corporation for which he held it in trust? There was no proof of the kind offered. He held the naked legal title, and the Corporation held the whole beneficiary interest in the land. In case of recovery the whole beneficiary interest would belong to the Corporation, and it could at any time compel him to convey the legal title to the Company. In a word, he sues just as every other trustee sues for the sole and exclusive benefit of the party owning the equitable estate.

Another essential ingredient to make a case of champerty is, that Cooper should have agreed to bring and carry on the suit, and that, too, at his own expense.

4 Black. Com. 135.

He did not agree to do either of these things.

Every trustee has a right, and it is oftentimes his duty, to sue in behalf of his beneficiary. In such case, unless there is proof to the contrary, the presumption is, the expense is borne by the beneficiary; and in this case the presumption as well as the fact is, that the expense is paid by the corporation.

The individual members or stockholders of a Corporation are entirely distinct from the artificial body endowed with corporate powers.

They may contract with each other, sue or be sued as individuals; and for these purposes the members and the Corporation are regarded by law as strangers to each other. In a word, they are wholly distinct beings. The one is a natural person, the other an artificial, invisible being, which (with its faculties and capacities) is created by law.

Dodge v. Woolsey, 18 How. 344, note; Curran v. Arkansas, 15 How. 308; Waring v. Catawba Co. 2 Bay, 100; Pierce v. Partridge, 3 Met. Mass. 44; Hill v. Manchester Waterworks, 5 B. & Ad. 866; Dunstone v. Imperial Gas Co. 3 B. & Ad. 125; Geer v. School District, 6 Vt. 76; 18 Vt. 405; Marine Bank of Balt. v. Biays, 4 Harr. & J. 338; Ang. & A. Corp. secs. 193, 390; 5 Ohio, 205.

If a party who carries on a suit has any interest, legal or equitable, or possibility of interest. in the land which is the subject of the suit, there is no ground for the charge of maintenance. In other words, where there is a privity of estate, direct or indirect, present or remote, maintenance is justifiable.

Wickham v. Conklin, 8 Johns. 227; Wallis v. Portland, 3 Ves. 503; 2 Rolle's Abr. 115; Bacon's Abr. title Maintenance, letter B.

Exception is taken to the verdict and judgment.

The record plainly shows what were the real facts and the merits of the case, and what was the law arising from them.

The judgment will not be reversed for want of form in the verdict and judgment; but in such case the court is required, by the 32d section of the Judiciary Act, to "proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfection, defects, or want of form in such writ, declaration, or other pleading, return process, judgment, or cause of proceedings whatsoever," except such as shall be set down by special demurrer.

1 Stat. 91; Roach v. Hulings, 16 Pet. 319; Parks v. Turner, 12 How. 46.

Amendment of error in the record may be made after writ of error brought, if the record shows the precise extent of the error.

Bank of Kentucky v. Ashley, 2 Pet. 328; Woodward v. Brown, 13 Pet. 1; Matheson v. Grant, 2 How. 281; 3 T. R. 659; Rees v. Morgan, 3 T. R. 349; Church v. Perkins, 3 T. R. 749; Anonymous, 1 Salk. 401.

Mr. Justice Grier delivered the opinion of the court:

Cooper, the plaintiff below, brought this action of ejectment to recover a part of section No. 16, in township 50 north, range 39 west, lying within the mineral district south of Lake Superior, in the State of Michigan. He claimed under the State of Michigan, and the defendant for the Minnesota Mining Company, under a right of preemption from the United States. The case was tried in the Circuit Court, and a verdict and judgment rendered for the defendants. On a writ of error to this court, the judgment of the court below was reversed, and the record remitted for further proceedings, in pursuance of the judgment of this court. The report of the case in 18 How. 173, *ex- [*481 hibits a full statement of the facts, and of the questions of law arising thereon, as decided by the court, which it is unnecessary to recapitulate. On the last trial, the Circuit Court was requested to give instructions to the jury, contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To

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allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members.

See Sizer v. Many, 16 How. 98; Corning v. Troy Iron and Nail Factory, 15 How. 466; Himely v. Rose, 5 Cranch, 313; The Ocean Ins. Co. v. Canter, 1 Pet. 511; The Santa Maria, 10 Wheat. 431; Martin v. Hunter, 1 Wheat. 304; Sibbald v. U. S. 12 Pet. 488.

We can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial.

I. The first of these is an exception to the refusal of the court to permit the deposition of John Wilson to be read to the jury. This exception, though not waived, has not been much pressed, and cannot be supported. The deposition refers to no facts relevant to the issue. It tended to show that some of the officers of the Land Office and the Attorney-General had expressed opinions on the questions of law arising in this case, different from those expressed in the opinion of this court. The practice of the Land Office and the opinions of the Attorney-General may form very persuasive arguments to the court, but cannot be read as evidence to the jury of what the law is, or ought to be. It is the province of the court to instruct the jury as to the principles of law affecting the case, and counsel cannot appeal to a jury to decide legal questions by reading cases to them, or giving in evidence the opinions of public officers.

482*] *II. The only other exception to be noticed is founded on an offer of testimony overruled by the court, and an instruction refused, involving the same question. The evidence offered and overruled is as follows:

"The defendant then produced, and offered to prove, a deed of release from Alfred Williams and wife to the Minnesota Mining Company, dated June 20th, 1856, covering the lands in controversy; and further offered to prove, in connection therewith, that at the time when the said Cooper obtained the deed of the premises in controversy from Alfred Williams, the Minnesota Mining Company was in actual and open possession of the same, claiming title under their patent from the United States, and that the said Cooper knew of such claim and occupancy before and at the time of his purchase, and of said conveyance; that he obtained said title from Alfred Williams, he being the naked trustee of John Bacon, and that all the negotiations for the said purchase, and the purchase itself, were had between said Cooper and Bacon, the said Williams acting under the directions and for the benefit of said Bacon, and having or claiming no personal interest in said lands; that said purchase and conveyance were made for the following purpose, viz.: that said Cooper should hold the same in trust for a Corporation known as the National Mining Company, all of whose stock was held by said John Bacon; and by the conditions of said sale, the said Cooper was to receive and did receive, with said conveyance, six tenths of the stock aforesaid, and the said Bacon was to retain, and did retain, four tenths of said stock. That the said Cooper purchased said stock and took said conveyance with a full knowledge of the claims and occupancy of the Minnesota Mining Company, and with the intention of prosecuting the title purchased by him, by legal proceedings in this court against the Minnesota Mining Company for the benefit of the National Mining Company; and that before said conveyance was delivered to him by said Williams, the said Cooper, in conjunction with the said Bacon, applied to counsel in the city of Detroit to employ such counsel in the litigation aforesaid, which was to be had with the Minnesota Mining Company."

The deed to the Minnesota Mining Company was for portions of the land not demanded in this suit, and by itself was not relevant. The purpose and object for which this testimony was offered is not stated; but it could have no relevancy, unless to show the title to the plaintiff below to be void, because purchased and obtained with full knowledge of an adverse possession, and support the following instruction, which was refused by the court:

*"The defendant further requested the [*483 court to charge the jury, that if, when said Williams conveyed to said Cooper the premises in question, the said Minnesota Mining Company was in actual and open possession of said lands, claiming title thereto under their patent, the said conveyance was void in law against the said Company and all claiming under them; which instructions the court refused to give, and to this ruling the defendant excepted."

As the court had excluded the testimony offered to support this point of defense, the defendant could not expect that it would be submitted to the jury without evidence. We have, therefore, to inquire whether the testimony offered and overruled by the court ought to have been received to establish the defense of maintenance or champerty.

In this country, where lands are an article of commerce, passing from one to another with such rapidity, the ancient doctrine of maintenance, which makes void a conveyance for lands held adversely, is in many States entirely rejected. In some it has been treated as obsolete by the court; in others it has been abolished by statute; while with some it appears to have found more favor.

The ancient policy, which prohibited the sale of pretended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. The repeated Statutes which were passed in the reigns of Edw. I. and Edw. III. against champerty and maintenance, arose from the embarrassments which attended the administration of justice in those turbulent times, from the dangerous influence and oppression of men in power. See 4 Kent's Com. 477.

The earlier decisions of the courts of Michigan seems to have adopted this antiquated doctrine as a part of the common law in that State. But so far as concerns its application to sales by one out of possession, the Legislature have annulled it. The Revised Code of 1846, page

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262, enacts that "no grant or conveyance of lands, or interest therein, shall be void for the reason that at the time of the execution thereof such land shall be in the actual possession of another claiming adversely."

From this enactment it is plain that the possession of the Minnesota Mining Company, under claim of title, and Cooper's knowledge of it when he purchased, cannot affect the validity of the deed of Williams to him. Although the testimony, which is the subject of this exception, was evidently offered with a view only to raise the question as above stated, the counsel for the plaintiff in error have endeavored to maintain in this court that the court below erred in rejecting it, because 484*] *if received it would have shown the contract between Cooper and Bacon, and the deed from Wilson, to be void for champerty. This offense seems to have been originated by the Statutes passed in the time of Edw. I. and Edw. III. See 15 Viner's Abr., 149, tit. Maintenance. It is defined (Hawk. Pl. 84) as the "unlawful maintenance of a suit, in consideration of an agreement to have a part of the thing in dispute, or some profit out of it;" and by Chitty as "a bargain to divide the land (campum partire) or thing in dispute, on condition of his carrying it on at his own expense." In some States these Statutes are held to be obsolete. But it seems that the case of Backus v. Byron, 4 Mich. 535, has declared that they still retain their force in Michigan. That was an action by an attorney against his client on a contract, by which the attorney agreed to carry on a suit for a share of the land in case of success, and in case of failure to have nothing.

But in this case there was no offer to prove that Cooper had agreed to carry on the suit in consideration of receiving a share of the land in case of success; on the contrary, the offer was to show that he "purchased stock" in a mining Corporation; that the legal title was conveyed to him in trust for himself and the other stockholders; and as a consequence of the legal title being vested in him, the suit was necessarily brought in his name. It needs no argument to show that such a transaction has none of the characteristics of champerty, and that the court below was right in rejecting testimony which would not, if admitted, tend to show a valid defense, and was, therefore, wholly irrelevant.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

Mr. Justice Daniel:

Whilst I concur entirely in the conclusion just declared by the court, that the case now decided is in its features essentially the same with that of Cooper v. Roberts, formerly before us, and reported in the 18th of How. p. 173, I am unwilling to place my own opinion upon the fact of the identity of the two cases, irrespective of the reasons or principles on which the former of those cases was determined. That case was elaborately discussed by counsel; was, as the opinion of the court evinces, deliberately considered; the theory and objects of the system adopted by the government for the distribution of public lands carefully examined, correctly expounded, and properly sustained by the decision. In the reasoning of the court, the cherished objects aimed to be secured by that theory, viz.: the advancement of "religion, morality, and knowledge," *as in- [*485 dispensable for the existence of good government, and for the happiness of mankind: the obligation for the maintenance of schools and the means of education as necessary for the ends proposed, as declared in the 3d article of the Ordinance of 1787, are prominently and correctly set forth as guides in the interpretation and application of the policy and system of the government in disposing of the public domain. It seems scarcely to admit of rational doubt, that it was in pursuance of this policy, and as deemed best calculated for its successful accomplishment, that in the surveys made or to be made of the public lands, the 16th sec. of every township, being central (and therefore more than any other section could be), connected with the several interests of the township was appropriated for the use of schools. Admitting these to be the policy and theory of the government, designed as it has been declared to lay the foundation of social and political good, it would seem to follow that nothing short of the highest and most overpowering public considerations, or an absolute inability or want of power, should be permitted to defeat or in any degree to control them. Surely speculations for private emolument, and still less such as might be attempted through the exercise of irregular or doubtful authority, should not be permitted to affect them.

The power vested in the President to reserve from sale such portions of land as he should deem necessary for public uses, may be classed as one of those paramount considerations, constituting a public or national necessity, reaching even to the defense of the country by fortifications or arsenals. In the same category may be placed the sanctimony of the rights of property and possession existing and vested in territories anterior to their acquisition by the United States; rights guaranteed by treaty stipulations. In the same light may be viewed the withholding temporarily from sale lands in which were minerals and salt springs. All these restrictions or reservations are exceptions merely, and should be carried no farther than their terms expressly or necessarily require. They can with no propriety be regarded as forming in themselves a system; much less as overturning a system designed to be, as far as practicable, general and uniform, and proclaimed from its origin to be founded in wisdom and in a solemn sense of public good, and as such to be fostered and sustained. Every new State has come and will come into the Union relying on the faith of this pledge; and even upon the concession of a power in the government to violate that pledge, such a violation could be referred to no principle of justice, and should, therefore, never be imputed but upon proofs the most positive and unequivocal. *The [*486 16th section of each township could not, it is true, be specifically designated and possessed anterior to a survey of the public lands; but the right to that section and its appropriation existed in contract or pledge by virtue of the Ordinance and the laws of the United States, and the right of possession and enjoyment was matured by the execution of the surveys. It

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cannot be supposed that this right, so important, was destroyed or impaired by an agreement for temporary occupancy, made without reference to any survey or division of the lands, made, too, without legitimate authority; nor can such right be affected by any ordinary allowance of preemption, because the pledge of the government is pre-existing, is express, and therefore paramount.

The State of Michigan was admitted into the Union under the pledge given her by the general land system of the United States; her right to the 16th section of each township was under that pledge fully recognized. It could not, therefore, consistently with good faith, be displaced by an arrangement irregular in its origin, and temporary in its character, in its tendencies and operation conflicting with a preceding, general and beneficial system of policy. No effectual adversary rights could grow out of such an arrangement. Upon the views herein expressed, I am in favor of an affirmance of the judgment in this cause, not merely on the ground that this cause is essentially the same with that already decided between these parties, as reported in the 18th of How. p. 173, but also because the opinion of this court upon the law and the facts of the last-mentioned cause commands my entire approbation.

FRANCIS SELDEN, Appt.,

v.

LAWRENCE MYERS, Philip Pike, Walter Lenox and James C. McGuire.

(See S. C. 20 How. 506-511.)

Parol evidence admissible to vary contract, in cases of deception—ignorant man, when must be shown to have understood contract.

Parol testimony is inadmissible to show that a contract was different from the one reduced to writing, unless it can also be shown that the party was fraudulently deceived and misled as to the contents of the written instruments.

Where one is dealing with an unlettered man, who can neither read nor write and makes his mark to the instruments he executed, it is incumbent on the former to show, past doubt, that the latter fully understood the object and import of the writings which he executed.

Argued Apr. 9, 1858. Decided, May 10, 1858.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The bill in this case was filed in the court below by the appellant, to have a certain deed set aside on the ground of fraud, and for an injunction and for general relief.

The court below having entered a decree dismissing the bill, the complainant took an appeal to this court.

The case is very fully stated in the opinion of the court.

Messrs. Richard S. Coxe and William B. Webb, for appellant:

The bill charges fraud.

1. Upon the ground that the complainant being an illiterate and ignorant man, the deed was not read to him.

2 Bl. Com. 304; 2 Co. R. 3, 9; 12 Co. R. 90; 11 Co. R. 27; Skin. 159; 2 Atk. 327; 8 T. R. 147; Com. Dig. Fait, B, 2; Shep. Touch. 56; Price v. Price, 12 Eng. L. and Eq. 144.

The deed was fraudulent, and equity must set it aside.

2 H. & G. 34.

2. That it conveys more property than was intended.

Messrs. Bradley and Lawrence, for appellees.

Mr. Chief Justice Taney delivered the opinion of the court:

This is an appeal from the Circuit Court for the District of Columbia.

It appears that the appellant, for some years before the execution of the instruments hereinafter mentioned, kept a restaurant in the City of Washington, and had considerable dealings with Lawrence, Myers & Company, who are merchants in New York, and who, from time to time, had supplied him with liquors for the use of his restaurant. On the 31st of December, 1846, the appellant gave his promissory note for $1,246.68 to Lawrence Myers & Company, payable with interest on the 1st of January, 1849, for value received; and on the same day he executed a deed to Walter Lenox, of the City of Washington, which recites that he is indebted to Lawrence Myers and Philip Pike, of the City of New York, trading under the name of Lawrence Myers & Company, in the sum of $1,246.68, for which sum they held his promissory note, dated the 31st of December, 1846, drawn to the order of the said Lawrence Myers & Company, payable on the 1st of January, 1849, and that the appellant was desirous to secure the payment of the said debt, and all interests and costs that may accrue thereon; and then proceeds to convey certain real property in the City of Washington to the said Lenox, in trust; that in case the appellant should fail to pay the said debt, or any part thereof, or any proper costs or charges that may accrue thereon, then, at the request of the holders of the said note, due and unpaid, to sell the said premises (or such part thereof as the trustee may deem necessary to pay so much of the debt as shall be then unpaid), in such manner, after such notice, at such time and place, and upon such terms and conditions, as the trustee shall deem most convenient for the interest of all concerned, and convey the same in fee simple to the purchaser.

This deed was duly acknowledged by Selden, according to law, before two justices of the peace for the County of Washington, and recorded among the land records of the county.

Some years after the expiration of the credit mentioned in these instruments—that is to say, in 1853—the trustee, at the request of Lawrence Myers & Company, advertised the premises to be sold on the 18th of July in that year; and thereupon Selden filed this bill to obtain an injunction to stay the sale.

The bill states, that in 1846 the appellant had a settlement of accounts with Lawrence Myers & Company; and after the *settle- [*508

NOTE.—Parol evidence to vary or contradict a writing—see note, 35 L. ed. U. S. 860,

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ment, Myers, in order to enable him to carry on his business, agreed that the Company would make advances to him from time to time in goods or money, as he should need them, provided he would give them his note for $1,246.68, payable on the first of January, 1849; that he accepted the proposition, and thereupon executed the promissory note above mentioned; and afterwards, at the request of Myers, executed the deed of trust to Lenox.

The bill further charges, that it was the distinct understanding of the parties, that advances should be made to the amount set forth in the note; but that only a small advance of about two hundred dollars had afterwards been made, and that sum diminished by sundry payments made by appellant; that the property conveyed by him in trust was of much greater value than the amount of the note; that he can neither read nor write; and when he executed the deed, did not know that the whole of said property was included, and was under the impression that it conveyed only a portion of it.

The bill further charges, that Lawrence Myers & Co. persuaded him to execute the deed with the intention to defraud him, and since its execution had refused to make advances to him in money or goods; that the west half of the lot conveyed in trust was advertised for sale by the trustee, and if the sale was allowed to proceed he would be injured and defrauded.

The members of the firm of Lawrence Myers & Co., and Lenox, the trustee, and McGuire, the auctioneer, were made parties defendants to the bill.

The answer of Lawrence Myers, who answers separately, denies that the note was given for the purpose stated in the bill, and states that it was given upon a settlement of accounts for goods before that time sold to the appellant, and for the amount which the appellant acknowledged to be then due; that the deed was executed voluntarily, and with full knowledge of its contents, and after it had been read and explained to him, and denies all fraud charged in the bill.

The respondent also denies that the property conveyed was more than sufficient to pay the debt; that the east half of it had been previously mortgaged, and had since been sold to pay that debt, and the remaining half is not more than sufficient to pay the debt due to the defendant. He admits that the appellant is entitled to a credit of $119.70, with interest from the 11th of September, 1845, on account of so much money received on a note of a certain William Walker, assigned by the appellant to Lawrence Myers & Company.

The answer of Philip Pike, the other partner 509*] in the firm, is *substantially the same with that of Myers, as far as he has knowledge. But he was not in Washington when the note was taken and the conveyance made, and had therefore no personal knowledge of that transaction.

And the answer of Lenox, the trustee, states that he prepared the deed at the request and according to the instructions of Lawrence Myers; that Selden and Myers met together at his office, on or about the day of the date of the deed; that he laid the note and deed before the parties; that he cannot charge his memory that the entire deed, word for word, was read to the parties, but avers that the description of the property conveyed, and the nature and purport of the deed, was made known and explained to each of the parties, and so much read as was necessary for that purpose; that the transaction was the subject of conversation between the parties in his presence; and that Selden showed a clear knowledge of its character and purpose, and that it was declared by both parties that it was a settlement between them of past dealings and accounts; and that the note and deed were prepared by him, and strictly conformed to the views of both parties, as made known to him by each of them. They were not signed in his presence, but taken away by Myers, in company with Selden. And he denies all fraud and deceit charged in the bill.

Testimony was taken on both sides. On the part of Selden several witnesses were examined, who state that, from conversations between Selden and Myers, at which they were present, about the time when the note and deed were executed, or shortly before the advertisement for the sale, they understood that Selden owed nothing to Myers & Co., when they were given, and that they were intended to secure future supplies which Myers & Co. were to furnish. But none of these witnesses were present when they were executed, and none of them know whether they were or were not read and explained to the parties before they were signed. And, certainly, parol testimony is altogether inadmissible to show that the contract was different from the one reduced to writing, unless it can also be shown that the party was fraudulently deceived and misled as to the contents of the written instruments.

It is true that Selden is an unlettered man, and can neither read or write. He makes his mark to the instruments he executed; and dealing with such a person, it is incumbent on Myers & Co., to show, past doubt, that he fully understood the object and import of the writings upon which they are proceeding to charge him; and if they had failed to do so, the above-mentioned testimony offered by the appellant, as to *the state of the accounts [*510 between them at the time, would have furnished strong grounds for inferring that he had been deceived, and had not understood the meaning of the written instruments he signed. But the testimony offered by Myers & Co., is conclusive on this point. Lenox, who was necessarily made a defendant in these proceedings, was, by consent of parties, examined as a witness on the part of Myers & Co., and in his testimony he confirms the statement made in his answer in every particular. He proves that the parties were together at his office; that they talked of their accounts while there, and that Selden admitted that the balance due from him at that time to Myers & Co. was the amount for which the note was given. He says, "I read so much of it (the deed) to the parties as explained its object, the amount of the note, and the description of the property, and the purposes; and it was admitted by both parties that it was right, and received from me as such by them together, and they left my office

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for the purpose of executing it." The testimony of this witness is not impeached, nor his statement of facts contradicted by any witness for the appellant, and is, therefore, a decisive answer to the allegations in the bill of the appellant.

Nor is there any ground for supposing that Selden, in his ignorance of accounts, was deceived or imposed upon as to the balance actually due. The accounts of the dealings between the parties up to that time have been produced by Myers & Co., and proved to be correct by the clerks who were at that time in their employment, and whose duty it was to keep them; and these accounts show that the balance then due was the amount for which the note was taken.

In this view of the subject, it is unnecessary to examine particularly the testimony of the different witnesses produced by the complainant. They no doubt speak to the best of their recollections; but every one knows how liable a party is to be led into mistakes who hears casual conversations about accounts in which he has no interest, and how liable they are to be mistaken, when some years have elapsed, both as to the particular time when the conversation took place and the precise language used by the speaker. And the strong probability is, that the conversations of which they speak, and in which they understood Myers to admit that he had been paid, related to the small transactions which took place after these instruments were executed; for it appears that liquors were supplied by Myers & Co., after this settlement, and for which Selden made some payments; and this account, it appears, was not adjusted and balanced when the property was advertised for sale, and there was some controversy about it. The depositions 511*] *of these witnesses were taken after many years after the instruments of writing were executed, and after these conversations are supposed to have passed, and the accuracy of their recollection in such a matter can hardly be relied on as to time or language; and they, as well as Selden, who is an unlettered man, and incapable of keeping accounts, and who does not appear to have had any regular books kept by a clerk, would most likely have but a confused recollection of these conversations, and might, without any evil intention, confound what had been said in relation to dealings subsequent to the note, with conversations which passed at the time it was executed.

And this view of the subject is strengthened by the fact, that although Selden states in his bill that he had a settlement with the Company of all accounts at that time standing unsettled between him and the firm, he does not state that nothing was found due from him on that settlement, nor does he say that the balance against him, if any, was paid. His statement of a settlement is no doubt true; but it is evident from the testimony that, upon settlement, the sum claimed by Lawrence Myers & Co. was found to be due, and the note and deed given to secure it.

We see no reason, therefore, for disturbing the decision of the Circuit Court dismissing the bill: and the decree must be affirmed with costs.

JAMES H. SUYDAM, Plff. in Er.,

v.

WILLIAM H. WILLIAMSON, David R. Williamson, Mary A. Williamson, Isabella Williamson, Catharine B. Williamson, Charlotte A. Williamson, Rupert J. Cochran, Isabella M. Cochrane and Bayard Clarke.

(See S. C. 20 How. 427–442.)

Bill of exceptions, when proper—special verdict, what is—how prepared—practice on—when errors are open to revision—must appear in the record—agreed statement—verdict subject to opinion of court—demurrer to evidence, and to pleadings—oyer—writ of error, what is, and when proper—case, with leave to turn same into special verdict or bill of exceptions—when "case" disregarded.

The record does not contain either a bill of exceptions, special verdict, or an agreed statement of facts. Rulings of the court in admitting or rejecting evidence, can only be brought to this court for revision by a bill of exceptions.

Such rulings are never properly included in a special verdict any more than in an agreed statement of facts.

A special verdict is where the jury find the facts of the case, and refer the decision of the cause upon those facts to the court. The court, in giving judgment, is confined to the facts so found.

The formal preparation of such a verdict is made by the counsel of the parties, and it is usually settled by them, subject to the correction of the court.

After the special verdict is arranged, and it is reduced to form, it is then entered on the record.

The questions of law arising on the facts found are then decided by the court, as in a case of a demurrer.

And if either party is dissatisfied with the decision, he may resort to a court of error, where nothing is open for revision, except the questions of law inferentially arising on the facts stated in the special verdict.

Whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner.

Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised.

A bill of exceptions is the safest method, and where the facts are disputed, it becomes the only effectual mode by which all the rights of the complaining party can be preserved.

Where there is no dispute in regard to the facts, the same purpose may be safely accomplished by a special verdict, or, according to a rule of this court, by an agreed statement of facts.

Where the facts are without dispute, and agreed between the parties, a statement of the same may be drawn up and entered on the record, and submitted direct to the court, for its decision, without the intervention of a jury.

Or a general verdict may be taken, subject to the opinion of the court upon the facts so agreed.

And in either case, the aggrieved party may bring error after final judgment, and have the questions of law, arising upon the facts thus spread upon the record, re-examined, as in the case of a special verdict.

A demurrer to the evidence extends only to the evidence produced, and has no effect at all upon the rulings of the court by which it was received; it is an unusual proceeding, and one to be allowed or denied by the court.

The same effect is produced and the same object is attained, when either party demurs to a material portion of the pleadings.

Another method by which certain evidence may be incorporated into the record at the nisi prius trial, is by oyer.

A writ of error is an original writ, and lies only where a party is aggrieved by some error in the foundation proceedings, judgment, or execution.

Where a case shall be made with leave to turn

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the same into a special verdict or bill of exceptions, the party shall not be at liberty to do either, at his election, but the court may, if they think proper, prescribe the one which he shall adopt.

The paper in the transcript denominated the "case" is not a part of the record, and must be wholly disregarded by this court.

Nothing can be considered upon a writ of error, except what appears upon the record.

Argued Feb. 23, 1858. Decided May 11, 1858.

THIS was an action of ejectment brought in the Circuit Court of the United States for the Southern District of New York, by the defendants in error, to recover the possession of certain premises in the City of New York.

The trial in the court below having resulted in a verdict and judgment for the plaintiffs, the defendant brought the case here on a writ of error.

A further statement appears in the opinion of the court.

The reader who wishes to trace the history of the remarkable litigation of which this case is a part, or who desires a full statement of the facts on which the merits of the case depend, should consult the following reports: Williamson v. Berry, 8 How. 495; Williamson v. Irish Presbyterian Church, 8 How. 565; Williamson v. Ball, 8 How. 566; Suydam v. Williamson, 65 U. S. (24 How.) 433; Williamson v. Suydam, 6 Wall. 723; Sinclair v. Jackson, 8 Cow. 543; Clarke v. Van Surlay, 15 Wend. 439; Cochran v. Van Surlay, 20 Wend. 365; Towle v. Forney, 14 N. Y. 423; Clarke v. Davenport, 1 Bos. 96.

Mr. N. Dane Ellingwood, for plaintiff in error.

Mr. David Dudley Field, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

This was a writ of error to the Circuit Court of the United States for the Southern District of New York.

The view we have taken of this case, as it is exhibited in the record, renders an extended statement of the facts entirely unnecessary. It was an action of ejectment brought in the court below to recover the possession of a certain parcel of land, with the appurtenances, situated in the sixteenth ward of the City of New York, and described as lots sixty-four and sixty-five, according to a certain map made by George B. Smith. The declaration, which was in the usual form, was filed in the Circuit Court for the Southern District of New York on the 15th day of August, 1845, and the defendant, James H. Suydam, appeared, by his attorney, and pleaded that he was not guilty of unlawfully withholding the premises claimed by the plaintiffs, as was alleged in the declaration, and tendered an issue, which was duly joined 431*] by the plaintiffs. During the *pendency of the suit, and before the trial, two of the plaintiffs, being the first two named in the declaration, died, and the cause was regularly revived in the name of the survivors and the heirs of those deceased. At the adjourned session of the Circuit Court held at the City of New York on the first Monday of October, 1849, the parties went to trial on the general issue, and the jury returned a general verdict in favor of the plaintiffs; after the verdict, the cause was continued, as the record states, until the first Monday of October, 1850, and "the same day is given to the parties to hear the judgment of the court," and on that day the judgment was rendered on the verdict for the plaintiffs, that they do recover against the said James H. Suydam the possession of the said premises according to the said verdict of the jury, and for their damages, costs and charges; and a writ of possession was duly issued, directed to the Marshal of the district. All these proceedings were in the usual course of judicial action, and were duly and formally entered on the record of the suit, and consequently furnish no ground of complaint whatever on the part of the present plaintiff, who was the defendant in the court below. The declaration contained on its face a good cause of action, and the general issue and joinder were regularly filed in the cause, and were entirely sufficient to make up a valid issue between the parties to the suit; and the verdict, which was strictly formal and legal, was in every respect responsive to the issue formed. It appears that the jury found, in the very words of the issue, that the defendant was guilty of unlawfully withholding the premises claimed by the plaintiffs, as alleged in the declaration; and the judgment followed the verdict, and was founded upon it, for the premises as they were set forth and described in the pleadings. Every step in the cause, from the filing of the declaration to the issuing of the writ of possession, was in exact conformity to the most approved practice and precedents in the federal courts.

We do not understand that the pleadings or the regularity of the proceedings are in any manner called in question, except as the foundation of a judgment, which it is insisted was erroneous, for reasons altogether aside from any connection with mere matters of form. The real controversy between the parties has reference more especially to the right of possession, and consequently extends to the title of the premises described in the declaration, and necessarily involves the principal questions which were presented to this court at the December Term, 1850, in the case of Williamson et al. v. Berry, 8 How. 495; and we regret that the facts of the case, and the rulings of the court below, are not now exhibited in a manner to justify this *court in giving the [*432 subject a re-examination, with the aid of the additional light which has been thrown upon it by the elaborate and very able discussion at the bar; and the more so, as it appears that a case, depending upon the same evidence of title, has, since that time, been before the Court of Appeals of the State of New York, where a conclusion was reached widely different from the one expressed by this court on the former occasion, in the answers given to the questions then submitted for its consideration. The difficulty, however, in the way of any such examination at this time is insurmountable, for the reason that the record does not contain either a bill of exceptions, special verdict, or an agreed statement of facts. Some of the questions discussed at the bar might have been satisfactorily presented in a special verdict, or by an agreed statement of facts, while in re-

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spect to others, apparently regarded as important, such as the rulings of the court in admitting or rejecting evidence, it is proper to remark that they could only be brought to this court for revision, by a bill of exceptions. Such rulings are never properly included in a special verdict, any more than in an agreed statement of facts. A special verdict is where the jury find the facts of the case, and refer the decision of the cause upon those facts to the court, with a conditional conclusion, that if the court should be of opinion, upon the whole matter thus found, that the plaintiff has good cause of action, they then find for the plaintiff; and if otherwise, they then find for the defendant; and it is of the very essence of a special verdict, that the jury should find the facts on which the court is to pronounce the judgment according to law, and the court, in giving judgment, is confined to the facts so found; and every special verdict, in order to enable the appellate court to act upon it, must find the facts, and not merely state the evidence of facts; so that, where it states the evidence merely, without stating the conclusions of the jury, a court of error cannot act upon matters so found In practice, the formal preparation of such a verdict is made by the counsel of the parties, and it is usually settled by them, subject to the correction of the court, according to the state of facts as found by the jury, with respect to all particulars on which they have passed, and with respect to other particulars, according to the state of facts which it is agreed they ought to find upon the evidence before them. After the special verdict is arranged, and it is reduced to form, it is then entered on the record, together with the other proceedings in the cause, and the questions of law arising on the facts found are then decided by the court, as in case of a demurrer; and if either party is dissatisfied with the decision, he may resort 433*] *to a court of error, where nothing is open for revision, except the questions of law inferentially arising on the facts stated in the special verdict; and we may here remark, for the purpose of illustration, that it is not so much because the proceeding is denominated a special verdict, that the party by virtue of it is authorized to invoke the aid of a revisory tribunal, as it is because it has the effect to incorporate the facts of the case into the record, which otherwise would have rested in parol, and therefore could not have been reached on a writ of error; and the same remark applies to a bill of exceptions, which is a still more comprehensive method of enlarging the record by incorporating into it not only the facts of the case, but the rulings of the court in admitting and rejecting evidence, and the instructions given to the jury; and after it is signed, sealed, and filed in the case, it becomes a part of the record, and the matters therein set forth can no more be disputed than those contained in any other part of the same record, and are alike subject to revision in a court of error. It is a mistake, however, to suppose that in such cases the writ of error operates only on the bill of exceptions. Such is never the fact, unless the whole record is set forth in the bill of exceptions; as the operation of the writ of error addresses itself to the record as an entirety, and not to any separate portion of it as distinct from the residue; and when the cause is removed into the appellate court, any error apparent in any part of the record is within the revisory power of such tribunal. The rule is, that whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner.

Bennett v. Butterworth, 11 How. 669; Slacum v. Pomery, 6 Cranch, 221; Garland v. Davis, 4 How. 131; Cohens v. Virginia, 6 Wheat. 410.

When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequences of his own neglect. Evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record, unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law. A bill *of exceptions, undoubtedly, is [*434 the safest method, as it is the most comprehensive one in its operation; and where the facts are disputed, and cannot be arranged except from evidence admitted under the ruling of the court as to its admissibilty, oftentimes it becomes the only effectual mode by which all the rights of the complaining party can be preserved. On the other hand, where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the same purpose may be safely accomplished by a special verdict, or, according to the rule established in this court, by an agreed statement of facts. United States v. Eliason, 16 Pet. 291; Stimpson v. Balt. & S. R. R. Co. 10 How. 329; Graham v. Bayne, 18 How. 60. Where the facts are without dispute, and agreed between the parties, a statement of the same may be drawn up and entered on the record, and submitted directly to the court, for its decision, withouth the intervention of a jury; or a general verdict may be taken, subject to the opinion of the court upon the facts so agreed; and in either case, the aggrieved party may bring error after final judgment, and have the questions of law, arising upon the facts thus spread upon the record, re-examined, as in the case of a special verdict. Faw v. Roberdeau's Exrs. 3 Cranch, 173; Brent v. Chapman, 5 Cranch, 358.

It should be observed, however, that the rulings previously made by the court, in admitting or rejecting evidence during the progress of the trial, are no more revisable on a special case, as it is called, when the verdict is taken subject to the opinion of the court on an agreed state of facts, than where the agreed statement is submitted directly to the court, without the intervention of the jury; and for the obvious reason that, in the one case as

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much as in the other, the foundation laid for the action of the revisory tribunal is based upon the consent of the parties to the suit, and consequently the action of the appellate court must be confined to the facts as they were agreed, and as they appear in the record of the case. Arthurs v. Hart, 17 How. 6; Bixler v. Kunkle, 17 S. & R. 310. At one time an attempt was made to introduce a different practice into this court; but it was distinctly disclaimed, and has never been sanctioned in writs of error to any of the circuit courts in States where the proceedings are according to the course of the common law. Shankland v. The Corporation of Washington, 5 Pet. 390.

In that case, it was agreed by the parties that the question of the admissibility, competency and sufficiency of the evidence to maintain the action, should be submitted to the court, and that in considering the evidence, the court 435*] should draw *from it, so far as it was admissible and competent, every inference of fact and law which it would have been competent for a jury to have drawn from it; and that agreement was appended to an agreed statement of facts, on which the case was submitted to the determination of the Circuit Court in this district. Subsequently, it was brought into this court on a writ of error for revision, and was heard and determined upon the matters properly exhibited in the record; but this court, in giving judgment, took occasion to characterize the agreement as an unusual one, and denied that it was competent for parties to impose any such duties on this court, and expressly declared that the case was not to be drawn into precedent. Whenever the parties to a pending suit desire to place the facts of the case upon the record, so as to secure the right to have the law arising on the facts, revised on a writ of error, they must adopt some one of the methods already suggested to effectuate that purpose, as there are no other effectual methods by which it can be accomplished.

Other modes are known to the practice of this court, by which the evidence produced against a party may in certain cases be put on the record either in whole or in part, according to the circumstances, so as to secure the right to have the questions of law arising upon it revised on a writ of error; but every proceeding of that kind is either so limited in its application or so tied up by conditions, that they are seldom of much practical importance, and are only referred to on the present occasion to confirm the proposition already advanced, that no ancillary step in the cause is of any avail to a party as laying the foundation to support a writ of error any farther than it has the effect to place on the record what otherwise would rest in parol. Formerly it was considered that a party might always demur to the evidence produced against him, as a matter of right; and while that was so, a demurrer to evidence was equally effectual with a bill of exceptions to the extent of its operation. 4 Chit. Gen. Prac. 7; 2 Inst. 427. The bill or exceptions was always the more comprehensive remedy, because it extended, as it still does, not only to the facts in the case, but also to the rulings of the court in admitting or rejecting evidence, and to the instructions given to the jury upon its legal effect. A demurrer to the evidence, while its operation in one respect is nearly the same as that of the bill of exceptions, in another is very different. It extends only to the evidence produced, as the term imports, and has no effect at all upon the rulings of the court by which it was received; and as a necessary consequence, where the error of the court consists in having admitted improper evidence, the effect of a *demurrer to [*436 it would be to waive the objection to the ruling instead of laying the foundation to correct the error. Bulkely v. Butler, 2 B. & C. 434. A demurrer to evidence is defined by the best text writers to be; a proceeding, by which the court in which the action is depending, is called upon to decide what the law is upon the facts shown in evidence; and it is regarded in general as analogous to a demurrer upon the facts alleged in pleading. When a party wishes to withdraw from the jury the application of the law to the facts, he may, by consent of the court, demur in law upon the evidence, the effect of which is to take from the jury and refer to the court the application of the law to the facts, and thus the evidence is made a part of the record, and is considered by the court as in the case of a special verdict. A mere description of the proceeding is sufficient to show that it is the evidence, and nothing else, that goes upon the record. Since it was determined that a demurrer to evidence could not be resorted to as a matter of right, it has fallen into disuse; and as long ago as 1813 it was regarded by this court as an unusual proceeding, and one to be allowed or denied by the court in the exercise of a sound discretion under all the circumstances of the case. Young v. Black, 7 Cranch, 565; United States Bank v. Smith, 11 Wheat. 171; Fowle v. Common Council of Alexandria, 11 Wheat. 322.

Another method by which certain evidence may be incorporated into the record at the nisi prius trial is by oyer, which occurs where the plaintiff in his declaration, or the defendant in his plea, finds it necessary to make a profert of a deed, probate, letters of administration, or other instrument under seal, and the other party prays that it may be read to him, which in such a case cannot, as a general rule, be denied by the court; and the effect of the proceeding, in certain cases, is to make the instrument a part of the pleadings, and, consequently, to place it within the operation of a writ of error, which, in every case where the proceeding is according to the course of the common law, brings up the whole record; and in all these cases, as well as in the one first named, it is because the evidence, whatever it may be, is made a part of the record by the proceeding, that the questions of law arising upon it become a proper subject of revision on the writ of error. 1 Chit. on Plead. 10th Am. ed. 431; 1 Tidd's Prac. 3d Am. ed. 586. And the same effect is produced and the same object is attained when the defendant demurs to the declaration, or when either party demurs to a material portion of the pleadings on which the cause depends; and so it must have been understood by this court in Gorman et al. v. Lenox, 15 Pet. 115, where *it was held, [*437 in accordance with the principle here advanced, that the action of the Circuit Court of this dis-

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trict, in sustaining a demurrer to a plea of performance in a suit on a replevin bond, was the subject of a revision on a writ of error; and the rule adopted in that case was undoubtedly correct, as the effect of the demurrer was to make the error apparent in the record; and when that is so, it becomes the subject of revision just as much as when it is made to appear by a bill of exceptions or a special verdict.

We have now adverted to the several methods acknowledged by courts of error, by which matters resting in parol at the trial in the subordinate tribunal may be put on the record, so as to lay a proper foundation for a revision of the legal questions arising out of them in the appellate court, and there are no others which can be recognized in this court in cases where the proceedings are required to be according to the course of the common law. Dougherty v. Campbell, 1 Blackf. 39; Cole v. Driskell, 1 Blackf. 16.

A writ of error is an original writ, and lies only when a party is aggrieved by some error in the foundation, proceedings, judgment, or execution, of a suit in a court of record, and is defined to be a commission, by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse; and it was expressly held by this court in Cohens v. Virginia, 6 Wheat. 410, that the writ of error operated upon the record, and that its effect under the Judiciary Act, was to bring it into this court, and submit it to a re-examination; and it is also laid down by the best writers on pleading, that nothing will be error in law that does not appear on the face of the record, for matters not so appearing are not supposed to have entered into consideration of the judges. Steph. on Plea. 121.

The writ of error in this case was issued on the 18th day of December, 1854, and on the 29th day of January, 1855, an additional paper was filed, which in the transcript is denominated the "case," and is the one which furnished all the materials for the discussion at the bar. It purports to contain all the evidence introduced at the trial in the court below, as well that given by the defendant as that given by the plaintiffs, and certain offers of proof on the part of the plaintiffs, which were objected to by the defendant, and excluded by the court. This mass of evidence, with the exhibits, filling sixty pages of the transcript, has respect, on the one side or the other, to the title and right of possession to the premises described in the declaration, and comprises all the evidences of title which were 438*] before this court on the former *occasion; and, in addition thereto, certain admissions of the parties and other parol evidence. It is now drawn up in the form of a report of the judge who presided at the trial, and is signed by him, and is under seal; and, as we understand the indorsement, is certified to be correct by the counsel of the plaintiffs. The conclusion of the report is as follows:

"A verdict was then, by direction of the court, taken for the plaintiffs, for the premises claimed, subject to the opinion of the court upon the questions of law, with liberty to either party to turn this case into a special verdict or bill of exceptions."

Whatever might have been the right of the parties under that report, it is too plain for argument, that no one connected with its preparation could have regarded it either as a special verdict or a bill of exceptions. All that it professed to do was to give either party the liberty to turn the case into one or the other of those forms of proceeding; and it is a sufficient answer to any pretensions under the report, to say, that the change has not been made; that for some reason unknown to this court, the right to make the change, if such it was has never been exercised; and that it is now presented here in the form in which it was prepared when it is too late to make the alteration. And we also say that this court cannot so far depart from the settled practice and regular course of proceeding as to give an effect to the paper which neither its contents nor terms would warrant; nor can we attempt to do for the plaintiff in error, what it was his duty to have done at the trial, and before the writ of error was sued out; nor are we prepared to admit that the option given to turn the case either into a special verdict or a bill of exceptions could have been exercised by either party under the concluding portion of that report, without the assent of the judge who presided at the trial, and irrespective of his authority. On the contrary, we conclude that "where a case shall be made with leave to turn the same into a special verdict or bill of exceptions, the party shall not be at liberty to do either, at his election, but the court may, if they think proper, prescribe the one which he shall adopt." Conk. Trea. 3d ed. p. 444.

Nothing less than the presence and assent of the court, we think, can give any legal validity to a special verdict; and in respect to a bill of exceptions, it must always be signed and sealed by the judge, or else it would be a nullity. Phelps v. Mayer, 15 How. 160. A special verdict ought always to be settled under the correction of the judge who presided at the trial, and, whether prepared at the time or subsequently, it should be filed as of the term when the trial took place. Turner v. *Yates, 16 How. 14; Sheppard v. Wil- [*439 son, 6 How. 275. The necessary effect of the proceeding, where the verdict is taken subject to the opinion of the court, would be to postpone the preparation of the special verdict till after the parties were heard, and the opinion given; and to that extent the delay is allowable, though we are by no means prepared to admit that it may be done after the cause has been removed into this court. The result is, we have come to the conclusion, on this branch of the case, that the paper in the transcript denominated the "case" must be considered merely as a report of the judge who presided at the trial; that it is not a part of the record, and, consequently, must be wholly disregarded by this court, in determining whether the judgment of the court below ought to be reversed or affirmed. Having come to that conclusion, it becomes unnecessary to notice any of the rulings of the court in admitting or excluding evidence, as no part of that report can be taken into consideration. The question, whether the report of a judge who tried the cause was a part of the record, came up directly before this court, in Inglee v. Coolidge, 2 Wheat. 263; and, after

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a deliberate consideration, the court unanimously determined that it did not. It was a writ of error to the Supreme Judicial Court of Massachusetts. The record showed that the jury found a general verdict for the original plaintiff, and the cause was then continued, as the record stated, "for the opinion of the whole court upon the law of the case, as reported by the judge who tried the same, and at a subsequent term judgment was rendered for the plaintiff upon the verdict. When the record was brought into this court, the report of the judge was annexed to the writ of error with the other proceedings and exhibits in the cause, and this court, in speaking of the report, said: It is not like a special verdict, or a statement of facts agreed of record, upon which the court is to pronounce its judgment. The judgment was rendered upon a general verdict, and the report is mere matter in pais to regulate the discretion of the court as to the propriety of granting relief, or sustaining motion for a new trial.

Other cases have been decided by this court, asserting the same general principle, that nothing can be considered upon a writ of error except what appears upon the record; and one in particular, which, in that point of view, bears a very close analogy to the case under consideration. We allude to the case of Minor v. Tillotson, 2 How. 392, which was a writ of error to the Circuit Court of the Eastern District of Louisiana, under the 22d section of the Judiciary Act. A mass of evidence in that case was received from both parties, consisting of concessions and grants under the Spanish Gov-440*] ernment, intermediate *conveyances, documents showing the proceedings in regard to the title under the laws of the United States, and parol testimony; and the cause was submitted to the court under an agreement that those documents, proceedings, and parol testimony, constituted all the evidence on which the cause was tried, and that the agreement was "made for a statement of the facts in the case." This court then said, it seems to have been supposed that the agreement of the counsel that the evidence in the cause should be considered as a statement of facts, was a sufficient ground for a writ of error on which a revision of the legal questions might be made, and intimated, very strongly, that if it were so, it would be to require the court to try the cause on its merits, and emphatically declared, "this is never done on a writ of error, which issues according to the course of common law." And so, also, it was held in Leland et al. v. Wilkinson, 6 Pet. 317, that the private laws of a State, and special proceedings of the Legislature of a State, in regard to the sale of the estate of a deceased person for his debts, could not be considered, unless they were found in the record; and in Williams v. Norris, 12 Wheat. 117, it was determined that neither depositions nor exhibits, of any description, constitute "any part of the record on which the judgment of appellate court is to be exercised, unless made a part of it by a bill of exceptions, or in some other manner recognized by law." These cases, we think, have a strong tendency to support the proposition, that the paper, in the transcript denominated the "case," cannot be regarded as a part of the record, and if not, then it is clear that it cannot be considered on the present occasion, irrespective of the fact that it was not filed till more than a year after the writ of error issued, which of itself is decisive of the point that it cannot be considered. Williams v. Norris, 12 Wheat. p. 120.

It is certain, therefore, that there is no error in the record; and the only remaining question is, what disposition ought to be made of the cause, under the circumstances of the case?

An important distinction exists in respect to writs of error issued under the 22d section of the Judiciary Act, from those issued under the 25th section of the same Act, which it becomes necessary to notice in this connection, in order to maintain a writ of error to this court from a State Court within the 25th section of that Act, it must appear on the face of the record that some one, at least, of the questions stated in that section did arise in the State Court, and that the question was decided in the State Court, as required in the section; and if it does not so appear in the record, then *this [*441 court has no jurisdiction of the case, and in that event the writ of error must be dismissed, as this court, under those circumstances, has no power either to reverse or affirm the judgment brought up for revision; and such was the state of the record in Inglee v. Coolidge, and accordingly the writ of error was dismissed. The writ of error, however, in this case issued under the 22d section of the Judiciary Act, in respect to which a different rule prevails, as will be seen by attending to the language of the Act. That section provides, in effect, that final judgments in a Circuit Court brought there by original process may be re-examined, and reversed or affirmed, in this court, upon a writ of error; and where the cause is brought into this court upon a writ of error issued under that section, and all the proceedings are regular, and no question is presented in the record for revision, it follows by the express words of the section, that the judgment of the court must be affirmed. Beyond question, the record in this case exhibits every fact required by the section to give this court jurisdiction of the cause, and in strict compliance with the terms of the Act. The action was originally brought in the Circuit Court for the Southern District of New York, and the record shows a sufficient declaration duly filed in court— a proper and valid issue between the parties—a perfect finding by the jury upon the issue joined, and a regular judgment on the verdict, which was final, unless reversed; and certainly these are all the requisites of a record, according to the requirements of the 22d section of the Judiciary Act, to entitle a party to retain the judgment which has been given in his favor. Minor et al. v. Tillotson, 1 How. 287; Stevens v. Gladding, 19 How. 64; Lathrop v. Judson, 19 How. 66. It is only when the special verdict is ambiguous or imperfect, or when it finds only the evidence of facts, and not the facts themselves, or finds but a part of the facts in issue, and is silent as to others, that this court can regard the finding as a mistrial, and order a venire de novo. Barnes v. Williams, 11 Wheat. 415; Carrington v. The Pratt, 18 How. 63; Prentice v. Zane, 8 How. 484.

When the record exhibits such a state of facts, it is then competent for this court to re-

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mand the cause for a new trial, in order that the finding of the jury may be perfected. The record itself in such a case shows the imperfection which it is the purpose of the new trial to remedy, and it constitutes the basis of the action of the court in giving the order to send the cause down to a rehearing. No such imperfection appears on this record. On the contrary the record shows a perfect finding of the jury, and, on a careful inspection of the transcript, 442*] *we are unable to discover error in any part of the proceedings.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

ALFRED INGRAHAM and George Read, Assignees in trust of the Grand Gulf Railroad and Banking Company, Appts.,

v.

HENRY S. DAWSON, Administrator of Moses Groves, Deceased; Josiah Stansbrough and John R. Marshall.

(See S. C. 20 How. 486–496.)

Informalities in State Court, not reviewable here.

A court of the United States, in a suit by bill in equity cannot call in question the informalities, if any exist, that may have occurred in executing the judgment of the State Court.

It was the duty of the State Court to correct any misconduct or mistake, had complaint been made in time and proper form.

Argued Apr. 27, 1858. Decided May 14, 1858.

THE bill in this case was filed in the Circuit Court of the United States for the Eastern District of Louisiana, by the appellants, to enforce their rights, as assignees of the Grand Gulf Railroad and Banking Company, to certain judgments against Groves. The court below having dismissed the bill, the complainants appealed to this court.

A further statement appears in the opinion of the court, and a still fuller statement may be found in the able opinion of the Circuit Court, given below, and referred to in the opinion of this court.

Opinion of the Circuit Court delivered June 11th, 1855.

The facts of this case are, that in May, 1841, the Grand Gulf Railroad and Banking Company, of Grand Gulf, Mississippi, recovered two judgments against Moses H. Groves, for the aggregate sum of $22,638.43, with arrears of interest and costs.

Prior to this event, the Bank had suspended specie payments, and in February, 1842, made a general assignment of its effects to the plaintiff, Ingraham, and one Lindsay (of whom the plaintiff Read is the assignee or successor), to be collected and appropriated, 1st, to the expenses of the trust; 2d, to pay off judgment creditors; 3d to indemnify and save harmless the sureties or guarantees of any engagement of the Bank; 4th, to make an equal distribution among the remaining creditors.

The trustees accepted their appointment, and in 1842 notified the curator of the debtor, Groves (H. H. Groves), that these judgments had been assigned to them.

In the month of June, 1843, the defendant, John R. Marshall, a bill holder of the bills of the Grand Gulf Banking Company, commenced two suits by attachment in the District Court of the Parish of Madison, against the Corporation, upon the bills of the Bank, and recovered a judgment upon the two suits (which, during the progress, had been consolidated), for the sum of $4,395, with arrearages of interest and costs.

The Sheriff (among other property) attached the two judgments against Groves by an entry of the fact upon the attachment, and by notice to H. H. Groves, administrator.

The Grand Gulf Banking Company appeared to the said suit and defended it, and Ingraham and Read intervened, claiming through their assignment the property attached, and "opposing the plaintiff's demand to claim the property attached."

To the intervention Marshall answered, denying the authority of the Bank to make an assignment, and averring that the assignments were fraudulent and void, designed to favor a portion of the creditors, and insisted upon the right of the attaching creditor to dispose of the effects seized, notwithstanding the assignment.

A suspensive appeal was taken immediately after the signature of the judgment to the Supreme Court of the State, by the Bank and the assignees (intervenors), and a judgment of affirmance was rendered in that court. This was entered upon the minutes of the District Court for Madison, in November, 1845. In December thereafter, an execution issued to the Sheriff, and in due course of law these judgments were sold, in April, 1846, at public sale, when Marshall, the plaintiff, became the purchaser. He transferred his title in his co-defendants by a public act in February, 1848.

To a full understanding of the facts and arguments, it is proper to set forth the proceedings in the Circuit Court of Claiborne County, Mississippi, to enforce a forfeiture of the charter of the Bank. In September, 1845, a judgment of partial forfeiture was entered, reserving the right to sue and collect debts, with a view to the settlement of the affairs of the Bank, and on the 17th of April, 1846, a final judgment in that court, forfeiting the whole charter, was entered.

This was suspended by appeal and affirmed in the Supreme Court in 1848, shortly before this suit was commenced.

This suit was commenced to enforce the rights of the assignees, to the judgments rendered against Groves in 1841. The jurisdiction of Chancery is asserted as a consequence of the destruction of the legal character of the Corporation, and upon the allegations, that the judgment of Marshall was obtained with a full notice of the title of the assignees, and that the parties who claim those judgments have acted fraudulently and collusively, in obtaining a title to them through the action of the courts of Louisiana.

The jurisdiction of the court was supported

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by my predecessor in this court in 1850, in determining the demurrer to the bill.

The case, then, rests upon the respective titles exhibited in the bill and answers. There is no support for the allegations of fraud or collusion in the evidence. The only questions to be considered are, whether the proceedings upon the attachment of Marshall devests the title of the Bank to the judgments in favor of the defendants, and whether the plaintiffs have confirmed that title by their conduct at the sale.

The Bank and the intervenors were parties to the proceedings and judgment of the attaching creditors. They appeared for their respective interests in the subject of the suit, and contested the validity of the creditor's claim to his debt and satisfaction from the property. Whatever judgment was rendered in that suit, is conclusive upon them.

The judgment entry recites that a jury was impaneled, the evidence closed, the case argued; the jury retired to deliberate upon their verdict, returned into court with their verdict, which was read, agreed to, and ordered to be recorded.

The verdict is for the plaintiff against the defendant, for his debt and interest. It proceeds to declare that the intervenors have established no evidence of their claim to the property, as set forth in their petition. Thereupon the court gives judgment that the plaintiff recover of the defendant his debts and interest, specially setting out the items composing both.

"It is further ordered that the property, rights and credits attached, be sold according to law to satisfy the judgments and costs of suit; and that the plaintiff have a preference and privilege thereon; and that the demand of the intervenors be rejected, with costs of suit."

This, it was said, was done and signed in open court the 9th May, 1844, after overruling the motion for a new trial.

E. R. Millson, Judge.

It will hardly be contended that this is not a final judgment on the merits conclusive between the parties.

Keene v. McDonough, 8 La. 187.

The parties who are now before this court, were parties to the record in that suit. The plaintiffs here, were there claiming to have a better title to the money due upon the judgments of Groves than Marshall, the attaching creditor, by virtue of their deed of assignment from the Bank. The Bank was before the court, affirming the titles of their assignees; Groves was before the court as a stockholder; Marshall was before the court, claiming his preference. This preference is declared, the judgments are ordered to be sold, and the claim of the plaintiff is dismissed. It is the title of Marshall and his assigns under this judgment that is now impeached, and impeached as inferior to the claim then rejected. All the conditions required by the Code to give force to this judgment as a res judicata, appear here.

C. C. 22, 65.

But the plaintiff insists that this is not the judgment rendered in the cause. He produces evidence to show that the entry on the minutes contains the words "as in case of nonsuit," after the words of rejection of the intervenor's claim, and with the addition of those words there is no res judicata.

The authorities of the Code practice of the decisions of the Supreme Court, are clear that the minute entry is not a judgment. The Supreme Court will not entertain an appeal from a judgment which has not been transferred to the book of judgments and signed by the judge; and the courts or original jurisdiction are not authorized to issue an exception upon such an one.

The judgment entries on the minutes do not form res judicata. They cannot be looked to to impeach, vary, or in anywise to affect the judgment signed by the judge in any collateral proceedings.

The State v. McDonald, 17 La. 485; Ex parte Nichall, 4 Rob. La. 52; 1 Ann. 206; 3 Ann. 62.

Considering the records of the District Court of Madison only, there can be no question that the only operative judgment, is that I have first described.

The question which arises upon the record of the Supreme Court, is one of more difficulty. In the transcript placed before that court upon the appeal of the intervenors and the Bank, the judgment was copied from the minute entry, and the signature of the judge superadded. It appears there that the claim of the plaintiff (intervenors) was rejected with costs, "as in case of nonsuit," and no mention is made of the refusal of a new trial.

In the Supreme Court the case was disposed of upon its merits. The court does not notice the objection to the rejection of the evidence of the intervenors (the deed of assignment), upon which their title depended, and without which the title of the assignees must necessarily fail on their intervention in the District Court. The Supreme Court takes no notice of the fact that the assignment was not admitted as evidence upon the trial in the District Court. It treats the assignment as a part of the evidence, and allowed the plea of prescription against the claim of the attaching creditor to impeach it, to be filed in that court. It is difficult to refer the opinion to the case made on the record.

It may be, as is suggested at the bar, that the case was submitted with a knowledge of the condition of the judgment in the District Court, and with a view to a decision on the merits; or, that the Supreme Court regarded the words "as in case of nonsuit" added to a judgment when there had been a trial and verdict, without significance, or that the court, finding there had been a trial, condemnation of property attached to be sold, and the preference and privilege of the creditors declared, supposed them sufficient to modify the import of those words, and that it understood the judgment to conclude the parties at least to the extent of this debt, leaving the rights unimpaired as to other parties. I should have great difficulty with the case, were there no other circumstances to affect it.

The general rule in Louisiana is, no matter what form of action or proceeding, whether by petition, exception or intervention, the question may have been presented, if the same question once judicially decided between the same par-

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ties be again agitated, it is sufficient to create the presumption resulting from the thing adjudged, and forms a complete bar.

Plicque v. Perret, 19 La. 328.

I agree that "the reasons for the judgment" given by the Supreme Court and spread upon the record in accordance with the Code of Practice (art. 909), are not to be taken as the judgment. But when the import of the judgment is equivocal or ambiguous, the opinion is important in determining the limits of the res judicata.

Plicque v. Perret, 19 La. 328; 5 Ann. 200; 3 Ann. 202; 6 Ala. 141. But to determine the value of the title of the respondents, we must not confine our observations to the record of the Supreme Court.

The Code of Practice prohibits the issuing of an execution upon judgments from that court; whether the judgments there be of affirmance or reversal, the execution is involved upon the court of original jurisdiction. It directs that the judgments shall be recorded in the court of original jurisdiction before they are executed, and the order to record the judgment must be moved for in open court by the party desirous of execution; after that an order for execution may be obtained from the court.

Cod. Pr. 617, 618, 619, 623, 915.

These acts were performed in this case. The record from the Supreme Court consisted of the opinion, such as I have described it, where the merits of the title, through the assignment, are carefully examined and pronounced insufficient to defeat the attachment, and concluding with the announcement, that " the judgment of the Disrict Court is therefore affirmed with costs;" and thereupon an order for execution was made by the District Court.

What was then the condition of the record of the District Court? The original judgment for the attaching creditor against the Bank and intervenors, finding a debt, condemning the property attached to be sold, declaring a preference and privilege in favor of the creditor, and rejecting the claim of the assignees, bearing the signature of the judge, was there, and from that an appeal has been allowed.

Then there was an opinion vindicating that judgment by a careful examination of the assignment of the Bank, and pronouncing its validity as against the attaching creditor. Then came the confirmatory order, which the District Court could refer to nothing but the judgment above described, and finally the order of execution.

There was nothing to indicate a variance between the transcript in the Supreme Court and the legal entry of judgment in the District Court. No inquirer could apply the confirmatory order to other than this judgment.

Upon this condition of the record, the execution under which the same was made was levied, the property appraised and sold. The seizure notice to the defendant's attorney and the appraisement were within the legal delays, and the sale after the return day of the execution, was permissible.

Dorsey v. Carrollton Bank, 5 Ann. 237; Rowly v. Kemp, 2 Ann. 361.

The inquiry remains, what title did the purchaser take by the sale and conveyance of the Sheriff? The purchaser is not bound to look beyond the decree when executed by a conveyance, if the facts necessary to give the court jurisdiction appear on the face of the proceedings, nor to look further back than the order of the court. If the jurisdiction was improvidently exercised, or in a manner not warranted by the evidence before it, it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court as an authority emanating from a competent jurisdiction.

10 Pet. S. C. 450–478.

The defendant, Marshall, was a creditor, pursuing what he considered to be his legal right, what the courts had pronounced to be a legal right, to satisfaction for his debt from judgments standing in the name of his debtor upon the records of the court where his suit was commenced. By his purchase he canceled his debt against the defendant, and assumed the burden of paying the costs of the suit. I have no evidence of fraud or collusion in the sale, or of any inadequacy of price; but there is evidence that the same was open and public and fairly conducted. Nearly a year after, he conveyed to other purchasers. They were required to see the judgment on the records of the District Court, and there was nothing there except what inspired confidence in the title which they undertook to purchase. They saw an absolute and unqualified judgment, rejecting the claim of the assignees of the Bank and condemning the effects attached to the sale. They saw no entry to annul or modify that judgment, but, on the contrary, one affirming it in all its parts, with reasons of its propriety convincing to the highest court of the State.

The questions whether the attachments had been legally levied, or whether the property seized was a subject for the satisfaction of the attaching creditor's demand, were involved in the issues tried, and the order for an execution of the judgment was given, after a review of all the claims of the Bank or its assigns. The subjects for sale were judgments on the record of the court that gave the order, and all persons entitled to oppose it were before the court. The purchaser was entitled to make the purchase, with an assurance that his title would be respected.

Nor were the purchasers advised by any act of the assignees that there was peril in the act of purchase, or that the sale was a derogation of their rights.

The evidence is satisfactory that the principal assignee was at the sale, and before and at the time encouraged purchasers to buy. The assignees were interested in this, for the claim of the attaching creditors was a charge upon the assets that might come to their hands, and its payment was a diminution of the debts that they were required to pay.

Three years elapsed from the entry of the unconditional and unexplained order of affirmance of the judgment of the District Court upon the records of the District Court, before this suit was commenced. No effort was made during that time to harmonize the conflict in the various and discrepant entries in the court of original and appellate jurisdiction, by direct applications to them.

No effort has been made by the assignees to enforce the judgments they claim in the court

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where they were rendered, and which has assumed to dispose of them, nor to correct the irregularities of the officers of which they now complain.

The titles which have been granted under the orders of the court, and the acts of the officers are impeached in a court of an independent and separate organization, and in a collateral proceeding.

The attempt is made, not by an application to the ordinary jurisdiction of the court, but to its extraordinary powers, powers which do not become active against conscience or public convenience, and when there has not been good faith and reasonable diligence.

My conclusion is, that the plaintiffs have not made such a case as authorizes the interposition of a court of equity for their relief.

The record shows a final judgment of the court of original jurisdiction against their title. That upon their own appeal an erroneous transcript of that judgment was carried to the Supreme Court, and is to be found there with the rest of the case. But that this case was not carried to the books of record of the Supreme Court, nor copied into its opinion, nor recited in its final order, nor do the reasons for the judgment in the Supreme Court depend upon its restricted language of the judgment exhibited in the transcript, nor does the decretal order of the Supreme Court recite or relate to it.

But the opinion of the court depends upon a judgment, such as existed on the record of the District Court, and the confirmatory order was addressed to that judgment.

This opinion and this confirmatory order were spread upon the records of the District Court, and form the basis of the executory orders and proceedings. Rights have attached under those proceedings and orders, not only without opposition, but with the solicitation and consent of the plaintiffs. This court does not feel at liberty to disturb them, by an inquiry into the supposed errors or irregularities which may be found in the various entries and proceedings of the State tribunals.

Bill dismissed with costs.

(Signed) J. A. Campbell,
Assoc. Justice S. C., U. S.

Messrs. H. H. Strawbridge and Reverdy Johnson, for appellants:

The court having no verdict and no evidence before it, in favor of or against either plaintiff or intervenor, could do no more than dismiss the intervention upon which the law required a decision to be rendered at the same time that the principal demand was decided.

Code of Pr. arts. 154, 394; Jones v. Lawrence, 4 La. Ann. 279.

It decided as it had full right to do; for, as ruled in Abat v. Rion, 7 Mart. 569, a plaintiff may be nonsuited in the discretion of the court, after a special verdict against him—"a verdict stating some naked fact," as in the present instance.

Omitting the words "as in case of nonsuit," the judgment would still be one of nonsuit only for "where there is any ambiguity in a judgment, it must be understood with reference to the verdict (if any) on which it is based, and which it must follow, Black v. Catlett, 1 Rob. La. 540, and "where a judgment admits of two constructions that will be adopted, which the court should have rendered on the facts before it, and the law of the case."

Trepagnier v. Williams, 4 La. 99.

The rule is, that when a plaintiff or an opposing intervenor fails to make out his case, there will be judgment as in case of nonsuit."

Levistone v. Bona, 4 Rob. La. 459; Culliver v. Garic, 11 La. 88, & 13 La. 137; Hervey v. Russell, 3 Mart. N. S. 59; St. Francis v. Lauve, Ib. 62; Harper v. Destrehan, 12 Mart. 31; Shewell v. Stone, Ib. 387; Turner v. Lockwood, 4 Rob. La. 444; Curell v. Johnson, 12 La. 290.

"Judgment of nonsuit and one of dismissal are identical; and by the Code of Practice, art. 536, are not res adjudicata."

Clay v. His Creditors, 9 Mart. 522, is a case in point; so Baudin v. Roliff, 1 Mart. N. S. 165; Dicks v. Cash, 7 Mart. N. S. 365; Collerton v. McCleary, 3 La. 430; Gilbert v. Burg, 7 Rob. La. 18.

"Nonsuit adjudges nothing."

DeArensbourg v. Chauvin, 6 La. Ann. 778; Perillat v. Puech, 2 La. 428; Mills v. Webber, 7 Rob. La. 108; Rutledge v. Barnes, 12 Rob. La. 160; Lynch v. Kitchen, 2 La. Ann. 843; so in Carter v. Wilson, 2 Dev. & B. L. 276.

Again; "when a case goes off on some matter of form or technical defect, it is obvious that the fact itself negatives the idea that the cause of action or defense were the same, or that the adjudication was on the contract; and a case so terminated does not in any sense form res adjudicata in another suit in which the original cause of action is in controversy." La. St. Bank v. Orleans Nav. Co. 3 La. Ann. 295, 213; Code of Practice, art. 539.

"Where there is doubt upon a question of res adjudicata, the party against whom the plea is set up should have the benefit of that doubt."

West v. His Creditors, 3 La. Ann. 532, and 4 Ann. 541; see, also, Municipality No. 2 v. New Orleans Cotton Press, 18 La. 21, and Clay v. His Creditors, 9 Mart. 521, 522, a case much like the present, and to which we specially call attention.

That the District Court of the State should have rendered, did render a judgment as in case of nonsuit, could legally render no other, is evident. It is evolved with almost the force of mathematical demonstration from the three following propositions, applied to the record:

1st. The character of an action depends on the prayer for judgment.

Legay v. Chieusse, 5 Rob. La. 132; Hood v. Segrest, 1 Rob. La. 109; Kemper v. Hulick, 16 La. 46; Russell v. Spring, 10 La. 424.

2d. A verdict must always be construed with reference to the pleadings.

Harrison v. Faulk, 3 La. 70; Downes v. Scott, 3 Rob. La. 84; Morgan v. Driggs, 17 La. 184; Trepagnier v. Durnford, 5 Mart. La. 452–457.

3d. Judgment must follow the verdict.

Bedford v. Jacobs, 5 Mart. N. S. 449; Dale v. Downs, 7 Mart. N. S. 225; Chain v. Kelso, 7 Mart. N. S. 263; Black v. Catlett, 1 Rob. La. 540.

And the verdict was simply that the intervenors had established no evidence of their claim—a separate and distinct verdict, and separately signed.

Be all this, however, as it may—whether the reasoning of the Supreme Court be right or

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wrong, applicable or inapplicable—their ultimate decree was, that the judgment of the District Court, such as it was, certified to them by the proper officer under his oath of office, be affirmed—"judgment, that the demand of the intervenors be rejected with costs, as in case of nonsuit."

Article 4, sec. 1 of the Federal Constitution provides that "full faith and credit shall be given in each State to the public Acts, records, and judicial proceedings of every other State." They are certainly entitled to the same faith before tribunals of the United States.

Mills v. Duryee, 7 Cranch, 484; Hampton v. McConnel, 3 Wheat. 234.

Mr. J. P. Benjamin, for appellees:

1. All the questions raised in this suit have already been decided in the State Courts of Louisiana. The judgment in the Louisiana court forms res judicata.

The present complainants were parties to the suit in the State Court.

The title now set up by them, viz.: the assignment, is the same as that which they asserted in the State Court.

The property in dispute, viz.: the two judgments against Moses Groves, is the same as was claimed in the State Court.

All the elements required by the civil law to constitute the bar res judicata, are found in the present case.

Civil Code, 2, 265.

2. But it is said that the judgment in the former suit was one of nonsuit only, and does not bar the complainants. This is erroneous.

The only judgment known to the law of Louisiana, is that which is signed by the judge. This is too clear to admit of a moment's dispute.

Code of Practice, 546, 547, 555.

The true test to ascertain if the judgment was res judicata, is the finality of the judgment. Did it dispose of the subject-matter in litigation?

Succ. of Durnford, 1 La. Ann. 92; Kellam v. Rippey, 3 La. Ann. 202.

The form is of no consequence; for a judgment of dismissal or nonsuit may be definitive and close the litigation forever.

City Bank v. Walden, 1 La. Ann. 46; Bradford v. Cook, 4 La. Ann. 231; Story, Eq. Pl. secs. 456, 793; 1 Greenl. secs. 566, 572; 2 Daniel's Eq. Pr. 758.

3. Especially is the judgment to be considered final against the present complainants, because in the State Court they were parties intervening; and such parties, under the state practice, assume the burden of making their title good against both the original parties, and the judgment in the original proceeding is final and conclusive on their rights.

Jones v. Lawrence, 4 La. Ann. 279; see, also, provisions of Code of Practice, art. 400.

4. The complainants, in their brief, allege numerous illegalities and informalities in the proceedings in the State Court, by which the two judgments were attached and sold.

We will not enter into an argument on these points, for the simple reason that they were parties to those proceedings, have had their day for pointing out errors, and cannot now collaterally attack the proceedings of the State Court. The State Court had jurisdiction of the subject-matter, determined the validity of the attachment, and enforced it. Surely this court has no power to set aside and annul its acts.

Mr. Chief Justice Catron delivered the opinion of the court:

This is a suit, by bill in equity, that was prosecuted in the Eastern District of Louisiana, by Ingraham and Read, as assignees in trust, of the Grand Gulf Railroad and Banking Company, against Dawson, administrator of Moses Groves, John R. Marshall and Josiah Stansbrough. The cause was pending in the court below for several years, and in its various details is complicated, but the point presented for our consideration is a narrow one.

According to the practice in Louisiana, the Circuit Court delivered a carefully prepared opinion on the final hearing there, setting forth the facts and reasons why that court dismissed the bill. The opinion will be found in the preceding report of this cause. We briefly restate the facts on which our judgment proceeds:

In May, 1841, the Grand Gulf Bank recovered two judgments against Moses Groves, in the District Court of the Parish of Madison, in the State of Louisiana, amounting in the aggregate to more than $22,000. Groves died without having satisfied those judgments, and the assignees by this bill seek to enforce payment of the debt from the estate of Groves, in the hands of his administrator.

The Grand Gulf Banking Company having failed, in February, 1842, assigned its assets in trust to Ingraham and Lindsay, including the two judgments against Groves. Lindsay afterwards died, and Read is his successor. This is the title relied on by the complainants. The defense set up depends on the validity of a sale of said judgments by legal process against Groves.

Marshall was the owner of a large amount of bank notes put in circulation by the Grand Gulf Company. In June, 1843, he instituted a suit against the Bank on these notes, by attaching the judgments the Bank had recovered against Groves, and also judgments against other persons. The suit was *prosecuted [*495 in the District Court of the Parish of Madison, in Louisiana. To this proceeding the present complainants, Ingraham and Read, as assignees of the Bank, intervened and set up their title by the assignment of the judgments, for the purpose of defeating the attachment of Marshall, and of having their claim as trustees established as the better title. Marshall responded to this allegation of the intervenors, that the deed of assignment was void: first, because it was contrary to the express law of Mississippi, prohibiting such assignments; and second, that it was void, because it was made for the purpose of defrauding a portion of the Bank's creditors, and in order to favor others. The parties really contesting were Marshall and the intervenors. They went to trial before a jury on the law and facts. The verdict found, first, that the debt was due to Marshall from the Bank; and second (says the record), "we of the jury find the intervenors in the case have established no evidence of their claim to the property, as set forth in the petition."

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The judgment recites that the verdict was in favor of the plaintiff, Marshall, and against the defendants and intervenors; declares the amount due to the plaintiff; adjudges a preference and privilege upon the property, rights and credits attached; orders them to be sold, according to law, to satisfy the plaintiff's judgment. "And it is further ordered and decreed, that the demand of the intervenors be rejected with costs."

This judgment was affirmed in the Supreme Court of Louisiana on appeal, prosecuted on the part of the Bank and the intervenors. The judgment as affirmed was duly entered in the District Court, which proceeded to execute the same.

The bill seems to have been founded on the supposition that the intervention was rejected, and the intervenors nonsuited in the District Court; and that, therefore, they were not concluded, and at liberty to pursue their claim on the deed of assignment made to them by the Grand Gulf Bank.

The assumption that the intervenors were nonsuited in the State Court is founded on a supposed record furnished to the complainants by the Clerk of the District Court, which probably might bear this construction; but it appears that no such record exists in that court, and that a copy of a memorandum, kept in a book to refresh the memory of the Clerk from which the record signed by the judge was made, is the writing relied on. The memorandum has no value in this cause. The judgment above recited defeated the assignment set up by the complainants in their petition of intervention, and in terms bound the property attached; nor could a court of the United States, in a suit by bill in equity, call 496*] in question the informalities, if *any exist, that may have occurred in executing the judgment of the State Court. It was the duty of that court to correct any misconduct or mistake on the part of the Sheriff in conducting the sale of the judgments, had complaint been made in time and proper form.

We concur with the Circuit Court, that the bill must be dismissed, and so order.

JOHN SIGERSON, Plff. in Er.,
v.
EDWARD MATHEWS.

(See S. C. 20 How. 496-501.)

Promise, or acknowledgment by indorser, when waiver of notice.

An unconditional promise by the indorser of a bill, to pay it, or an acknowledgment of his liability, and knowledge of his discharge by the laches of the holder, will amount to an implied waiver of due notice of a demand of the drawer, acceptor, or maker.

Argued Apr. 28, 1858. Decided May 14, 1858.

THIS suit was brought in the Circuit Court of the United States for the District of Missouri, by the defendant in error, against John Sigerson, as indorser on a certain promissory note.

The trial below having resulted in a verdict and judgment in favor of the plaintiff, the defendant brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Messrs. C. Cushing and R. H. Gillet, for plaintiff in error:

1. The note in question was not an accommodation note, made for the defendant. The evidence of Wilson and Taylor shows that it was a regular business note, taken by defendant on the sale of real estate, without security; and that when, at a subsequent day, the property was redeeded and the remainder of the notes given up, the defendant credited this particular note on another debt due him from James Sigerson, the maker.

2. Unless the defendant agreed unconditionally, after the note became due and after he knew that the note had not been presented for payment, to pay said note, he was not liable therefor.

The note not having been made for the defendant's accommodation, he could only be made liable by presentation, demand of payment and notice of non-payment. If these steps had been taken, his liability became fixed by them, but otherwise not. If he made any promise on misapprehension of the facts, he is not bound by it, because the inducement to make it was not what it appeared to be. There is no evidence that the necessary steps had been taken to charge the indorser; nor does it appear that the defendant had been informed of the true state of the facts at the time of the conversation, which is now claimed to be a promise of payment.

In Thornton v. Wynn, 12 Wheat. 183, it was held, that where the promise or agreement was not unequivocal, it would not authorize a recovery.

3. An agreement to pay the debt of a third person by an indorser, where the note was not presented at the time and place of payment, and notice of non-payment duly given, unless made and signed by the parties to be charged upon a consideration specified therein, is not binding and cannot be enforced.

There was no legal contract made which could bind the defendant, because no consideration passed, and there was no writing signed by the defendant by which he agreed to pay James Sigerson's debt.

He stood like any other person at that time in relation to the note. Clearly no third person would be chargeable upon a naked promise to pay. The Statute of Missouri is express upon this point.

Sec. 5, of ch. 68 of the Revised Laws, 1 vol. p. 807, provides:

"No action shall be brought to charge . . . any person upon any special promise to answer for the debt, default, or miscarriage of another person . . . , unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person by him thereto lawfully authorized."

Under this provision, the agreement, if actually made, was void, and cannot be enforced.

4. The suggestion by the defendant's agent

NOTE.—Promise to pay, or acknowledgment of liability, after maturity, by indorser, with knowledge of laches, is waiver of notice—see notes, 6 L. ed. U. S. 596; 29 L.R.A. 308.

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that he need not prove the note against the estate of James Sigerson, and that it would be paid at maturity, created no liability on the part of defendant.

The liability of the defendant did not depend upon the probating of the note, nor did the remark that it would be paid at maturity amount to a promise to pay. The inference was, that the means would be supplied by those whose duty it would be to provide for the payment.

Nor did the suggestion to Elder tend to show that a presentation, demand of payment and notice of non-payment were dispensed with. The remark that the note would be paid at maturity, seems to imply that the defendant expected that the note would be paid on being presented in the usual course of business.

5. The court erred in instructing the jury on questions not raised by the evidence.

The court, in its instructions, said: "If the jury believe from the evidence, that the defendant, before the maturity of the note, in conversation with the agent of the plaintiff, dispensed with the presentation of the note for payment and demand of payment, and promised to pay the note or procure or provide for its payment at maturity, he cannot now set up as a defense to this suit that said note was not presented for payment and demand made therefor, and that he received no notice of the dishonor of the note."

There was no testimony whatever to base this instruction upon. It was merely hypothetical and calculated to confuse and mislead the jury. It falls within the case of Chirac v. Reinecker, 2 Pet. 613, and The U. S. v. Breitling, ante, p. 253, decided at the present term of this court.

In the present case, it is evident that this unauthorized part of the charge had its effect and misled the jury; but whether it do so in fact or not, is wholly immaterial. It might have done so, and the verdict must, therefore, be set aside.

Mr. M. Blair, for defendant in error:

The defendant cannot complain of the refusal of the court to give the instructions asked by him because such refusal was not prejudicial to him, but the contrary. His instructions, like those given, allowed a recovery on the ground of the waiver of the presentation, etc., but they also allowed that a recovery might be had on the distinct ground that the note was an accommodation note, which the instructions given prohibited.

The principle declared by the court amounts only to this, as has been said in a similar case Taunton Bank v. Richardson, 5 Pick. 436, that a party may dispense with conditions for his benefit; and it has been applied in many cases similar to this.

Drinkwater v. Tebbetts, 17 Me. 16; Boyd v. Cleveland, 4 Pick. 525; Marshall v. Mitchell, 35 Me. 221; Thornton v. Wynn, 12 Wheat. 183, and Union Bank of Georgetown v. Magruder, 7 Pet. 287; see also, Story, Bills, 389, 390, 489 to 507; Jones v. Fales, 4 Mass. 245, 253; Farmers' Bank v. Waples, 4 Harr. Del. 429; Hoadley v. Bliss, 9 Geo. 303; Lary v. Young, 8 Eng. 402; 5 Pick. 436; 8 Pick.; 1 Harr. & J. 531; 2 N. H. 340; 1 Hill, S. C. 411; 3 Met.

As to the exception to the admission of testimony objected to as incompetent and irrelevant; if the testimony was irrelevant, this would not be ground for reversal.

Postens v. Postens, 3 Watts & S. 127; Shortz v. Unangst, Ib. 45; Kercheval v. Ambler, 4 Dana, 166. It could not be assumed that such testimony had any influence on the verdict.

Mr. Justice McLean delivered the opinion of the court:

This is a writ of error to the Circuit Court for the District of Missouri.

An action was brought by Mathews against John Sigerson, as indorser on a note of James Sigerson, now deceased, dated the 10th of March, 1852, for the payment of the sum of $2,000, two years after date, at the Bank of the State of Missouri, with interest from the date.

It was proved on the trial that, in 1851, Mathews advanced largely to John Sigerson on some transactions in pork, whereby Sigerson became indebted to him in the sum of $2,000; that Sigerson wanted two years' time, on which Mathews required a mortgage on real estate as security; but Sigerson offered to give the note of his brother James, indorsed by himself, instead of the mortgage; and he represented *that his brother James was [*499 the owner of a valuable real estate near St. Louis; which offer was accepted, and the note was given.

Some time in the fall of 1852, Joseph E. Elder, a witness, received the note from Mathews for collection, soon after the death of James Sigerson, and before the note became due. Witness called on John Sigerson, and asked him if he should have the note protested against the estate of James Sigerson. He replied, that the witness need not do so, and that the note should be paid at maturity. The witness then placed the note in his portfolio, where it remained until after due. After it was due, witness called on John Sigerson, and informed him that he had neglected to put the note in bank for collection, and asked him what he was going to do; he said he would see witness in a few days, and arrange it. Afterwards Sigerson said to the witness that he did not consider himself liable as indorser, as the note had not been protested.

In February, 1852, John Sigerson sold his interest in the farm near St. Louis, which was one half of it, and which contained about one thousand acres, to James Sigerson, who was to pay off the incumbrances on the land, which amounted to about $16,000. James executed twenty notes for $2,000 each, payable in six, twelve, and eighteen months; and John Sigerson made him a deed. In July, 1852, James reconveyed the land to John, and the bargain was rescinded. This was done because James had not fulfilled his contract. Nineteen of the notes were given up, but the note now in suit was not surrendered, and for which the account of James was credited on the books of John. James, on his decease, left no property.

On the above facts, the court charged the jury, "if they believe, from the evidence, that before the maturity of the note, in conversation with the agent of the plaintiff, the defendant dispensed with a presentation of the note

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and demand of payment, and promised to pay it or provide for its payment at maturity, he cannot now set up as a defense to this suit, that the note was not presented for payment, and demand made therefor, when it was due, and that no notice of its dishonor was given."

That, "if, after the maturity of the note, the defendant promised the plaintiff or his agent to pay the same, having at the time of making said promise, knowledge of the fact that the note had been presented for payment, and that no demand had been made therefor, or notice of non-payment given, the defendant cannot now set up, as a defense to said note, a want of such demand or notice."

500*] *"If the defendant dispensed neither with the presentation of the note and notice, nor promised to pay the same, having knowledge as above stated, the plaintiff cannot recover."

Exception was taken to these instructions.

Certain instructions were asked by the defendant, which were refused; but it is unnecessary to state them, as they are substantially embraced in those given by the court.

As there was no formal demand of payment, nor protest for non-payment, and notice, those requisites must have been waived by the defendant to make him responsible as indorser; and to this effect were the instructions of the court; and we think the testimony not only authorized the instructions given, but also the verdict rendered by the jury. Before the note was due, the defendant said to Elder, the agent of Mathews, and who held the note, that he need not take steps to collect it from the estate of his brother James, as it should be paid at maturity. This was an assurance which could not be mistaken, and it was relied on by the agent. He placed the note in his portfolio, where it remained until after it became due. After this, the agent called on the defendant, and informed him that he had neglected to take measures for the collection of the note, and asked him what he was going to do; he answered, that in a few days he would see the witness, and arrange it. This was an unconditional promise to pay the note, which no one could misunderstand, and which he could not repudiate at any subsequent period.

A promise by an indorser to pay a note or bill, dispenses with the necessity of proving a demand on the maker or drawer, or notice to himself. Pierson v. Hooker, 3 Johns. 68; Hopkins v. Liswell, 12 Mass. 52. Where the drawer of a protested bill, on being applied to for payment on behalf of the holder, acknowledged the debt to be due, and promised to pay it, saying nothing about notice, it was held that the holder was not bound to prove notice on the trial. Walker v. Laverty, 6 Munf. 487. An unconditional promise by the indorser of a bill to pay it, or an acknowledgment of his liability, and knowledge of his discharge by the laches of the holder, will amount to an implied waiver of due notice of a demand of the drawee, acceptor, or maker. Thornton v. Wynn, 12 Wheat. 183; Bank of Georgetown v. Magruder, 7 Pet. 287.

We think the instructions of the court were correct, and that consequently the judgment must be affirmed, with costs.

JOSEPH D. BEERS, use of Wm. A. Platenius, as Administrator of James Holford, Deceased, Plff. in Er.,

v.

THE STATE OF ARKANSAS.

(See S. C. 20 How. 527–530.)

Sovereignty cannot be sued without its consent—may waive such privilege, and prescribe terms of suit, or withdraw consent—this, no violation of contract.

It is an established principle of jurisprudence in all civilized nations, that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission; but it may waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State.

As this permission is voluntary, the sovereignty may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

In exercising this latter power, the State violates no contract with the parties; it merely regulates the proceedings in its own courts.

The writ of error must therefore, be dismissed for want of jurisdiction in this court.

Argued Apr. 20, 1858. Decided May 14, 1858.

IN ERROR to the Supreme Court of the State of Arkansas.

This was an action of covenant brought in one of the Circuit Courts of the State of Arkansas, by the plaintiff in error, to recover the interest due on certain bonds issued by the State. The case was dismissed, under circumstances stated in the opinion of the court.

This judgment having been affirmed by the Supreme Court of the State, the plaintiff brought the case here on a writ of error.

A further statement appears in the opinion of the court.

Mr. **Albert Pike**, for the plaintiff in error.

Mr. **S. H. Hempstead**, for the defendant in error.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This was an action of covenant, brought in the Circuit Court for Pulaski County, in the State of Arkansas, to recover the interest due on sundry bonds issued by the State, and which the State had failed to pay according to its contract.

The Constitution of the State provides, that "the General Assembly shall direct by law in what courts and in what manner suits may be commenced against the State." And in pursuance of this provision, a law was accordingly passed; and it is admitted that the present suit was brought in the proper court, and in the manner authorized by that law.

The suit was instituted in the Circuit Court on the 21st of November, 1854. And after it was brought, and while it was pending in the Circuit Court, the Legislature passed an Act,

NOTE.—Government, State or National, cannot be sued in its own courts or in any other without its consent and permission, given by law. Cohens v. Virginia, 6 Wheat. 264, 380-392; U. S. v. Clark, 8 Pet. 436, 444; Cary v. Curtis, 3 How. 236, 245; U. S. v. McLemore, 4 How. 286, 288; Hill v. U. S. 9 How. 386, 389; Reeside v. Walker, 11 How. 272, 290; Beers v. Arkansas, 20 How. 527, 529; Nations v. Johnson, 24 How. 195; De Groot v. U. S. 5 Wall. 419, 431; U. S. v. Eckford, 6 Wall. 484, 488; The Siren, 7

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which was approved on the 7th of December, 1854, which provided, "that in every case in which suits or any proceedings had been instituted to enforce the collection of any bond or bonds issued by the State, or the interest thereon, before any judgment or decree should be rendered, the bonds should be produced and filed in the office of the Clerk, and not withdrawn until final determination of the suit or proceedings, and full payment of the bonds and all interest thereon; and might then be withdrawn, canceled, and filed with the State Treasurer, by order of the court, but not otherwise." And the Act further provided, that in every case in which any such suit or proceeding had been or might be instituted, the court should, at the first term after the commencement of the suit or proceeding, whether at law or in equity, or whether by original or cross-bill, require the original bond or bonds to be produced and filed; and if that were not done, and the bonds filed and left to remain filed, the court should, on the same day, dismiss the suit, proceeding, or cross-bill.

Afterwards, on the 25th of June, 1855, the State appeared to the suit, by its attorney, and, without pleading to or answering the declaration of the plaintiff, moved the court to require him to file immediately in open court 529*] the bonds on which the *suit was brought, according to the Act of Assembly above mentioned; and if the same were not filed, that the suit be dismissed.

Upon this motion, after argument by counsel, the court passed an order directing the plaintiff to produce and file in the court, forthwith, the bonds mentioned and described in the declaration. But he refused to file them, and thereupon the court adjudged that the suit be dismissed, with costs.

This judgment was afterwards affirmed in the Supreme Court of the State, and this writ of error is brought upon the last mentioned judgment.

The error assigned here is, that the Act of December 7th, 1854, impaired the obligations of the contracts between the State and the plaintiff in error, evidenced by and contained in each of the said bonds, and the indorsement thereon, and was therefore null and void, under the Constitution of the United States.

The objection taken to the validity of the Act of Assembly cannot be maintained. It is an Act to regulate the proceedings and limit the jurisdiction of its own courts in suits where the State is a party defendant, and nothing more.

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

Arkansas, by it Constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is, that it was passed after this suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary Act of legislation, prescribing, the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and *no such con- [*530

Wall. 152, 154; The Davis, 10 Wall. 15, 20; U. S. v. O'Keefe, 11 Wall. 178; Case v. Terrell, 11 Wall. 199, 201; Carr. v. U. S. 98 U. S. 433, 437; U. S. v. Thompson, 98 U. S. 486, 489; Railroad Co. v. Tennessee, 101 U. S. 337; Railroad Co. v. Alabama, 101 U. S. 832; U. S. v. Lee, 106 U. S. 196; State v. Jumel (107 U. S.) 2 Sup. Ct. Rep. 128; Ex parte Dunn, 8 S. C. 207; Treasurers v. Cleary, 3 Rich. (S. C.) 372; People v. Dennison, 84 N. Y. 272; People v. Miles, 56 Cal. 401; Chicago, M. & St. P. Ry. Co. v. State, 53 Wis. 509; Raymond v. State, 54 Miss. 562; Chevallier's Adm'r v. State, 10 Tex. 315; Tracy v. Hornbuckle, 8 Bush. 336; Tate v. Salmon (Ky. Ct. Appeals), 13 Rep. 144; Rollo v. Andes Ins. Co. 23 Graff, 515; State v. B. & O. R. R. Co. 34 Md. 344; State v. Hill, 54 Ala. 67; Ex parte State, 52 Ala. 231; Owen v. State, 7 Neb. 108; Pattison v. Shaw. 6 Ind. 377; Briggs v. The Light Boats, 11 Allen, 162.

This principle of immunity from suit applies to every sovereign power, whether the form of government is monarchical or republican. It is essential to the common defense and general welfare. Briggs v. The Light Boats, 11 Allen, 162; The Siren, 7 Wall. 152; U. S. v. Lee, 106 U. S. 196. And but for the protection which it affords the government would be unable to perform the various duties for which it was created. Nichols v. U. S. 7 Wall. 122, 126.

It applies equally to foreign sovereigns and their property, and to sovereigns of the country where the suit is brought. Tavasour v. Crupp, 9 Ch. Div. 351; The Parliamente Belge, 5 Prob. Div. 197; Briggs v. The Light Boats, 11 Allen, 162; The Exchange v. McFaddon, 7 Cranch, 116; U. S. v. Lee, 106 U. S. 196; see, also, State v. State, 2 Sup. Ct. Rep. 183, citing U. S. v. Dickelman, 92 U. S. 524.

The State may consent to be sued by individuals or by another State. Beers v. Arkansas, 20 How. 529; Ex parte State, 52 Ala. 235. But this privilege can only be conferred by the law-making power. The Davis, 10 Wall. 15; U. S. v. Lee, 106 U. S. 196. And whoever institutes proceedings against the State, must bring himself within the terms of the Statute. State v. Hill, 54 Ala. 67; Owen v. State, 7 Neb. 108; Ex parte Dunn, 8 S. C. 207; Tate v. Salmon, 13 Reporter, 144; U. S. v. Clarke, 8 Pet. 444; The Siren, 7 Wall. 152; Nichols v. U. S. 7 Wall. 126.

As this permission is purely voluntary on the part of the State, it may prescribe the terms and conditions on which it consents to be sued and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. Ex parte State, 52 Ala. 235; Beers v. Arkansas, 20 How. 529; The Davis, 10 Wall. 145; Antoni v. Greenhow, 2 Sup. Ct. Rep. 103, concerning opinions of Matthews, Bradley & Gray, J. J. compare Hancock v. Walsh, 3 Woods, 363; Dabney v. State Bank, 3 S. C. 167; Clark v. State, 7 Cold. 318; Danolds v. State, 89 N. Y. 36, and dissenting opinions of Field & Harlan, J. J. in Antoni v. Greenhow, 2 Sup. Ct. Rep. 103, 119, and in State v. Jumel, 2 Sup. Ct. Rep. 142, 157.

These principles are as applicable to the several States as to the United States, except in cases where by the Constitution a State may be sued in the Supreme Court of the United States, Railroad Co. v.

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tract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power, the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant.

Nor has the State Court, in the judgment brought here for review, decided anything but a question of jurisdiction. It has given no decision in relation to the validity of the contract on which the suit is brought, nor the obligations, it created, or the rights of parties under it. It has decided, merely, that it has no right under the laws of the State to try these questions, unless the bonds given by the State are filed. The plaintiff refused to file them pursuant to the order of the court, and the case was thereupon dismissed, for want of jurisdiction in the court to proceed further in the suit. There is evidently nothing in the decision, nor in the Act of Assembly under which it was made, which in any degree impairs the obligation of the contract, and nothing which will authorize this court to reverse the judgment of the State Court.

The writ of error must, therefore, be dismissed for want of jurisdiction in this court.

The two cases of William A. Platenius, Administrator of James Holford, against The State of Arkansas, in covenant, are the same in all respects with the one above decided, and must also, for the same reasons, be dismissed for want of jurisdiction.

THE PRESIDENT AND DIRECTORS OF THE BANK OF WASHINGTON, and Henry S. and Frederick S. Holford, Administrators of Jas. Holford, Deceased, Plff. in Er.,

v.

THE STATE OF ARKANSAS, and Henry L. Briscoe, Sanford C. Faulkner and James H. Walker.

(See S. C. 20 How. 530–532.)

Persons not defendants, cannot file cross-bill —judgment of State Court not reviewed— holders of state bonds must rely on good faith of State—they cannot be enforced in court.

This is not a cross-bill in the chancery sense of the words; the complainants were not defendants in the suit brought by the State. They cannot, therefore, file a cross-bill.

Judgment of State Court dismissing the bill in this case, is not open to revision here.

Those who deal in the bonds and obligations of a sovereign State, must rely on the sense of justice and good faith of the State.

The judiciary of the State cannot interfere to enforce these contracts without the consent of the State, and the courts of the United States are expressly prohibited from exercising such a jurisdiction.

Argued Apr. 20, 1858. Decided May 14, 1858.

IN ERROR to the Supreme Court of the State of Arkansas.

The bill in this case was filed in one of the Circuit Courts of the State of Arkansas, by the plaintiffs in error, to enforce payment of the amount due on certain bonds.

The court entered a decree dismissing the bill. The Supreme Court of the State having affirmed the decree, the case is now here on a writ of error.

A further statement appears in the opinion of the court.

Mr. Albert Pike, for the plaintiffs in error.

Mr. H. S. Hempstead, for the defendants in error.

Tennessee, 101 U. S. 337; Railroad Co. v. Alabama, 101 U. S. 182; U. S. v. Lee, 106 U. S. 196; Cunningham v. Macon & B. R. R. Co. 3 Sup. Ct. Rep. 292.

But a suit by a citizen of one State against another State in the courts of the United States, is prohibited by the Eleventh Amendment to the Constitution, and one State cannot create a controversy with another State within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other States to its citizens. State v. State, 2 Sup. Ct. Rep. 176.

Nor can this amendment be so construed as to allow the property of a State to be alienated or conveyed in a suit in equity against a subordinate official of the State. Preston v. Walsh, 13 Fed. Rep. 328.

As the State cannot be sued directly, the public funds cannot be reached indirectly in the hands of its officers by attachment or garnishment at the instance of the creditors of its employees. Buchanan v. Alexander, 4 How. 20; Averill v. Tucker, 2 Cranch, C. C. 544; Providence & S. S. Co. v. Virginia F. & M. Ins. Co. 11 Fed. Rep. 287; Schillman v. Isham, 11 Conn. 124; McMeekin v. State, 4 Eng. (Ark.), 553; Wild v. Ferguson, 23 La. Ann. 752; Tracy v. Hornbuckle, 8 Bush. 336; Rollo v. Andes Ins. Co. 23 Gratt. 509; Bank v. Debrill, 3 Snead (Tenn.), 378; Bank v. Hodge, 3 Rob. (La.), 373; Spaulding v. Imlay, 1 Root. 551; Wicks v. Bank, 12 Ala. 584; Dobbins v. Railroad Co. 37 Ga. 240; Mayor, etc. of Baltimore v. Root, 8 Md. 95.

When an officer of the State exceeds the authority conferred by law (Dabney v. State Bank, 3 S. C. 167; Belknap v. Belknap, 2 Johns. Ch. 463; See Spring Valley Water-works v. Bartlett, 16 Fed. Rep. Cunningham v. Macon & B. R. R. Co. 3 Sup. Ct. Rep. 292), or is proceeding under an unconstitutional law, he may be liable to suit (State Lottery Co. v. Fitzpatrick, 3 Woods, 323; Claybrook v. Owensbor, 16 Fed. Rep. 297; Hancock v. Walsh, 3 Woods, 360; Lynn v. Polk, 8 Lea. (Tenn.), 131; Davis v. Gray, 16 Wall. 203; Cunningham v. Macon & B. R. R. Co. 3 Sup. Ct. Rep. 292), but when acting under a valid law, or the property sought to be reached in his hands is the lawful property of the State, he is exempt from suit, to the same extent that the State itself would be. Queen v. Powell, 1 Q. B. 352; S. C. 4 Perry & D. 719; Queen v. Comrs. of Treasury, L. R. 7 Q. B. 387-399; State v. Burke, 33 La. Ann. 498; Tate v. Salmon, 13 Reporter, 144; Preston v. Walsh, 10 Fed. Rep. 315-328; McCauley v. Kellogg, 2 Woods, 13, 22, 23; Governer v. Madrazo, 1 Pet. 110; Ex parte Madrazo, 7 Pet. 627; U. S. v. Peters, 5 Cranch, 115; Osborn v. Bank, 9 Wheaton, 738; Davis v. Gray, 16 Wall. 203; Carr v. U. S. 98 U. S. 433; Board of Liquidation v. McComb, 92 U. S. 531; Chaffraix v. Bd. of Liquidation, 11 Fed. Rep. 638; Providence & S. S. Co. v. Virginia F. & M. Ins. Co. 11 Fed. Rep. 287; U. S. v. Lee, 106 U. S. 196, and cases cited; Antoni v. Greenhow, 2 Sup. Ct. Rep. 91; State v. Jumel, 2 Sup. Ct. Rep. 128.

No judgment can be rendered against the United States for balance found due defendant on set-off. Reeside v. Walker, 52 U. S. (11 How.), 272.

See, also, note, 11 L. R. A. 370.

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Mr. Chief Justice Taney delivered the opinion of the court:

This is a bill in equity, brought in the Chancery Court of the State of Arkansas, to recover the money due or on which had arisen from, certain bonds issued by the State, to which the complainants claimed to be entitled. The bill is drawn out very much at length, and states particularly the bonds and contracts on which the complainants are proceeding, and also certain laws and Acts of the State, which the bill alleges impaired the obligation of these contracts and were forbidden by the Constitution of the United States.

It is unnecessary, however, to state at large the contents of the bill, or the particular contracts and bonds to which it refers, because the decision of the State Court dismissing the bill has no relation to the validity of these contracts, or to the rights and obligations which they created. The bill was dismissed by the State Court upon the same ground with the common-law actions above mentioned; and the appeal to this court must be disposed of upon the principles upon which we have dismissed the writs of error.

The bill was filed in November, 1854, and in February, 1855, the attorney for the State moved the court to dismiss it, unless the bonds upon which the complainants were proceeding were forthwith filed according to the provisions of the Act of December, 1854. The complainants put in written objections to the motion, and finally refused to file the bonds. The court overruled the objections as insufficient, and dismissed the bill.

The complainants call their bill a cross-bill. The bill filed by the State, and which gave rise to this, is not set forth in full in the transcript. The appellants in their bill refer to it, and state that it was filed by the State for itself and in behalf of all the creditors of the Real Estate Bank; and that it claims for the State a right to share with other creditors of the Bank in certain assets of the Bank in the hands of trustees, although the bonds issued by the State which furnished the capital for the Bank, had not been paid; and many of these bonds were held by the appellants, who were creditors to the Bank as well as of the State.

532*] *But this is not a cross-bill in the chancery sense of the words; the complainants, according to their own statement, were not defendants in the suit brought by the State. They cannot, therefore, file a cross-bill, nor be regarded as defending themselves in that form of proceeding against the suit of the State. Their bill is evidently a suit against the State and others, to enforce the payment of money due on certain contracts made by the State, and the State is made a party defendant in the suit. And for the reasons assigned in the aforegoing cases at common law, the judgment of the State court dismissing the bill is not open to revision here. Like the cases at common law, it was dismissed by the State Court for want of jurisdiction to proceed further, after the passage of the Act of December, 1854.

The appellants have not sought to come in under the bill filed by the State for itself and all the creditors of the Real Estate Bank, and to share with the State the assets in the hands of the trustees, who are assignees of the Bank. Nor, indeed, could they do so upon the allegations made in their bill; for they do not claim a common interest with the State in the fund they are pursuing, but an adverse interest, and deny the right of the State to share in it, and could not, therefore, come in and associate themselves as complainants with the State in its creditor's bill, when they denied that the State was a creditor of the fund.

The laws and proceedings on the part of the State may have operated harshly and unjustly upon the appellants. But it is not the province of this court to decide that question. Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State; and that the judiciary of the State cannot interfere to enforce these contracts without the consent of the State and the courts of the United States are expressly prohibited from exercising such a jurisdiction.

The case must be dismissed for want of jurisdiction in this court.

The case of The Bank of Washington et al. against The State of Arkansas and the Bank of Arkansas, being confessedly an original bill, must be disposed of in like manner.

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*JOHN B. IRVINE, Appt., [*558
v.
WILLIAM B. MARSHALL and Thomas Barton.

(See S. C. 20 How. 558–571.)

Lands in Territories belong to U. S.—to be disposed of by their laws—agent, obtaining patent for land, is trustee for principal—practice of Department cannot control court.

All the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the government may deem most advantageous.

A Territory cannot, by its law, interpose and dictate to the United States, to whom, and in what mode, and by what title, the public lands shall be conveyed, or denounce a forfeiture.

The agent who has entered the land for himself, and obtained a patent in his own name, becomes a trustee for his principal, and cannot hold the land under such entry, otherwise than as such trustee.

Whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be solved by the laws of the United States.

The practice or the opinion of the officers of the Land Department cannot control the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them.

Argued Apr. 15, 1858. Decided May 14, 1858.

IN ERROR to the Supreme Court of the Territory of Minnesota.

The history of the case and the facts involved sufficiently appear in the opinion of the court.

Mr. James Cooper, for appellant.

The defendant, Marshall, having purchased the land in his own name, with the money of the complainant, at complainant's request, a trust is implied in favor of the latter, such as a court of equity always enforces. Trusts of this kind are not within the Statute of Frauds, and are expressly excepted from the operation of the Statutes of Minnesota.

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Ch. 44, R. S. Minn. secs. 5 and 9, pp. 202, 203; Ch. 62, secs. 6 and 7, p. 267; 2 Atk. 248; 3 Binn. 302–305; 2 Story, Eq. Jur. sec. 1201; 4 Kent's Com. 505; Jackson v. Feller, 2 Wend. 465; Jackson v. Matsdorf, 11 Johns. 91; Finch v. Finch, 15 Ves. 50; Boyd v. McLean, 1 Johns. Ch. 582; Rider v. Kidder, 10 Ves. 360(a).

An agent authorized to purchase an estate for his principal, but who purchases it for himself, will be held a trustee for his principal.

1 Story, Eq. Jur. secs. 252, 316, 395; 2 Story, Eq. Jur. secs. 1211(a), 1196, 1197, 759, 760, 768; 2 Atk. 99; 3 Wood. Lec. 57, p. 429; Kisler v. Kisler, 2 Watts, 324; Peebles v. Reading, 8 S. & R. 492.

The Statute of Minnesota, R. S. ch. 62, secs. 6 and 7, in relation to fraudulent conveyances, being substantially similar to 29 Charles II. ch. 3, the case at bar is not within its operation, especially as the defendants have confessed by their demurrer the facts set forth in the complaint, without pleading or otherwise insisting on the Statute as a defense or bar.

6 Ves. 12, 37, 548, 555; 2 Story, Eq. Jur. 755–757.

Moreover, the Statutes of Minnesota do not refer to, and cannot affect, sales under the authority of the laws of the United States. The certificate of purchase given to Marshall by the officer who made the sale, was not a deed or devise within the meaning of the Statute. Further, a court of equity will not permit a Statute to prevent frauds, even where it would be otherwise applicable, to be used as an instrument to aid in the protection of fraud, or as a shield to protect it.

1 Story, Eq. Jur. 330, 439; 2 Id. 759, 761; 2 Atk. 100; 1 P. Wms. 618.

Messrs. John B. Brisbin, H. L. Stevens and J. H. Bradley, for appellee:

The Revised Statutes of Minnesota have abolished resulting trusts of the character set forth in the complaint.

Rev. Stat. ch. 44, pp. 202, 203, secs. 1, 7, 8, 9.

These provisions are substantially copied from the Revised Statutes of New York, which have been construed by the courts of that State to cover cases like the present.

Norton v. Stone, 8 Paige, 222; Watson v. LeRow, 6 Barb. 481; Jencks v. Alexander, 11 Paige, 619; Lounsbury v. Purdy, 16 Barb. 380.

As to the necessity of pleading a Statute, the rule has always been that where a Statute makes a deed, or agreement, or other act void, the plaintiff must show that the circumstances existed under which alone it can have validity.

Williams v. Ins. Co. of N. A. 9 How. Pr. 365.

Mr. Justice Daniel delivered the opinion of the court:

The proceedings in this cause, though in form somewhat anomalous and peculiar, may be regarded as presenting substantially the case of a bill for a specific performance of a contract; a demurrer to the relief sought by that bill, a decree (or what in the proceedings is called a judgment) sustaining the demurrer, although there is no express or formal direction or order for a dismission of the bill; and a general affirmance, by what is styled the judgment of the Supreme Court of the Territory, of the decision of the District Court.

The appellant, in his complaint in the District Court of the Territory, alleges, that at a sale of public lands which occurred on the 11th day of September, in the year 1854, at the Land Office at Stillwater, in the Territory of Minnesota, in pursuance *of the procla- [*559 mation of the President of the United States, the appellee, Marshall, as the agent, and with the funds and under the authority of the complainant, and of the appellee, Barton, purchased for them the southwest quarter of section number seven, in township number twenty-eight north, of range twenty-three west, in the County of Ramsey, containing one hundred and sixty acres, at the price of $1.25 per acre, making an aggregate of $200 for the entire purchase; the certificate for which purchase was, with the assent of the complainant and Barton, issued in the name of their said agent, Marshall. That notwithstanding the equality of interest in the land in the complainant and Barton, and the fact that the price was furnished by them in equal portions, viz: $100 by each of these parties, the appellee, Barton, has claimed the entire tract of land; and the agent, Marshall, in consequence, or under the pretext of this pretension, refuses to convey to the complainant his rightful portion, viz.: one full undivided moiety of these lands.

The bill next charges, that Marshall is about to convey the whole of the land to Barton, in fraud of the complainant's rights, and concludes with a prayer that Marshall may be enjoined from executing such a conveyance to Barton, and may be compelled to convey to the complainant his full undivided half part of the land, in conformity with the terms and objects of the purchase; it contains also a prayer for general relief. To this complaint there was no answer; but the record of the District Court discloses the following entries:

"Territory of Minnesota, County of Ramsey. District Court, 2d district. John R. Irvine against William R. Marshall and Thomas Barton. Then came the defendants, by their attorney, and demur to the complaint of the plaintiff herein, and specify the following grounds of demurrer.

First. The complaint does not state on its face facts sufficient to constitute a cause of action.

Second. The complaint alleges that the defendant, Marshall, purchased the land mentioned therein, in trust for the plaintiff and the defendant, Barton. No trust arises or can grow out of the facts stated.

Third. Admitting that a trust could arise upon the facts, the complaint does not show the plaintiff entitled to the relief sought, inasmuch as it does not specify the nature of the trust.

Fourth. There is a defect of the parties defendants; it does not appear that the defendant, Barton, has any interest in the event of the action. It does not appear that the defendant, *Barton, has any interest 'in [*560 the event of the suit, adverse to the plaintiff.'"

Next follows the decision, judgment, or decree, by whichsoever of these titles it may be

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appropriately designated, in these words: "There is no allegation in the complaint that the conveyance was taken without the knowledge or consent of the complainant, nor that the purchase was made in violation of some trust. The complainant does not therefore bring himself within the provisions of sec. 9, p. 202, of the Revised Statutes, and the demurrer must be sustained. See, also, sec. 5, of the same chapter. I do not discover any defect of parties. The plaintiff has twenty days to amend, so as to bring his complaint within the provisions of sec. 9 referred to, if he shall be advised that the facts will warrant it."

There having been no amendment of the pleadings in the District Court, either proposed or allowed, the decision of that court must be regarded as final between the parties upon the case, as disclosed on the face of the record; and that decision having been taken by appeal to the Supreme Court of the Territory, the following transcript is certified as containing the proceedings of the latter tribunal in this cause:

"John R. Irvine, Appt,
v.
Marshall and Barton,
Respondents, } July 15, 1856.

This cause having been argued and submitted, after due consideration of the matters at issue herein, it appears to the court that in the order and judgment thereon in the court below, there is no error. It is therefore ordered that said judgment be in all things affirmed, with costs to respondents."

The omission in this latter decision of any statement of the particular grounds on which it has been placed, and the general reference made by it to the opinion of the District Court not showing the principles and the authority on which the judgment of affirmance has been rested, lead necessarily to an examination of the opinion of the District Court as the true test of conclusions, adopting that opinion and relying upon it for their support. In such an examination, it would be unnecessary, and even irregular, to consider any points not ruled by the inferior court; as whatever has not been adjudged or passed upon by an inferior tribunal cannot be embraced in a general judgment, either of affirmance or reversal, upon an appeal from its opinion.

The points intended to be ruled by the District Court, and affirmed by the Supreme Court of Minnesota, if sought for solely upon the face of the judgments of those courts, or even with the aid of the references to the Territorial Statute furnished by the former judgment, it 561*] might be difficult to discover. *Connecting those references, however, with the 7th and 8th sections of the Statutes of Minnesota, Rev. Stat. pp. 202, 203, we may perceive in the decisions of these Territorial courts the design to assert and establish the following positions, viz.: That in every instance of a grant or purchase, or of an agreement, for the purchase of lands for a valuable consideration, in which the price or consideration shall be paid by one person, and the conveyance or the contract for title shall be to another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title and possession shall vest exclusively in the person named as the alienee in such conveyance or agreement. The position asserted by the court of Minnesota, in interpreting their Statute, must be understood as broadly as it has just been stated, or it has no application to the case before us. It is a denunciation of everything like an equitable title or lien, or a resulting trust, with the exceptions contained in the 8th and 9th sections of the Statute, of the interests of creditors of the equitable claimant, of instances in which the alienee or agent shall, without the knowledge and consent of him who paid the consideration, have taken the conveyance in his own name; or shall, in violation of some trust, have purchased the lands with moneys belonging to another person.

The authority and effect of the Territorial laws of Minnesota upon subjects within the legitimate bounds or cognizance of that Territorial Government, no person, it is presumed, will be disposed to question; but it seems equally clear that to respect the rights and interests which come not within the scope of that authority, but which are created by the Constitution and laws of the United States, imposes a duty as sacred as any which enjoins upon a State or Territory the obligation to protect and maintain whatever of power may justly belong to it. And it cannot without extravagance be supposed, that to secure these proper and necessary ends, the Territory should assume the power to control the acquisition or transmission of property never belonging to, and not acquired from, herself; to which, therefore, she could annex no conditions, much less conditions which might impair the interests of the citizens of every State, and of every State collectively in the Confederacy, and even of the United States, and render utterly worthless, and incapable of being disposed of, subjects in which the Territory has no legal right or property whatsoever. It cannot be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, *and by such titles, [*562 as the government may deem most advantageous to the public fisc, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new States, and has heretofore been recognized and scrupulously respected by sovereign States within which large portions of the public lands have been comprised, and within which much of those lands is still remaining. Can this right co-exist with a power in a Territory (itself the property of the United States) to interpose and to dictate to the United States to whom, and in what mode, and by what title, the public lands shall be conveyed? If a person desirous of purchasing shall depute an agent to attend a sale of public lands, and if at such sale payment be made by the agent with the funds of his principal, and both agent and principal shall present themselves at the General Land Office, and mutually request a patent to be issued to the true owner, can it possibly be thought within the competency of a Territorial Legislature, either upon the suggestion, or upon proof of the fact, that a certificate of purchase was given to the

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agent in his own name, to interpose, and say to the Federal Government, you shall not make a title to this person whom you know, upon the acknowledgment of all concerned, is the true and bona fide purchaser of the land, and if you do we will vacate that title? Is it not for the increase of the revenue that the sales of the public lands should be as extensive as possible, and is it not obviously promotive of this end, that persons who can attend and bid at those sales by agent or attorney only, as well as those who can attend them in person, should have the power to purchase; and would not an inhibition of this privilege operate to restrict the sales of the public lands, and thereby injure the revenue of the government? And cui bono, should this mischief be permitted? Simply to favor a visionary innovation for the destruction of resulting trusts and equitable titles, a class of titles resting upon the essential elements of all honest titles, truth and justice, and coeval with the very rudiments of equity law. And this innovation, too, to be extended not merely to cases which from contestation or from defective proof might be uncertain or hazardous, but to instances which shall forbid to persons willing and proffering the fulfillment of their duty, the power to do so; the power of being honest—a power surely not so often exerted as to merit being repulsed as obtrusive and ungracious.

1st. It has been argued that the subject of this controversy is situated within the limits of the Territory.

2d. That it is property, and may pass as such by devise or inheritance.

563*] *3d. That in some of the States and Territories, actions at law may be maintained on these certificates.

4th. It is asked under what head of jurisdiction, in the absence of express and particular statutory provision, the courts of the United States can recognize or enforce a resulting trust like that in the present case. The fallacy of the conclusion attempted from the first of the positions just stated, consists in the supposition, that the control of the United States over property admitted to be their own, is dependent upon locality, as to the point within the limits of a State or Territory within which that property may be situated. But as the control, enjoyment, or disposal of that property, must be exclusively in the United States, anywhere and everywhere within their own limits, and within the powers delegated by the Constitution, no State, and much less can a Territory (yet remaining under the authority of the Federal Government), interfere with the regular, the just and necessary powers of the latter. Another error, inherent in the same position, is seen in the supposition that the contracts of the government with respect to subjects within its constitutional competency are also local, confined in their effect and operation strictly to the situs of the subjects to which they relate. The true principle applicable to the objection just noted, and by which that objection is at once obviated, we hold to be this: That within the provisions prescribed by the Constitution, and by the laws enacted in accordance with the Constitution, the Acts and powers of the Government are to be interpreted and applied so as to create and maintain a system, general, equal, and beneficial as a whole. By this rule, the Acts and the contracts of the Government must be understood as referring to and sustaining the rights and interests of all the members of this Confederacy, and as neither emanating from, nor intended for the promotion of, any policy peculiarly local, nor in any respect dependent upon such policy. The system adopted for the disposition of the public lands embraces the interests of all the States, and proposes the equal participation therein of all the people of all the States. This system is, therefore, peculiarly and exclusively the exercise of a Federal power. The theater of its accomplishment is the seat of the Federal Government. The mode of that accomplishment, the evidences or muniments of right it bestows, are all the work of federal functionaries alone. Are these things in any degree compatible with the claim to prescribe to the United States the modes or the extent in which they may dispose of their own property, or with a denunciation of a forfeiture as the consequence of a departure from such a pretension?

*With regard to the positions, that the [*564 right acquired by a purchase of a certificate, bona fide made, is property in the vendee, even before the emanation of the patent, and that some of the States have permitted suits at law to be instituted on certificates of purchase (as several have permitted such suits on other equitable titles), it is not perceived that the concession of either or both of these positions can in any degree impair the right of the United States to contract upon their own terms for the sale of their own property, or diminish their obligation in the fulfilment of their contract in good faith, to convey to their vendee the subject for which he has paid them. There certainly can exist nowhere a power to compel them to convey to any person, and much less to require of them the perpetration of a fraud in behalf of one in whom no shadow of a valid title is shown; and who, by the pleadings in this cause it is admitted, has acted dishonestly; whose admitted dishonesty indeed is the alleged and the sole foundation of the claim of the defendants.

When the engagements or undertaking of the United States, with respect to property exclusively and confessedly their own, from a period anterior to the existence of the Territorial Government, shall have been consummated; when the subject, and all control over it, shall have passed from the United States, and have become vested in a citizen or resident of the Territory, then indeed the Territorial regulations may operate upon it; but whilst these remain in the United States, or are affected by their rights, or powers, or duties, those rights, duties, or powers, can in nowise be influenced by an inferior and subordinate authority.

With regard to the fourth objection, of a want of jurisdiction in the courts of the United States, in the absence of express statutory provisions, to recognize and enforce a resulting trust like that presented by the present case, it is a sufficient response to say, that the jurisdiction of the courts of the United States is properly commensurate with every right and

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duty created, declared, or necessarily implied, by and under the Constitution and laws of the United States. Those courts are created courts of common law and equity; and under whichsoever of these classes of jurisprudence such rights or duties may fall, or be appropriately ranged, they are to be taken cognizance of and adjudicated according to the settled and known principles of that division to which they belong.

By the language of the Constitution, it is expressly declared, art. 3d, sec. 2, clause 1, that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United 565*] States, and treaties *made under their authority. By the Statute which organized the judiciary of the United States, it is provided, that the circuit courts shall have jurisdiction of suits of a civil nature "at common law or in equity." Vide 1 Stat. at L. p. 78, sec. 11. In the interpretation of these clauses of the Constitution and the Statute, this court has repeatedly ruled, that by cases at common law are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered. Vide Parsons v. Bedford, 3 Pet. 447, and Robinson v. Campbell, 3 Wheat. 212. That by cases in equity are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction, as established in English jurisprudence. Vide the case of Robinson v. Campbell, just cited, and the United States v. Howland, 4 Wheat. 108. Here, then, is an exposition both of the Constitution and laws of the United States, with reference both to the jurisdiction and powers of their courts, and to the instances in which it is their duty to exercise those powers; and the inquiry forces itself upon us, who shall or can have the authority to deprive them of those powers and that jurisdiction? Or can those courts, consistently with their duty, refuse to exert those powers and that jurisdiction for the protection of rights arising under the Constitution and laws, in the acceptation in which both have been interpreted and sanctioned?

With respect to resulting trusts, and the jurisdiction and duty of the courts of the United States to enforce them, the opinion of this court has been emphatically declared; and so declared in a case of peculiar force and appositeness, because it related to the acts of an agent in the entry and survey of lands, and is in its principal features essentially the same with the cause now under consideration. We allude to the case of Massie v. Watts, reported in the 6th vol. of Cranch, p. 148. This was a suit in equity in the Circuit Court of the United States for the District of Kentucky, to compel the conveyance of land from an agent to his principal, upon the ground that the agent had withdrawn an entry on lands made in the name of his principal, had caused an entry and survey to be made in his own name, and had thereby obtained a legal title to this land. In decreeing the relief sought by the complainant, this court, expounding the law by the Chief Justice, pp. 169, 170, said: "If Massie (i. e., the agent) really believed that the entry of O'Neal (his principal), as made, could not be surveyed, it was his duty to amend it, or to place it elsewhere. But if in this he was mistaken, it would be dangerous in the extreme—*it would be a cover [*566 for fraud which could seldom be removed, if a locator alleging difficulties respecting a location might withdraw it, and take the land for himself. But Massie, the agent of O'Neal, has entered the land for himself, and obtained a patent in his own name. According to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for himself, otherwise than as a trustee for his principal." This exposition of the equity powers of the courts of the United States as applicable to resulting trusts—a power inseparable from the cognizance over frauds, one great province of equity jurisprudence—is conclusive.

With respect to the power of the Federal Government to assert, through the instrumentality of its appropriate organs, the administration of its Constitution, rights and duties, and with regard to such an assertion as exemplified in the management and disposition of the public lands, and the titles thereto, the interpretation of this court has been settled too conclusively to admit of controversy.

In the case of Wilcox v. Jackson, reported in the 13th of Pet. p. 498, which presents an instance of an attempt to control, by the authority of the laws of the State of Illinois, the effect and operation of a right or title derivable from the United States to a portion of the public lands, this court thus emphatically declare the law: "It has been said that the State of Illinois has a right to declare, by law, that a title derived from the United States, which by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and the construction of her own courts seems to give that effect in her Statute. That State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens, by descent, devise, or alienation. But the property in question was a part of the public domain of the United States. Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this, a patent is necessary to complete the title. But in this case no patent has issued; and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. Now, if it were competent for a State Legislature to say, that notwithstanding this, the title shall be deemed to have passed, the effect would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that *Illinois possessed it. That [*567 would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the Constitution to Congress only; and the practical result in this very case would be, by force of State legislation, to take from the United States their own lands, against their own will and against their

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our laws. We hold the true principle to be this: that whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

It has been argued, that it is the practice of the officers of the Land Office to receive the certificate of purchase, as presenting upon its face the only evidence of title, and that those officers will recognize no other evidence of title but this certificate. Of the practice or the opinion of the officers of the Land Department, no evidence is exhibited upon this record. But supposing these to be in accordance with the above suggestion, they could by no means control the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them; and this they must do, in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the government. The reception of the certificate of purchase as evidence of title may be regular and convenient as a rule of business, but it has not been anywhere established as conclusive evidence, much less has it been adjudged to forbid or exclude proofs of the real and just rights of claimants. It is mere justice to the officers of the Land Department, to presume that they would respect the interpretation of the Constitution, and laws promulgated by those who are appointed to be their expositors; but upon a supposition, or even upon a conviction of the converse of this, the path of duty here is plain and direct, and must be followed without hesitancy or deviation. The judgment of the Supreme Court of Minnesota is reversed with costs, and this cause is remanded to that court, with instructions that it be remitted to the District Court, with permission to the defendant to answer over to the complaint of the plaintiff; and in the event of a refusal or failure of the defendant so to do, with direction to the District Court to render a judgment in favor of the plaintiff, in conformity with the law, as ruled by this court in this cause.

568*] *Mr. Justice Nelson dissenting:

In this case, Marshall bought, at the request of Irvine and Barton, a quarter section of land, at a land sale in Minnesota Territory, for which $200 was paid, and a patent certificate given to him in his name. One hundred dollars of the money was furnished by Irvine, and one hundred by Barton, and the land, according to the arrangement, was to be held in trust by Marshall, for their benefit. Barton, for some reason not explained, afterwards claimed the whole instead of an undivided half of the section, and demanded a conveyance of the same from Marshall, the trustee. Irvine afterwards applied to the trustee for a conveyance of his undivided half, which was refused, in consequence of the previous claim of Barton to the whole section. This suit is brought by Irvine, against Marshall, the trustee, to compel him to make the above conveyance.

The court below, on a demurrer to the complaint, which contained the facts substantially as above stated, gave judgment for the defendant, refusing to compel the execution of the conveyance.

The question presented would be a very plain one at common or equity law upon the doctrine of trusts as administered by courts unaffected with any local legislation. The facts would present the case of a resulting trust for the benefit of the persons who had furnished the purchase money, and the trustee compelled to convey accordingly the interest belonging to the respective parties.

But the Legislature of Minnesota have passed a law modifying the doctrine of uses and trusts, and especially in respect to resulting trusts of the character in question. It has provided, that when a grant is made for a valuable consideration to one person, and the consideration paid by another, no trust shall result in favor of the person paying the consideration, but the title shall vest in the person named as grantee, subject only to two exceptions: 1. In favor of the creditors of the person paying the consideration money; and 2. When the person taking the conveyance in his own name shall have taken it without the knowledge or consent of the party paying the consideration, or when the trustee shall have purchased, in violation of his trusts, with moneys belonging to another person. Rev. Stat. of Minnesota, pp. 202, 203, secs. 7, 8, 9.

It is admitted that the present case does not fall within either *of the exceptions, [*569 and on this ground the relief in the court below was denied.

This provision in the laws of Minnesota will be found adopted in several of the States. This precise modification of a resulting trust was incorporated into the laws of the State of New York as early as 1830, and from which, as is said, it was taken and engrafted in the Statutes of this Territory.

The object of the change is to prevent secret and fraudulent conveyances of property, with the view of defrauding creditors. A common and successful contrivance for this purpose, is by placing the title of the property in the name of a third person, while the whole of the beneficial interest is in another, thereby concealing it from the creditor, and embarrassing his remedy against the property of the debtor.

The provision is designed to deter parties from engaging in this contrivance, by subjecting the property, thus concealed in the name of another, to the peril of being claimed and held by him as his own. The question is one of state policy, in regulating the terms and conditions of holding and disposing of the property within the State, so as to encourage open and frank dealing with the same, and to prevent concealed and covinous trusts as a cover for defrauding creditors. It may be wise or unwise; that we suppose is a question with which courts have nothing to do, as the power of a State to regulate the subject is unquestionable, and in this respect the power in the Territory is the same.

It is insisted, however, that the nature or character of the property in question, impressed upon it by the law of Congress providing for

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and regulating the sales of the public land, takes it out of the system of municipal law which, it must be admitted, governs and controls parties in dealing with property in general in the States and Territories. If this be so, it constitutes certainly a very important exception; for it is, perhaps, not hazarding too much in saying, that in the new States, and in the Territories for many years after their organization, the largest portion of the real property owned and cultivated by the inhabitants is held and enjoyed under a title similar to that in question, namely: a patent certificate. And we may, I think, in respect to property in this predicament, ask, under what system of laws is it to be held and regulated, if the municipal laws of the State are to be set aside? It is true, the laws of Congress provide for and regulate the sale of the public lands, and in doing so, provide for this inchoate title to be given to the purchaser, on paying the purchase money. And, if any one undertakes to question this title, the law of Congress is called in as the highest evidence of it. Thus far the law of 570*] *Congress operates, of whatever nature or character that may be. But beyond this, whether A or B owns this inchoate title, whether A has made a good sale and transfer of it to another, or such a one as the municipal law will give effect to, are questions which do not concern the law of Congress or the Federal authorities. They are questions arising purely under the municipal laws. Whether the original purchaser who has received the certificate has himself settled on the section under it, or whether he has transferred it to another settler, are questions in which the Federal Government has no interest. They belong to the State within which the lands are situate. Indeed, the Land Department so determined at an early day, and in case of a dispute as to the ownership of the certificate, it gives the patent to the person named in it, leaving the parties to settle their disputes in the courts of law. The question in this case is not whether a title has been derived from the Federal Government under the Act of Congress—that title is admitted, indeed it is that which gives value to the right in dispute—the question is, who has acquired the right to the property, after the title has been acquired from the government; in other words, who owns this inchoate title secured by the patent certificate. That is a question depending upon local law. The point was well put by Judge Barbour, in delivering the opinion of the court in Wilcox v. Jackson, 13 Pet. 517. "We hold," he observed, "the true principle to be this: that whenever the question in any court, state or federal, is, whether the title to land which had been once the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever according to those laws the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed according to the laws of the United States."

Now, it is upon this principle that the lands held under the patent certificate have become property in the State, and subject to its legislation, that they are subject to judgment and execution against the owner; to conveyance by deed or devise; to descend to his heirs at law on his decease, or to sale by a court of probate to pay his debts. And it may well be asked, if the title is thus subject to the municipal laws concerning judgments and executions, deeds of conveyance, devises, of descent, and of administration in the probate court, how the title can be exempt from the law of trusts? The general principles of equity can no more be invoked in respect to them than in respect to either of the other matters referred to, when they have been the subject of regulation by the local law. *That law then becomes the rule of prop- [*571 erty to govern them, the same as it governs the inheritance, or any other lawful disposition of it. We do not see the reason or propriety of setting aside the local law in respect to this class of property as to trusts, while it is admitted to regulate every other legal disposition made of it; and I must, therefore, for the reasons given, dissent from the opinion of the majority of the court.

Messrs. Justices **Catron, Grier and Campbell,** concur with Mr. Justice **Nelson.**

Rev'g—1 Minn. 340.

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*Ex parte In the Matter of FRANKLIN [*581
RANSON et al., Plffs. in Er.,
v.
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, and Richard Busteed, their Attorney.

(See S. C. 20 How. 581–583.)

Order upon condition—when condition, waived.

An order was entered vacating judgment on the payment of costs, and also upon the condition that the case should be settled in a short time mentioned, and the motion made for a new trial.

The attorney for the plaintiffs, by not making out his bill of costs, procuring a taxation, and demanding them previous to the hearing of the motion for a new trial, thereby impliedly consented to waive this condition, and cannot afterwards set it up for the purpose of invalidating the order vacating the judgment.

Decided May 18, 1858.

ON MOTION for a rule on the Judges of the Circuit Court of the United States for the Southern District of New York, to show cause why a mandamus should not issue, etc.

The case is stated by the court.

Mr. **Charles M. Keller,** in support of the motion.

Mr. Justice **Nelson** delivered the opinion of the court:

A motion is made on behalf of the plaintiffs for a mandamus to the Circuit Court of the United States for the Southern District of New York, to compel that court to vacate an order in the above cause, directing a judgment entered against the defendants on the 12th December, 1857, of $21,458.21, to be vacated. The judgment was entered upon a verdict rendered for the plaintiffs, in an action for the alleged infringement of a patent for an "improvement in the mode of applying water to fire engines, so as to render their operation more effective." The judgment was entered in consequence of the stay of proceedings

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having expired, given to the defendants to make a case on which to move for a new trial. Afterwards, on the 19th December, during the same term, an order was entered on motion of the defendants, after hearing counsel on both 583*] *sides by Judge Ingersoll, then holding the court, vacating the judgment on the payment of costs that had previously accrued, and also upon the condition that the case should be settled in a short time mentioned, and the motion made for a new trial, with liberty to either party to turn the case into a bill of exceptions which right had been reserved at the trial. The case was settled accordingly, the motion for a new trial heard and denied, a bill of exceptions settled and signed, agreeably to the order of the 19th December, and filed in the office of the Clerk of said court. Since the motion for a new trial, and the settlement of the bill of exceptions, the attorney for the plaintiff issued an execution on the judgment of the 12th December, claiming it to be still in force, on the ground that the condition had not been complied with in respect to the payment of costs. A motion was subsequently made by the defendants to set aside this execution, and the judgment aforesaid unconditionally, which was granted by the court. The present motion to this court is for a rule to show cause against the court below why a mandamus should not issue to vacate this last order.

The ground upon which the court below placed its decision for setting aside the judgment and execution unconditionally, is, that the attorney for the plaintiffs, by not making out his bill of costs, procuring a taxation, and demanding them previous to the hearing of the motion for a new trial, thereby impliedly consented to waive this condition, and cannot afterwards set it up for the purpose of invalidating the order of the 19th December, vacating the judgment. We concur in this view of the court, and we are also satisfied, from the course of the proceedings preparatory to the motion for the new trial, the hearing of that motion, and the turning of the case into a bill of exceptions with a view to a writ of error, it was the understanding of both parties that the judgment of the 12th December was to be considered as vacated, and that a new one be entered for the plaintiffs, if a motion for a new trial was desired.

The court is of opinion, therefore, that the facts presented upon this motion for a mandamus are not such as entitle the plaintiffs to a rule to show cause, and it must, therefore, be denied.

Judgment amended, May 18, 1858.

GILBERT L. THOMPSON, Plff, in Er.,

v.

WM. SELDEN, Jno. Withers, Robt. W. Latham, and Lawrence P. Bayne, Bankers, doing business under the Firm of Selden, Withers & Co.

(See S. C. 20 How. 195–198.)

NOTE.—Error. The Supreme Court will not review the discretionary action of the court below. See note to Barrow v. Hill, 14 L. ed. U. S. 48.

Nonsuit cannot be entered on failure to comply with order to produce—refusal of inferior court to continue case, no ground of error.

Circuit court is not authorized by the Act of Congress to enter a judgment of nonsuit upon the failure of the party to comply with the notice to produce books and papers.

The refusal of an inferior court to continue a case to another term, cannot be assigned for error here.

Argued Feb. 2, 1858. Decided Feb. 25, 1858.

THIS suit was brought in the Circuit Court for the District of Columbia, by the defendants in error, on certain promissory notes. Judgment was rendered in the court below in favor of the plaintiffs, and the defendant brought the case here on a writ of error.

A further statement of the case appears in the opinion of the court.

Mr. John S. Tyson, for plaintiff in error:

The court's refusal to grant the order, which was an order nisi only, was error.

The order nisi issues as a matter of course—ex debito justitiæ.

Geyger v. Geyger, 2 Dall. 332; Lawrence v. The Ocean Ins. Co. 11 Johns. 245; Joseph Bas v. Steele, 3 Wash. C. C. 381.

It is not necessary that the party applying for the order nisi should first produce proof of the pertinency of the evidence—a simple suggestion to that effect, is sufficient.

Hylton v. Brown, 1 Wash. C. C. 298.

If that suggestion was not sufficient in affidavit No. 1, it was rendered completely so by affidavit No. 3.

The court, therefore, certainly erred in refusing the order nisi, moved after the filing of the affidavit No. 3.

Entries on partnership books may be given in evidence, if made before dissolution.

Assignees of Simonton v. Boucher, 2 Wash. C. C. 473; Jordan v. Wilkins, 2 Wash. C. C. 482.

A fortiori entries on the books of a banking establishment.

This proceeding, under the Act of 1789, is in the nature of a bill of discovery and proceedings under it.

9 Wend. 458; Bank of Utica v. Hillard, 6 Cow. 62; Kenny v. Clarkson, 1 Johns, 395; Cowen & Hill's Notes to Ph. Ev. 191; Notes to Phil. 197.

The right to a bill of discovery, although said to be a right of the plaintiff, is also a right of the defendant, because by cross-bill he can always make himself plaintiff.

Wig. on Disc. 24, 25.

To a bill of discovery a party must answer.

Wig. on Disc. 207.

By an Act of the General Assembly of Maryland, ch. 72, sec. 21, passed in 1785, the defendant in equity has the same power to interrogate the plaintiff that he has to interrogate the defendant.

Gres. Eq. Ev. 43 to 46.

So upon an order nisi, if the party refuses to show cause, the order becomes absolute.

Hylton v. Brown, 1 Wash. C. C. 298.

The court further erred in refusing the necessary order after the jury was sworn.

In general, the refusal to continue a cause is not error; but it is presumed that this rule is

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not without exceptions, and that in a case like this, where by the action of the court the defendant is placed at the mercy of the plaintiff, the least the court could do would be to continue the cause.

Act Assem. Md. 1787, ch. 9, sec. 8.

Upon the whole, the whole question of the court was the withholding from the jury of competent evidence offered by the defendant below, and that is error.

Bradstreet v. Thomas, 12 Pet. 174; 17 How. 13; Cowen & Hill's Notes, Vol. IV. pp. 775, 776; 1 Duer, 431, 434.

Messrs. Davide & Ingle and Chilton & Magruder, for the defendants in error:

1. The notice to produce books and papers served by the defendant on the plaintiff's counsel below, in the record referred to, was insufficient in point of time, and too general in its terms and extent.

1 Stat. at L. 82; 2 Cranch, C. C. 427; 2 Cranch, C. C. 336; 3 Cranch, C. C. 646.

2. The said notice and affidavits filed therewith are defective, because they do not show or aver that the evidence sought was "pertinent to the issue," and such as the plaintiffs "might be compelled to produce by the ordinary rule of proceeding in chancery."

3 Johns. Ch. 45; 16 Johns. 591, 598.

3. The exercise of the power invoked by the defendant's motion to produce books, etc., is matter of sound discretion with the court, and not imperative and unconditional, and the record does not show that this discretion has been abused by the court below.

4. The refusal of the court to continue the cause is not error— such a motion being always addressed to the sound discretion of the court.

6 Cranch, 206, 218.

Mr. Chief Justice Taney delivered the opinion of the court:

This is a writ of error to the Circuit Court for the District of Columbia, upon a judgment rendered in that court in favor of the defendants in error, in a suit brought by them upon certain promissory notes set forth in the pleadings.

Some time before the trial, a notice was served on Selden, Withers & Co., the defendants in error, to produce certain books and papers mentioned in the notice; and that, unless they were produced at the trial, the plaintiff in error would move the court for a nonsuit, or for a like judgment as in cases of nonsuit; and an affidavit was made by the plaintiff in error, that the books and papers specified were necessary for his defense. Those applications and motions were afterwards repeated before the trial and at the trial, upon further affidavits and notices to the same effect, which it is not necessary here to set forth.

They were opposed by Selden, Withers & Co., who were the plaintiffs in that court, and the motions were all overruled by the court. The exception does not state on what ground they were opposed, nor upon what ground they were overruled; and as far as the case is disclosed in the record, we see nothing in the rulings of the court to impeach its judgment.

The 15th section of the Judiciary Act of 1789, under which these proceedings were had, authorizes the court, upon motion and due notice thereof, to require a party to produce books or writings in his possession or power, which contain evidence *pertinent to the issue, in [*198 cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, it shall be lawful for the court, on motion, to give the like judgment for the defendant as in cases of nonsuit.

The transcript does not show that any motion was made for an order upon the plaintiff to produce the books and papers mentioned in the notice. It shows that a motion was made to render a judgment of nonsuit for not complying with the notice, and also a motion for a continuance of the case. But the court is not authorized by the Act of Congress to enter a judgment of nonsuit upon the failure of the party to comply with the notice. The notice is merely a preliminary proceeding, to enable the party to bring before the court the motion for the order to produce; and when that motion is made, the party called on has a right to be heard, and he is not bound to produce the books and papers called for, until the court shall order him to produce them, and is in no default unless he refuses or neglects to obey the order. The court were, therefore, right in refusing to enter the judgment, when no order had been moved for or granted.

And as regards the motion to continue the case, it has often been decided by this court, that the refusal of an inferior court to continue a case to another term cannot be assigned for error here. Justice requires that the granting or refusal of a continuance should be left to the sound judicial discretion of the court where the motion is made, and where all of the circumstances connected with it, and proper to be considered, can readily be brought before the court.

We think, therefore, that neither of the objections taken here can be sustained, and that the judgment of the Circuit Court must be affirmed.

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*JAMES MARKS, Plff. in Er., [*501

v.

MICHAEL DICKSON and Elizabeth M. Dickson.

(See S. C. 50 How. 501-506.)

Preemption rights—conveyance after entry and before patent, good.

The Act of 1834 in regard to preemption rights of settlers on public lands, revived the Act of 1832, as well as that of 1830 on the same subject.

Where the land was entered in 1840, a transfer of the entry and conveyance was valid, and vested the equitable title in transferee, which was not defeated by a subsequent patent to the transferrer and another.

Argued Apr. 30, 1858. Decided May 18, 1858.

IN ERROR, to the Supreme Court of the State of Louisiana.

The suit was brought in the seventeenth Judicial district of Louisiana, by the plaintiff in error, to recover a certain tract of land under a purchase of a patent emanating from the United States. It was held, both in the lower court and the Supreme Court of Louisiana, that the

NOTE.—Preemption rights. See note to U. S. v. Fitzgerald, 10 L. ed. U. S. 785.

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right and title claimed by the said Marks could not be maintained. From the judgment of the Supreme Court of Louisiana this writ of error is prosecuted.

A further statement of the case appears in the opinion of the court.

Mr. J. P. Benjamin, for plaintiff in error:

The policy of Congress has been fixed and invariable, not to allow the beneficent purposes of the preemption laws to be defeated, nor its objects perverted to the profit of land speculators.

The 3d section of the Preemption Act of May 29, 1830, provides that "all assignments and transfers of the right of preemption given by this Act prior to the issuance of patents, shall be null and void."

4 Stat. 420.

The Act of Jan. 24, 1832, so far modifies this prohibition, as to declare that "all persons who have purchased under an Act entitled, etc., may assign and transfer their certificates of purchase or final receipts, and patents may issue in the name of such assignee."

4 Stat. 496.

The Act of June 19, 1834, 4 Stat. 678, revives the Act of May 29, 1830, for two years. In this Act nothing is said of the Act of 1832.

On June 22, 1838, the Act of May 29, 1830, was again revived for two years, nothing being said of the Act of 1832.

5 Stat. 521.

So, again, when by Act of June 1, 1840, the Act of 1838 was revived and extended to June 22, 1842, the right of preemption was by grant "subject to all limitations and conditions contained in the Act of 1838."

5 Stat. 382.

In the new Preemption Law of Sept. 4, 1841, the 12th section expressly provides that "all assignments and transfers prior to the issuance of the patent, shall be null and void."

5 Stat. 456; see, also, Act of Sept. 28, 1850, 9 Stat. 520; Act of Feb. 11, 1847, 9 Stat. 125.

This policy of Congress has been maintained and upheld by the Supreme Court of Louisiana.

Strong v. Rachal, 16 La. 234; Poirrier v. White, 2 La. Ann. 935; see, also, Wilkerson v. Mayfield, 27 Miss. 543.

Under this legislation and jurisprudence, it is submitted that the Supreme Court of Louisiana, in the present case, erred in so construing the Act of Congress as to exclude from its application the conveyance now under consideration. The court treated the conveyance by Butler as having been made after the location. The deed from Butler's attorneys was dated under the location; but Butler's power was dated prior to the entry, and the power was a device to elude and evade the law.

2. The court erred in determining that when Congress, in 1834, revived the Act of 1830, it also revived that of 1832.

An opinion to that effect was given in 1835, by Mr. Attorney-General Butler, second opinion, 701, but no reasons are given for it. He simply says, "that the revival of the original law is to be considered as embracing the provisions engrafted thereon by the supplementary Act of Jan. 23, 1832."

It is submitted that this opinion is utterly untenable.

It is not true that the Act of 1832 engrafted any provision on that of 1830. On the contrary, the Act of 1832 was a partial repeal of that of 1830.

The Act of 1830 prohibited assignments of preemption rights prior to issuance of patents. The Act of 1832 repealed this prohibition so far as to prevent the assignments of certificates of purchase, or final receipts.

In 1834 Congress re-enacts the law which prohibited assignments before issuance of patents.

Every law since passed by Congress repeats the prohibition, as already shown.

The Act of 1834 is to be construed just as if the entire Act of 1830 had been copied into it.

3. The Act of 1832, however, can have no possible application to the case before the court. That Act, in its very terms, applies only to persons who purchased before its passage. It says, in words, that "persons who have purchased under the Act of 1830," may transfer their certificates of purchase, and patents may issue to assignees.

The Act of 1830 had expired by its own limitation on the 29th May, 1831. Nobody who had acquired rights under it could sell or assign before the issuing of the patents. On the 23d January, 1832, Congress, speaking of this expired law, says, that those who have purchased under it may assign their certificates of purchase, notwithstanding the prohibition.

The law applied to a certain class of preexisting cases. When those cases were settled, the law was functus officio.

Now, Butler was not a person who had purchased under the Act of 1830. His preemption was established in 1836, under the Act of 1834.

To apply the rule of 1832 to his case, is to violate the language of the law, the rules of grammar, and the legislative intention as exhibited in long continued and repeated expressions of the will of Congress.

Mr. Miles Taylor, for defendants in error:

1. The Act of the 29th of May, 1830, and the supplementary Act, of January 23d, 1832, and July 14th, 1832, constituted but one Act, and any revival of the Act of 29th of May, 1830, in the absence of any declaration to the contrary, would necessarily carry with it the supplementary Act.

Sedg. Stat. and Const. L. pp. 247, 251, 255; 1 Cranch. 299.

This view is confirmed by the Act of June 22d, 1838, which is cited by plaintiff's counsel for a different purpose.

2. The administration of the land system of the United States, is vested in the Executive Department of the Government, and the officers charged with the disposal of the public domain under authority of Acts of Congress, are required and empowered to determine the construction of those Acts so far as it relates to the extent and character of the rights claimed under them, and to be given through their action to individuals. This is a portion of the political power of the government, and courts of justice never interfere with it.

Cousin v. Blanc's Ex. 19 How. 206, 209; 2 Pet. 253; 12 Pet. 511; 9 How. 154.

The decision of the Attorney-General and the action of the Land Department for a long series of years in conformity with it, is conclusive as

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to the right of a preemptor to sell the land embraced in his entry, before the using of the patent.

A different conclusion would unsettle a vast number of titles, and overthrow rights acquired upon the faith of the settled practice of the Land Department of the Government, dating back to the spring of 1835.

Mr. Justice Catron delivered the opinion of the court:

This cause is brought here by a writ of error to the Supreme Court of Louisiana, which, by its judgment, construed the Acts of Congress of 1830, 1832, and 1834, securing preemption rights to actual settlers on the public lands.

The facts giving rise to the questions decided are these: John Butler and Elkin T. Jones resided on the same quarter section of land, lying in the Parish of Claiborne, Louisiana; and having duly proved their residence on the land, as required by the Acts of Congress, were allowed to purchase jointly at the proper land office the quarter section on which they resided.

Being entitled to additional land, Jones and Butler obtained a certificate, known as a float, authorizing them to enter a quarter section. Butler sold his float to Murrill in 1837; Murrill sold to Wood in 1838, and Wood sold to Dickson in 1839. The land was located in August, 1840, in Butler's name, by Bullard, who held a power from Butler to locate and sell it.

And in November, 1840, Butler, by his attorney in fact, Bullard, conveyed to William Dickson. In April, 1843, a joint patent issued in favor of Butler and Jones for the quarter section. In 1851, Butler again sold his undivided moiety of the land to James Marks, and conveyed to him in due form. The Supreme Court of Louisiana held, that the assignment made in August, 1840, to William Dickson, was lawfully made, and that Marks had no equity to sustain his petition, in which he demanded partition and possession. His petition was dismissed in the state courts.

If the assignment of the entry to Dickson was valid, then the judgment below must be affirmed; on the other hand, if the assignment made by Bullard, as Butler's attorney in fact, was made in violation of the Acts of Congress, then it cannot be set up as a defense against the deed made to Marks in 1851. This is the only question that can be revised here on this writ of error to the proceeding in the Supreme Court of Louisiana. Its decision depends on the true meaning of the Acts of Congress referred to.

The Act of 1830 (sec. 3) provides that all as-
505*] signments and *transfers of the right of preemption given by that Act, prior to issuing of the patent, shall be null and void.

In 1832 a supplementary Act was passed, which recites the Act of 1830, and declares that all persons who have purchased under the Act may assign and transfer their certificates of purchase, or final receipts, anything in the Act of 1830 to the contrary notwithstanding.

The Act of June 19, 1834, revived the Act of 1830, and continued it in force for two years without referring to the Act of 1832. If this Act was made part of that of 1830, then the revival of the latter carried with it no incapacity in the preemptor to assign his certificate of purchase.

A difficulty arose in the General Land Office, as to the effect of the revival of the Act of 1830 by the Act of 1834; and whether the Act of 1830, as revived, included the provision of the Act of 1832. The Commissioner referred the matter to the Secretary of the Treasury for his decision, and this officer presented the question to the Attorney-General for his official opinion, who decided that the Acts of 1830 and 1832 stood together as one provision, and being revived by the Act of 1834, the intention of Congress was to confer on the purchaser the power to sell before the patent issued.

This opinion was given in March, 1835, and has been followed at the General Land Office ever since; and as Butler's claim originated under the Act of 1834, it was governed at the Land Office by that decision.

We think the construction then given was, in effect the true one. Before the prohibition was made by the Act of 1830, the purchaser, when he had obtained his final certificate, acquired with it a right to sell the land he had purchased in all cases, nor has that right ever been questioned by Congress, where entries had been made in the ordinary operations of the Land Office; so that the Act of 1832 repealed the prohibition imposed on those having a preemption, and placed those who purchased under it on the footing of other purchasers.

The Act of 1832 provided that patents might issue to assignees; but this provision does not affect the present case, as the transfer of the entry was valid, and bound Butler from its date, and vested his equitable title in Dickson and his heirs, which was not defeated by the patent. Such would have been the rights of the parties, had the prohibitory clause not been passed, and so their rights stood after its repeal.

The object of the Legislature is manifest. It was intended to prevent speculation by dealings for rights of preference before the public lands were in the market. The speculator acquired power over choice spots, by procuring occupants *to seat themselves on them, [*506 and who abandoned them as soon as the land was entered under their preemption right, and the speculation accomplished. Nothing could be more easily done than this, if contracts of this description could be enforced. The Act of 1830, however, proved to be of little avail; and then came the Act of 1838, 5 Stat. 251, which compelled the preemptor to swear that he had not made an agreement by which the title might inure to the benefit of anyone except himself, or that he would transfer it to another at any subsequent time. This was preliminary to the allowing of his entry, and discloses the policy of Congress, but it has no application in this cause, as this claim was founded on the Act of 1834.

The contract preceding the entry made by Butler with Murrill was merely void; and so were the agreements of Wood and Dickson for the float before its location. But after the land was entered by Butler, he had power to affirm his contract of sale at his opion, by conveying

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the land, and which sale bound Butler, and concludes Marks.

We order that the judgment of the Supreme Court of Louisiana be affirmed, with costs.

JOHN H. AHL, Appt.,
v.
ROSWELL B. JOHNSON.

(See S. C. 20 How. 511-522.)

Specific performance—when purchaser entitled to, though payment due—when refused—time, when essence of contract.

Where more than half the purchase price of land was paid in advance, and possession continued in purchaser till after balance was due, and valuable improvements made by him, with consent of seller, the purchaser held entitled to specific performance, although balance of purchase money is due.

Time may be made the essence of a contract, but generally in equity it is not.

Specific performance may be refused for laches, negligence, or change of circumstances.

Argued Apr. 15, 1858. Decided May 18, 1858.

APPEAL from the Supreme Court of the Territory of Minnesota.

The history of the case, and a statement of the facts, appear in the opinion of the court.

Mr. James Cooper, for appellant:

The Supreme Court of Minnesota erred in reversing the decree of the District Court.

1. Because, there having been a part performance of the contract on the part of the complainant, by payment of nearly one half of the purchase money before any of it was due, accompanied by possession, and valuable improvements of the premises, with the knowledge and consent of the defendant, and no great or unreasonable delay in tendering the portion of the purchase money remaining unpaid, it would be against equity and good conscience to rescind the contract.

Adams, Eq. 85 to 87, Mar.; 18 Ves. 328, 332, n. 3, p. 334; 1 Ves. 326, 332; 2 Atk. 100; 2 Str. 783.

2. Because, by rescinding the contract, the complainant could not be remitted to the condition in which he stood at the time when the contract was made; while the defendant, in recovering the residue of the purchase money, with interest, would be in the position he designed to place himself, by the contract.

2 Story, Eq. Jur. 771-776; 1 Pars. Eq. Cas. 541.

3. Because time in this case was not of the essence of the contract, as is manifest from the contract itself, as well as from the conduct of the defendant in demanding the residue of the money since the exhibition of his bill by the said complainant, without ever pretending that he had a right to rescind the contract, or reenter into possession of the said premises.

Taylor v. Longwood, 14 Pet. 174, 175; 3 Hor. Penn. 429, 438; 6 Wheat. 528; Wyson v. Morgan, 7 Ves. 202; Radcliffe v. Warrington, 12 Ves. 326; Irvine v. Remington, 2 Harris, 145; De Comp v. Feay, 5 S. & R. 323, 326; 4 Adol. & El. 599; 3 McLean, 148.

4. Because, although payment of the purchase money was a condition precedent to the execution of the conveyance, the tender of the money on November 4, or earlier, was under the circumstances a sufficient performance.

Milligan v. Dick, 2 Ves. Jr. 23, note A; 18 Ves. 334, note; 10 Ves. 506; 10 Ves. 210; 4 Kent's Com. 451, note.

Messrs. Lawrence and Bradley, for appellee:

1. This is a bill for specific performance of an agreement in writing. The party must show that he has always held himself ready, desirous, prompt and eager, to perform the contract.

5 Ves. 720, note; Sug. Vend. ch. 8, sec. 2.

Although he tendered the money just before he filed his bill, he has never been ready to pay it at any other time, and has not paid it into court.

2. The contract being in writing, the intention of the parties is to be gathered from the terms employed by them, and from the subject-matter of the contract itself.

3. It stipulates for the payment of the purchase money, $165, on the 1st of October, 1850, and in default thereof, $190 with interest, upon the 1st of May, 1851, the purchaser to build a wharf on the premises, etc.

It will be argued that the parties meant to make time the essence of the contract.

It was competent for the parties to make time the essence of the contract, and if that intention clearly appears, a court of equity will not assist him who is in default.

Sug. Vend. ch. 8, sec. 3, pl. 32, to 36, inclusive; see note 2 to Harrington v. Wheeler, 4 Ves. 689; see cases collected in note a, same case, p. 686, Am. Notes; Lloyd v. Collett, 4 Bro. Ch. 469, and Am. Notes.

The facts that he went into possession and improved the property and paid part of the purchase money, do not relieve him from his default, if time was of the essence of the contract. Nor do they aid in arriving at the intent of the parties.

The only just inference to be drawn from the facts is, that the defendant was indulgent and willing to buy his peace; but insisted on his part that the contract was at an end.

Mr. Justice Clifford delivered the opinion of the court:

This is an appeal from the Supreme Court of the Territory of Minnesota, in a suit in Chancery, to compel a specific performance of a written contract to convey a certain parcel of land described in the bill of complaint, and situated in the Village of Stillwater, and County of Washington, in that Territory. The bill was presented to the District Judge at chambers, in the first place, where an order was passed for an injunction, and it was then duly filed in the office of the Clerk of the District Court, and on the same day the writ of injunction was issued, returnable to the District Court at the May term next ensuing, and was duly served on the respondent. On the 29th day of November, 1851, the respondent, by his solicitors, filed his answer to the bill of complaint, and on the 30th day of June, 1852, the com-

NOTE.—Specific performance, time not generally material, etc. See note to Hepburn v. Dunlop, 4 L. ed. U. S. 65. When time is material, etc. See note to Pratt v. Carroll, 3 L. ed. U. S. 627.

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plainant filed the general replication, and testimony was subsequently taken by both parties, under a regular commission issued in pursuance of the order of the court. After the testimony was taken, the temporary injunction 513*] was *dissolved, and the cause was set down for hearing on the 6th day of October, 1853, upon bill, answer, replication, and proofs; and after the hearing, the District Court decided in favor of the complainant, and entered a final decree against the respondent for a specific performance of the agreement set forth in the bill of conplaint. An appeal was taken by the respondent to the Supreme Court of the Territory, and the Supreme Court, at the January Term, 1856, reversed the decree of the District Court, and entered a final decree against the complaint, dismissing the bill with costs; whereupon, the complainant appealed to this court.

A brief statement of the pleadings will be sufficient to give a clear view of the nature of the controversy between the parties to the suit. On the part of the complainant, it is alleged that the respondent, being seised in fee simple of the parcel of land described in the bill of complaint entered into a treaty with the complainant for the purchase of the same on the 15th day of June, 1850, for the price of $190.00, with interest, to be paid on the 1st day of May, 1851, and that he agreed to accept that sum for the consideration; and that an agreement in writing was entered into between them to that effect, and the bill of complaint sets forth the agreement, which is of that date, and is signed and sealed by the parties. By that agreement, the respondent contracted to sell and convey the premises by deed of warranty, provided the complainant should pay him the sum of $165 on the 1st day of October then next, or the sum of $190 by the 1st day of May, 1851, and the complainant agreed to purchase and pay for the premises in the manner, and to the amount specified. They also thereby mutually agreed to build a wharf suitable for a steamboat landing—the complainant on the land contracted for, and the respondent on his lot adjoining—and it was stipulated between them that either party was to be at liberty to commence the building of the wharf on his own lot, but neither was to be obliged to continue or complete it, unless the other, upon notice, did the same in a reasonable time. And the complainant further alleges that the respondent delivered up the possession of the premises to him about the time of the execution of the agreement, and that he has ever since remained in the occupation of the same; that he paid the respondent $60 on the 2d day of July, 1850, in part performance of the agreement; and the respondent, on the 7th day of September, 1850, indorsed on the agreement $30.33 more, in part performance of the same, being the amount awarded to him as damages under a reference 514*] between the *parties, of a claim he presented against the respondent on account of a misrepresentation made by him, at the time of the execution of the agreement, in respect to the western boundary of the land; and that since he entered into the possession of the premises, under the agreement, he has laid out large sums of money upon the land, in erecting a valuable dwelling-house, and in making other improvements thereon; and that he has tendered to the respondent the whole sum of the balance of the purchase money, with the interest, and has always been ready and willing to perform the agreement on his part, according to its terms, upon having a proper title made out and a proper conveyance executed to him of the premises therein described; and that he has demanded the deed of the respondent, and he had hoped that he would specifically perform his part of the agreement, as in justice and equity he ought to do. And the bill of complaint charges that the respondent, combining and confederating with persons unknown, refuses to perform his part of the agreement, and at times falsely pretends that he is entitled to more than the sum stipulated between the parties; and at other times, that the complainant, had not performed his part of the agreement; whereas it is alleged he has performed his part of the agreement, and that the respondent is entitled to no more than the balance due and unpaid of the sum stipulated, and the interest thereon; and that the whole of that sum with interest, is now ready and unproductive in the hands of the complainant; and that he is seriously embarrassed and injured by reason of not having a good and sufficient title to the premises, which is contrary to equity; and the complainant prays for discovery and general relief, and that the respondent may be decreed specifically to perform the agreement upon being paid the balance so due, with interest, and for an injunction to restrain the respondent from conveying, transferring, or in any manner disposing of the title to the premises.

The answer admits that the fee simple title was in the respondent at the time mentioned, and that there was a negotiation between the parties respecting the purchase and sale of the premises, and that the agreement was made and executed at the time it bears date, and that the complainant paid the sum of $60.00 as alleged in the bill of complaint, but expressly denies that the respondent delivered the possession of the same to the complainant, or that he ever consented to his taking the possession in any manner, as is stated, unless he should pay the purchase money, with interest, except and save for the purpose of building the wharf; and the answer also denies that any misrepresentation was made respecting the *western [*515 boundary of the lot, or that the respondent ever admitted that he made it, as is charged in the bill, or that the complainant was ever injured by any representation made by him in that behalf, though the answer admits that the complainant did express some dissatisfaction with that boundary; and that for the purpose of cultivating and sustaining friendly relations with him, as a citizen and neighbor, in the same community where they resided, he did agree to refer the matter, whether he ought to make any deduction from the price agreed, and that the referees did determine that he should deduct the sum of $30.33 from the same; and he further admits, that the complainant has made improvements upon the premises by erecting a dwelling-house thereon, which has greatly enhanced the value of the same, but he denies that any improvements were ever made by his consent, or that the complainant had any right to make them; and also denies every allegation in the bill that the complainant was ever

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ready and willing to perform his part of the agreement, or that he has performed or ever offered to perform the same. On the contrary, the answer avers the fact to be, that at the time the purchase money became due and payable, he called upon the complainant, and demanded of him the sum due, and told him he was ready and willing to execute and deliver to him the deed, upon being paid the balance of the money, which he refused to pay, alleging as an excuse that he had not the means. And it is further averred, that the respondent, at different times, afterwards, called upon the complainant, and informed him of his ability and readiness to deliver the deed upon being so paid, and urged the payment, which was refused on every occasion when the demand was made; and the respondent says he has suffered great pecuniary embarrassment and injury in his business, from the refusal of the complainant to perform his part of the agreement. He admits, however, that the solicitor of the complainant, on or about the first day of November, 1851, did demand the deed of him, and offered to pay him a sum of money which the solicitor informed him was the balance of the sum of $190.00 and interest at seven per cent.; but what sum of money was so offered he does not know, nor whether that money is now ready in the hands of the complainant and unproductive, but he does not believe such to be the fact; and he denies all manner of fraud, combination and confederacy.

There is not much dispute about the facts of the case, whether we look to the testimony on the one side or the other. The agreement was admitted in the answer, and was made, as is alleged in the bill, on the 15th day of June, 516*] 1850, and it is *fully proved that the complainant shortly after entered into the possession of the premises, and has continued in the possession of the same to the present time, and there is not an intimation in the proofs exhibited in the case that the respondent ever demanded the surrender of the premises, or that he ever manifested any intention to rescind the agreement, except so far as it arises from his refusal on the first day of November, 1851, to accept the balance remaining unpaid when it was tendered to him by the solicitor of the complainant. On the contrary, it appears from his own witness, William H. Morse, that in the fall of 1851 he requested payment of the balance then due and unpaid; and when the complainant replied to his request, that he had a good many debts out, and as soon as he could collect the money he would settle up with him, he told the complainant he was ready to make him a deed whenever he was paid the balance due on the lot. The precise time when this conversation took place does not appear; but the witness says he was in the employment of the respondent from the 20th day of October to the 18th day of November, 1851, and that within that time he heard the respondent ask the complainant two or three times for the balance due on that lot, and it was in some one of those conversations that he told the complainant that he was ready to make the deed whenever the balance was paid; and we infer from the testimony of the witness, though it is not very clearly expressed in the deposition, that the last interview between the parties, when that remark was repeated, must have taken place only a few days before the tender was made by the solicitor or the complainant. Whether so or not, it is plain, as well from the language of the request as from that employed by the respondent in reply to the reasons assigned by the complainant, why he could not make the payment as requested; that the object of the respondent on the occasion was more to hasten the action of the complainant, and prompt him to an early compliance, than to make any formal demand of the money with the view to terminate the agreement, or to impair the right of the complainant to make the payment at a future time. Such unquestionably, was the impression that the conversation at the interview was calculated to produce upon the mind of the complainant; and considering all the circumstances under which the interview took place, and the relation of the parties to each other in respect to the matter now in controversy, we think it was the only reasonable construction which could be put upon the language used by the respondent, consistent with fair dealing on his part, and rectitude of intention; and that view of the conversation derives strong confirmation in the fact that *the deed subsequently tendered to the [*517 complainant had not then been prepared, and no allusion was made to a conveyance on the part of the respondent, except in connection with the promise of the complainant to settle and make the payment as soon as he could collect the means.

Nothing further transpired between the parties, in respect to the subject-matter of the controversy, till after the tender was made by the solicitor of the complainant. There is not a word of proof, other than what has been mentioned, that has the least tendency to show that the respondent, prior to the tender made by the complainant, ever formally demanded the payment of the sum due as is alleged in the answer, or even notified the complainant, or even intimated to him that he should insist upon a rescission of the agreement unless the payment was made at the time, or in the manner specified, or that he ever expressed so much as a wish that the possession of the premises should be surrendered up because the payment had not been made, or in any manner signified to the complainant that he was unwilling that he should remain in possession, and continue his occupation and improvement of the same as he had done, throughout nearly the whole period after the agreement was made. The proofs are clear and full that the complainant entered into possession shortly after the agreement was made, and that he built a valuable dwelling-house on the premises, and if the wharf was not completed, he had at least commenced the building, and made considerable progress in the work, and had otherwise made expenditures in leveling the grading the grounds, and in various ways had greatly improved the premises and enhanced their value, and that all these improvements had been carried forward at large expense, while the respondent resided in the same village, and under circumstances which show, beyond controversy, that he must have had full knowledge of their progress and daily opportunities to have manifested his dissent if he had desired

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to do so, or if such had been his intention; and yet he never expressed the slightest dissatisfaction while the works were progressing, or intimated to the complainant, so far as appears, that in case he failed to make the payment at the time specified in the agreement, he should claim that the improvements had been made of his own wrong, and at his own risk, and without any liability, on his part, to allow any compensation either for the labor, materials, or money expended, in making them. On the contrary, he suffered the improvements to go on, silently acquiescing in the right of the complainant to make them, until they were nearly completed; and when the tender was made by the solicitor of the complainant, and he found 518*] he *could no longer conceal his real position with respect to the failure to make the payment at the time specified in the agreement, he then declined to accept the money, and refused to execute the deed.

The tender on the part of the complainant was made by Frederick R. Bartlett, his solicitor, on the 1st day of November, 1851, at Stillwater, where the land is situated, and in the office of H. L. Morse, the solicitor of the respondent. A sum sufficient to pay the whole balance due, with interest, was formally tendered on the occasion, and the deed demanded, and the respondent notified that the sum so tendered would be always in readiness to be paid by the solicitor, at his dwelling-house in Stillwater, where both parties resided. According to the testimony of the solicitor, the respondent refused to accept the money, and got up and went out of the office, and did not take it, and did not offer to execute a deed; and it does not appear that he gave any explanation whatever as to the grounds of his refusal. His omission to explain why he refused to accept the money, which, not many days before, he had requested the complainant to pay, indicates an inconsistency in his acts not altogether reconcilable with the idea that the previous request for payment had been made in good faith, or at a time and under circumstances when he either anticipated or desired that the complainant might be able to obtain the money to comply with the request; and it is calculated also to throw some light upon his subsequent conduct, in selecting a moment to demand the money and tender the deed to the complainant, when there is much reason to think that he must have known that a compliance could not be expected, on account of the absence of the solicitor in whose hands the money was deposited. He was then reminded by the complainant that the money had been deposited with his solicitor, and informed that he was absent, and told that he must wait until the solicitor returned. These facts are established by the testimony of several witnesses introduced by the respondent, and it is worthy of remark that this attempt to demand the money and tender the deed was not made till more than a year after the bill was filed, and nearly six months after the respondent had formally answered to the suit. It occurred at the dwelling-house of the complainant on the premises; and it appears, from the testimony of Elijah A. Bissell, that the respondent called upon the complainant at the time mentioned, and told *him* that he understood that he, the complainant had a sum of money for him on the account of the lot, and that he was read to give him a deed of the premises, upon the receipt of the money which he then demanded, and called the witness *to notice the same, and [*519 the witness put a private mark on the deed, which is annexed to his deposition, and makes a part of the case. According to the testimony of that witness, the complainant said that the money which he was supposed to have, had been paid away, but the witness admits that he referred to the money deposited with his solicitor as that which was designed to pay the respondent.

Three days afterwards the same thing was repeated; when the complainant was called into the office of the solicitor of the respondent, unattended by any friend or legal adviser, and a second demand was made of him for the money, and the same deed was again tendered. His explanation on this last occasion, as given in the testimony produced by the respondent, is full and satisfactory, and we refer to it as affording a perfect solution of the whole transaction. After the demand was made, he replied that he could not pay the money, as he had not enough money to pay his taxes; that he had left the money with his solicitor, who had once tendered it to the respondent, and that he ought then to have taken it; that his solicitor was now away from home, and the respondent must wait until he returned. Three depositions were taken by the respondent to establish this last demand, and each of the witnesses proves the substance of this explanation, and we think it is not of a character to require any extended comment, as the transaction speaks its own construction. More than a year before that demand was made, the complainant had tendered the money to the respondent, and deposited it in the hands of his solicitor, and notified the respondent that it would always be in readiness to be paid whenever he would accept it; and he well knew that he had never asked for it, or in any manner signified his willingness either to receive the money or to execute the deed. These considerations furnish a complete answer to any supposed defense upon that ground, wholly irrespective of any question which might otherwise arise, involving the rectitude or the transaction, or the motives of those who were concerned in making the demand, and consequently remove all necessity for any further remarks upon this branch of the case. Looking to the whole evidence, we think it is satisfactorily proved that more than half of the consideration was paid in advance of the time when it fell due; that valuable improvements were made on the premises by the complainant, under the agreement, and that the possession of the premises was continued by him after the time elapsed for payment, with the knowledge and appropriation of the respondent, which, in some cases, has been held sufficient of itself to entitle the party to relief, where, in all other respects, it *ap- [*520 peared that he was without fault. Waters v. Travis, 9 Johns. 466.

Suppose it were otherwise; it can make no difference in this case, as it also appears, and the proof on this point is equally satisfactory, that the tender of the balance of the purchase money was duly made while the complainant

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was in possession of the premises, under the agreement, and before any act had been done by the respondent disaffirming it, or any notice or intimation given by him that he did not intend to insist upon its performance. Readiness to perform is distinctly alleged in the bill of complaint, and is as distinctly denied in the answer, and therefore it becomes important to inquire how the fact was, according to the evidence in the case. What occurred between the parties, in respect to the delay which had ensued prior to the interview at the dwelling-house of the complainant, does not appear by the testimony on either side, and consequently it is reasonable to conclude that, so far as that period is concerned, it was not the subject of dispute; and it seems quite probable that it had been arranged by mutual consent. That such was the fact, though not directly proved, is clearly inferable, as well from the conduct as the conversation of the parties at the time the interview took place. They met at the time in a friendly way, and the respondent asked for the money, and in turn the complainant asked for some forbearance till he could collect the means; and apparently it was granted without objection or any imputation of any prior remissness. No demand was made of the money, or any intimation given, that if it was not paid immediately, the delay would be regarded in any manner as impairing the right of the complainant to make it at any time. It was a mere ordinary request of a creditor to a debtor, and embraced not only what was due on the agreement, but also a balance due on account, and was not intended as anything more than an offer to settle and a request for payment, which applied quite as much to the account as to the agreement; and there is good reason to infer that the respondent himself had not been ready to execute the title prior to that time, as he took occasion to inform the complainant that he was ready to make the deed when he was paid; whereas, if the business had been delayed, contrary to his wishes, there would have been no necessity for that notification. However that may have been, the circumstances we think abundantly show that the delay, prior to that time, was not the subject of complaint; and therefore it is dismissed from any further consideration. Time may be, and often is, of the essence of a contract for the purchase and sale of real property, so that courts of equity will not in-
521*] terfere in behalf *of either party. It may be made so by express stipulations of the parties, or it may arise by implication from the nature of the property, or the avowed objects of the seller or purchaser; and even when it is not so, expressly or impliedly, if the party seeking redress has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the meantime, been a material change in the circumstances affecting the rights, interests or obligations of the parties, in all such cases courts of equity will in general refuse to decree a specific performance, upon the plain ground that it would be inequitable and unjust. On the other hand, the general doctrine on this point is expressed in the maxim, "that time is not of the essence of a contract in equity;" and except in cases like those already mentioned, or in those of a kindred character, courts of equity, as a general rule, have always claimed and exercised the right to decree specific performance of agreements, in respect to the purchase and sale of real property, in their discretion, and usually to a more liberal extent in favor of purchasers than those who contract to sell such properties. Taylor v. Longworth, 14 Pet. 174; 2 Story's Eq. Jur. sec. 771–776; Adams. Eq. ch. 2, p. 263.

The authorities cited will suffice for the present occasion, as the cause depends very much upon the facts exhibited by the parties, and upon certain obvious principles of justice and equity, universally admitted wherever courts of equity exist. There was no negligence or delay of performance on the part of the complainant prior to the tender of the money on the 1st day of November, 1851, except what is reasonably and satisfactorily accounted for on the ground of acquiescence or waiver on the part of the respondent; and after that time the fault was entirely his own, and neither the rules of common justice nor equity will allow him to take advantage of his own wrong. He can derive no benefit from his subsequent attempt to tender the deed, as it was then too late to impair the right of the complainant to insist upon performance; and we attach no importance whatever to his demand of the money, as he well knew at the time that the amount was deposited in the hands of the solicitor of the complainant, and that he could have it the moment he returned.

It is a case of clear equity on the part of the complainant. He has been guilty of no negligence or fraud, and he was admitted into possession of the premises under the agreement, and suffered to make valuable improvements, without any notice to desist; and now, when he cannot be made whole in any other way, it is his right to insist that the agreement should *be performed, and a court of equity is [*522 the proper tribunal to enforce his right.

On the whole case, we are of the opinion that the Supreme Court of the Territory of Minnesota erred in the order and decree made in this cause.

The decree, therefore, of that court is reversed, and the cause remanded for further proceedings, with directions to enter a decree affirming the decree of the District Court, with costs.

DAVID MORELAND, Plff. in Er.,
v.
JEREMIAH PAGE.

(See S. C. 20 How. 522, 523.)

This court has no jurisdiction to review state judgment, fixing boundaries.

This court has no jurisdiction to review the judgment of a State Court, ascertaining the boundaries between two neighbors having complete grants.

Argued May 3, 1858. Decided May 18, 1858.

IN ERROR to the Supreme Court of the State of Iowa.

This case arose upon a petition filed in one of the State Courts of Iowa, by the plaintiff in error, for the settlement of a certain boundary line and recovery of a strip of land claimed by him.

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The judgment of the court in his favor having been reversed, on appeal, by the Supreme Court of Iowa, the plaintiff sued out this writ of error.

Messrs. P. Smith, Geo. E. Badger and J. M. Carlisle, for plaintiff in error.

Messrs. J. H. Bradley and A. H. Lawrence, for defendant in error.

Mr. Justice Grier delivered the opinion of court:

In a court which is not bound by law to ignore all species of action, and use only the generic name, this would be called an action of ejectment. Plaintiff's statement alleges that "he is owner of certain adjoining quarter sections of land, and that the northern boundary thereof is a line surveyed by Joel Baily, as per diagram annexed, and that plaintiff claims the line A B to be the true line, while defendant claims that the line C D is the proper line between them. The defendant, by his plea or answer, denies that A B is the true line, and avers that C D is. On this issue the party went to trial without a jury, and the court decided in favor of the plaintiff. But, on appeal to the Supreme Court of Iowa, the judgment below was reversed, and judgment entered for the defendant, establishing the line C D as the true line between the respective patents, according to a survey made by Edward James, a copy of a plat of which is on file in the case, from the original deposited in the office of the Surveyor-General."

We have searched this record in vain to discover any authority for this court to assert its jurisdiction to review the judgment of the State Court, under the power granted by the 523*] 25th *section of the Judiciary Act. The record does not show that it draws in question any treaty, statute or authority, exercised under the United States; or the validity of any state statute, for repugnancy to the Constitution of the United States; or the construction of any clause of the Constitution; or of a treaty or statute of commission held under the United States. It is a mere question of boundary between two neighbors, both admitted to have valid grants from the United States. It is a question of fact, depending on monuments to be found on the ground, documents in the Land Office, or the opinion of experts or surveyors appointed by the court or the parties. If the accident to the controversy that both parties claim title under the United States should be considered as sufficient to bring it within our jurisdiction, then every controversy involving the title to such lands, whether it involve the inheritance, partition, devise, or sale of it, may, with equal propriety, be subject to the examination of this court in all time to come.

This question is not new; it was decided in the case of McDonough v. Millaudon, 3 How. 693, where this court refused to entertain jurisdiction to review the judgment of a State court, ascertaining the boundaries between complete grants under the French government, as it did not call in question either the construction or the validity of the Treaty, or the title to the land held under it. See, also, Kennedy v. Hunt, 7 How. 593.

It is therefore ordered that this case be dismissed for want of jurisdiction.

ENEAS McFAUL, Plff. in Er.,
v.
JAMES C. RAMSEY.

(See S. C. 20 How. 523–527.)

Exceptions to matters in discretion of court below, not reviewable.

No exception was taken on the trial to the admission or rejection of evidence; no error alleged in the charge of the court; and a regular judgment was entered on the verdict. The only exceptions were to the refusal of the court to grant a continuance and change the venue; both of which were matters of discretion in the court below, and not the subject of review here.

Argued May 6, 1858. Decided May 18, 1858.

IN ERROR to the District Court of the United States for the District of Iowa.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. Reverdy Johnson and Reverdy Johnson, Jr., for plaintiff in error.

Mr. William Henry Norris for defendant in error.

Mr. Justice Grier delivered the opinion of the court:

Ramsey, the plaintiff below, instituted this suit in the District *Court of the United [*524 States for the District of Iowa. The parties have been permitted by that court to frame their pleadings, not according to the simple and established forms of action in courts of common law, but according to a system of pleadings and practice enacted by that State to regulate proceedings in its own courts. This code commences by abolishing "all technical forms of actions," prescribing the following court rules for all cases, whether of law or equity:

"Any pleading which possesses the following requisites shall be deemed sufficient:

1st. When to the common understanding it conveys a reasonable certainty of meaning.

2d. When, by a fair and natural construction, it shows a substantial cause of action or defense.

If defective in the first of the above particulars, the court, on motion, will direct a more specific statement; if in the latter, it is ground of demurrer."

If the right of deciding absolutely and finally all matters of controversy between suitors were committed to a single tribunal, it might be left to collect the nature of the wrong complained of, and the remedy sought, from the allegations of the part ore tenus, or in any other manner it might choose to adopt. But the common law, which wisely commits the decision of questions of law to a court supposed to be learned in the law, and the decision of the facts to a jury; necessarily requires that the controversy, before it is submitted to the tribunal having jurisdiction of it, should be reduced to one or more integral propositions of law or fact; hence it is necessary that the parties should frame the allegations which they respectively make in support of their demand or defense into certain writings called pleadings. These should clearly, distinctly and succinctly, state the nature of the wrong complained of, the remedy sought, and the defense set up. The end proposed is to bring the matter of litigation to one or more points, simple and unambigu-

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ous. At one time, the excessive accuracy required, the subtlety of distinction introduced by astute logicians, the introduction of cumbrous forms, fictions and contrivances, which seemed only to perplex the investigation of truth, had brought the system of special pleading into deserved disrepute, notwithstanding the assertion of Sir William Jones, that "it was the best logic in the world, except mathematics." This system is said to have come to its perfection in the reign of Edward III. But in more modern times it has been so modified by the courts, and trimmed of its excrescences, the pleadings, in every form of common law action, have been so completely reduced to simple, clear, and unambiguous forms, that the 525*] *merits of a cause are now never submerged under folios of special demurrers, alleging errors in pleading, which, when discovered, are immediately permitted to be amended. This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common law courts.

The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice. In the case of Randon v. Toby, 11 How. 517, we had occasion to notice the operation and result of a code similar to that of Iowa. In a simple action on a promissory note, the pleadings of which, according to common law forms, would not have occupied a page, they were extended to over twenty pages, requiring two years of wrangle, with exceptions and special demurrers, before an issue could be formed between the parties. In order to arrive at the justice of the case, this court was compelled to disregard the chaos of pleadings, and eliminate the merits of the case from a confused mass of fifty special demurrers or exceptions, and decide the cause without regard to these contrivances to delay and imepde a decision of the real controversy between the parties. In the case of Bennett v. Butterworth, 11 How. 669, originating under the same code, the court were unable to discover from the pleading, the nature of action or the remedy sought. It might, with equal probability, be called an action of debt, or detinue, or replevin, or trover, or trespass, or a bill in chancery. The jury and the court below seemed to have labored under the same perplexity, as the verdict was for $1,200 and the judgment for four negroes. In both these cases this court have endeavored to impress the minds of the judges of the District and Circuit Courts of the United States with the impropriety of permitting those experimental codes of pleading and practice to be inflicted upon them. In the last mentioned case, the Chief Justice, in delivering the opinion of the court, says: "The Constitution of the United States has recognized the distinction *between law and equity, and it must [*526 be observed in the federal courts." In Louisiana, where the civil law prevails, we have necessarily to adopt the forms of action inseparable from the system. But in those States where the courts of the United States administer the common law, they cannot adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either.

We have made these few introductory remarks before proceeding to notice the merits of the controversy, as developed by the record, in order that the bar and courts of the United States may make their records conform to these views, and not call upon us to construe new codes and hear special demurrers or pleadings, which are not required to conform to any system founded on reason and experience. To test such pleadings by the logical reasoning of the common law, after requiring the party to disregard all forms of action known to the law under which he seeks a remedy, would be unwarrantable and unjust.

The plaintiff's petition sets forth his grievances in plain, intelligible form, if not with technical brevity and simplicity.

1st. He alleges a contract with defendant to deliver to him eight hundred hogs, on or before a certain day; in consideration whereof, the defendant agreed to pay plaintiff $5.50 per hundred pounds net. He avers that he did deliver according to contract, at the time and place, the number of eight hundred hogs; that defendant refused to receive over five hundred and fifty of them, or pay for the remainder.

2d. He complains that defendant refused to receive and butcher the hogs in accordance with the agreement, and, thus caused by his delay, that the plaintiff was put to expense in feeding the hogs, and exposed to a great loss in the net weight.

3d. That defendant did not make a true return of the net weight, but defrauded plaintiff on that behalf.

4th. That he slaughtered twenty-four hogs more than he accounted for, and improperly cut off parts of others to reduce their weight.

5th. The plaintiff alleges, in what might be called a second count, another contract to deliver fourteen hundred hogs to the defendant at $5.60 per hundred net.

He avers delivery according to contract, and charges defendant with delay in slaughtering them; causing great loss in the weight, and expense to plaintiff in feeding them in the meanwhile.

6th. He charges defendant with taking one hundred other hogs of plaintiff, for which he refused to account.

*7th. That in consequence of delay in [*527 receiving, many of the hogs died, to the great loss of the plaintiff.

8th. That defendant returned false weights of these 1,400, and cut off parts before weighing.

9th. The plaintiff also set up a third contract

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for five hundred hogs which were delivered, and avers the same delay and consequent injury to plaintiff, and the same frauds in weighing, etc.

To this catalogue of grievances the defendant, in his answer, pleads thirty-three distinct denials of the averments in the petition. A jury was called to try these thirty-three issues, and found a verdict for plaintiff, and assessed his damages.

No exception was taken on the trial to the admission or rejection of evidence; no error is alleged in the charge of the court; and a regular judgment was entered on the verdict.

The only bills of exception were to the refusal of the court to grant a continuance and change the venue; both of which were matters of discretion in the court below, and not the subject of review here.

The cavils to the sufficiency of the plaintiff's statement, under the name of a special demurrer, were overruled by the court below, and justly, because the Code permits a demurrer only when the petition "by a fair and natural construction does not show a substantial cause of action." As we have already shown, it contains a dozen.

The judgment of the court below is affirmed, with costs.

JAMES BARTON, Plff. in Er.,

v.

ROBT. FORSYTH.

(See S. C. 20 How. 532-534.)

Exception must be taken while jury are in court—exception after judgment, unauthorized—legal proceedings, evidence—error in, not examinable collaterally.

No instruction to the jury, given or refused by the court below, can be brought here for revision by writ of error, unless the record shows that the exception to it was taken or reserved while the jury was at the bar.

An exception after judgment is clearly unauthorized by law, and the decisions and rulings to which it refers cannot be considered upon writ of error.

The legal proceedings, under which the lot in question was sold, are evidence.

If there were any irregularities or errors in the proceedings after they were instituted, they were not open to examination in the Circuit Court, coming in, as they did, collaterly as evidence of title.

Argued May 5, 1858. Decided May 18, 1858.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The history and the statement of the case appear in the opinion of the court.

Messrs. Charles Ballance and Reverdy Johnson, for the plaintiff in error.

Mr. Archibald Williams, for defendant in error.

Mr. Chief Justice Taney delivered the opinion of the court:

This action was brought in the Circuit Court of the United States for the District of Illinois, to recover a certain lot in the Town of Peoria, described in the plaintiff's declaration.

In that suit, Forsyth, the defendant in error, was plaintiff, and Barton, the plaintiff in error, was the defendant; and upon the trial, the judgment of the Circuit Court was in favor of the plaintiff, Forsyth, and thereupon Barton brought the case here by writ of error.

It appears from the record, that the title was a very disputed one, and sundry questions of much nicety and difficulty were raised in the trial and decided by the court. But, from the manner in which the case has been brought up, none of these questions are open for revision here; for no exception to them appears to have been taken or reserved by Barton while the jury were at the bar.

The record shows, that after the trial, and after verdict and judgment for Forsyth, Charles Ballance filed an affidavit, stating that he was the landlord of Barton, and the real party in interest, and thereupon moved the court to substitute him for Barton, as defendant; or if, in the opinion of the court, that could not be done, that he might be admitted as co-defendant with Barton, and that Ballance might proceed with the suit in his own name. But the court overruled the motion, and refused to permit said Ballance to become a defendant in the suit. "To all which decisions, rulings and instructions, defendant then and there excepted, and prayed that this bill of exceptions be sealed, signed, and made a record, which is done." And this has been relied on here as an exception to all the points which the transcript shows to have been raised at the trial; and decided by the court. But this is no valid exception to anything, according to the well settled and established principles of law. It has been repeatedly ruled by this court, as will appear by the cases reported, that no instruction to the jury, given or refused by the court below, can be brought here for revision by writ *of error, unless the record shows that [*534 the exception to it was taken or reserved while the jury were at the bar.

This is required by the Statute which authorized the exception, and cannot be dispensed with. If the party does not reserve the exception at the time at which the law requires it to be done, he acquiesces in the decision, and cannot bring up the point upon writ of error.

But in this case, the exception was not proposed to be reserved until long after the trial was over, and the verdict and judgment had been entered; for the affidavit of Charles Ballance, upon which his motion was made, appears to have been sworn to on the 22d of July, 1856, after judgment, and his motion was not overruled until August 6th, on which last mentioned day he, for the first time, took his exceptions. Such an exception is clearly unauthorized by law, and the decisions and rulings to which it refers cannot be considered upon this writ of error.

There is but one exception legally taken, and that is upon the admission as evidence of the legal proceeding under which the lot in question was sold as the property of a certain Michael La Croix, to pay his debts, and at which sale Morrison was the purchaser, under whom Forsyth claims title.

Barton objected to the admissibility of this evidence, and the judges of the Circuit Court were divided in opinion; and thereupon the evi-

NOTE.—Exception, when must be taken, to be available on review. See note to Phelps v. Mayer, 14 L. ed. U. S. 643.

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dence was allowed to go to the jury, and the defendant excepted. Upon this point, therefore, the plaintiff in error is entitled to the consideration and judgment of this court.

But we think that there was no error in admitting the evidence objected to. The documents appear to be duly certified and the proceedings under which the sale was made, to have been before a court of competent jurisdiction. If there were any irregularities or errors in the proceedings after they were instituted, they were not open to examination in the Circuit Court, coming in, as they did, collaterally as evidence of title. Being the proceedings of a judicial tribunal which had jurisdiction over the subject matter, the Circuit Court had no right to take upon itself the functions of an appellate court, and inquire whether the debts claimed were really due from La Croix, nor whether the proceedings were conducted and the decision rendered in good faith by the tribunal which authorized the sale.

This being the only point legally before this court, and there being no error in it, the judgment of the Circuit Court must be affirmed, with costs.

535*] *JOHN S. WILLIAMS, Administrator of Jas. Williams, Deceased, Appt.,
v.
ROBT. M. GIBBES and Chas. Oliver, Surviving Executors of Robt. Oliver, Deceased.

and

ROBT. M. GIBBES and Chas. Oliver, Surviving Executors of Robt. Oliver, Deceased, Appts.,
v.
JOHN S. WILLIAMS, Administrator of Jas. Williams, Deceased.

(See S. C. 29 How. 535-541.)

Costs and expenses of trustee, a charge on the fund—trustee must defend title—improvements by bona fide purchaser, when payable to him—trustee, in case of doubt, should apply for direction to the court.

Williams v. Gibbes, in 58 U. S. contains the report of the present case, when formerly here.

Where the costs and expenses of a trustee were properly incurred in the protection and preservation of the fund, it is but just and equitable they should be made a charge upon it.

The misapprehension as to the right cannot change the beneficial character of the expenses, when indispensable to its security.

The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned, and the expenses are properly chargeable in his accounts against the estate.

When a bona fide purchaser has expended time and money in enhancing the value of the subject of the purchase, and the true owner seeks the aid of a court of equity to enforce such a title, the court will administer that aid, only when making compensation to the purchaser.

A trustee having notice that it is doubtful if the trust fund should be distributed according to the trusts under which he holds it, should apply to the court for its direction before he executes the trust, by paying over the fund.

Argued Apr. 23, 1858. Decided May 18, 1858.

APPEALS from the Circuit Court of the United States for the District of Maryland.

The original bill in this case was filed in the Supreme Court of Baltimore City on August 21, 1852, by the administrator of James Williams against the executors of Robert Oliver, to recover the proceeds of Williams' share in a certain Company, known as the Baltimore Company. The cause was removed into the Circuit Court of the United States for the District of Maryland, where the bill was dismissed. This court reversed the decree of dismissal (58 U. S.—17 How. 239), and remanded the cause to the court below for further proceedings.

The court below proceeded to determine the amount of the share in question, as it had not been ascertained on the first hearing, and the amounts to be allowed on certain claims made by Oliver's executors, and finally decreed that Williams' administrator should recover of Oliver's executors the net sum of $9,686.33, and $19,215.95 in stocks. From this decree both parties appealed to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Reverdy Johnson** and **J. Mason Campbell**, for Oliver's executors.

Messrs. **R. N. Martin, G. L. Dulany** and **H. W. Davis**, for Williams' administrator.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Maryland.

A bill was filed in the court below by Williams, the present appellant, to recover of the defendants the proceeds of the share *of [*536 complainant's intestate in what is known as the Baltimore Company, which had a claim against the Mexican Government, that was awarded to it under the Treaty of 1839. The proceeds of the share amounted to the sum of $41,306.41. The history of the litigation to which the award under the Treaty gave rise, in the distribution of the fund among the claimants or the assignees composing the Baltimore Company, will be found in the report of four of the cases which have heretofore come before this court. 11 How. 529; 12 Ib. 111; 14 Ib. 610; 17 Ib. 233, 239. That of Williams v. Gibbes, in 17 How. 239, contains the report of the present case, when formerly here. This court then decided that the claim of the executors of Oliver to the share of Williams was not well founded; that the interest of Williams in the same had not been legally devested during his lifetime; and that his legal representative then before the court was entitled to the proceeds. The decree of the court below was reversed, and the cause remanded for further proceedings, in conformity with the opinion of the court. Upon the cause coming down before that court on the mandate, the defendants, the executors of Oliver, set up several charges against the fund, which it was claimed should be received and allowed in abatement of the amount.

1. For certain costs and expenses to which they had been subjected in resisting suits instituted against it by third parties. The history of these suits will be found in the cases already referred to in this court, and need not be stated at large.

2. For services and expenses of Oliver, in his

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lifetime, in the prosecution of the claim of the Baltimore Company, as its attorney and agent before the Government of Mexico, from the year 1825 down to the time of his death, in 1834.

The court below allowed to the executors the costs and expenses to which they had been subjected in defending the suits mentioned, and also thirty-five per cent. of the fund in question for the services of Oliver.

The case is one, in many of its features, novel and peculiar.

James Williams, the intestate, and owner of the share in the Baltimore Company, became insolvent in 1819, and took the benefit of the Insolvent Laws of Maryland, and in 1825 the insolvent trustee of his estate sold and assigned to Robert Oliver the share in question in this Company; and from thence down to the year 1849, Oliver in his lifetime, and his executors afterwards, did not doubt but that a perfect title to the share had passed by virtue of this assignment. In that year, the Court of Appeals of Maryland decided, in a case between the executors and an insolvent trustee of Williams, that no title passed to Oliver by this assignment; and, as a legal consequence, 537*] *it was held by this court, in 17 How. that the interest remained in Williams at his death, and of course passed to his legal representative, the complainant.

All the services and expenses, therefore, of Oliver, in his lifetime, in the prosecution of the claims of the Baltimore Company against the Government of Mexico, and of the litigation since encountered by his executors in respect to the share, have resulted in securing the proceeds of the same to the estate of Williams, the original shareholder. Williams in his lifetime, and his legal representatives since, down till the fund was in court awaiting distribution, had taken no steps for its recovery, nor had they been subjected to any expense. The whole of the services had been rendered, and expenses borne, by Oliver and his executors; and the question is, whether, upon any established principles of law or equity, the court below were right in taking into the account in the settlement between the parties these services and expenses. We are of opinion they were.

By the judgment of the Court of Appeals of Maryland, Oliver was at no time the true owner of this share, as, notwithstanding the assignment by the insolvent trustee, it still remained in Williams. Oliver thereby became trustee, instead of owner, of the share and of the proceeds, as did also his executors, and they must be regarded as holding this relation to the fund from their first connection with it. In that character the executors have been made accountable to the estate of Williams, and have been responsible since the fund came into their possession for all proper care and management of the same. In defending these proceeds, therefore, against suits instituted by third parties to recover them out of the hands of the executors, they have done no more nor less than they were bound to do, as the proper guardians of the fund, if they had known at the time the relation in which they stood to it, and that they were defending it for the benefit of the estate of Williams, and not for that of Oliver. The services rendered and expenses borne could not have been dispensed with, consistently with their duties as trustees.

But it is said that these suits were defended by the executors, while claiming the fund in right of their testator, and hence for the supposed benefit of his estate; that the defense was not made in their character of trustees, and cannot, therefore, be regarded as a ground for charging the estate of Williams with the costs of the litigation.

The answer to this view is, that although, in point of fact, the defense was made under the supposition that the fund belonged to the estate of Oliver, yet, in judgment of law, it was made by them *as trustees, and not [*538 owners, as subsequently judicially ascertained; and as the costs and expenses were properly incurred in the protection and preservation of the fund, it is but just and equitable they should be made a charge upon it.

The misapprehension as to the right cannot change the beneficial character of the expense, when indispensable to its security.

The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned, and the expenses are properly chargeable in his accounts against the estate. 2 Story, Eq. Jur. sec. 1275.

Another principle which we think applicable to this case is to be found in a class of cases where a bona fide purchaser, for a valuable consideration, without notice, has enhanced the value of the property by permanent expenditures, and has been subsequently evicted by the true owner, on account of some latent infirmity in the title. It is well settled, if the true owner is obliged to come into a court of equity to obtain relief against the purchaser, the court will first require reasonable compensation for such expenditures to be made, upon the principle that he who seeks equity must first do equity. 2 Story, Eq. secs. 799 and 996; 6 Paige, 403, 404; 1 Story, 494, 495.

A kindred principle is also found in a class of cases where there has been a bona fide adverse possession of the property tacitly acquiesced in by the true owner. The practice of a court of equity, in such cases, does not permit an account of rents and profits to be carried back beyond the filing of the bill. 8 Wheat. 78; 27 E. L. & E. p. 212; 7 Ves. 541; 1 Ed. Ch. 579. This principle is applicable where the person in possession is a bona fide purchaser, and there has been some degree of remissness, or negligence, or inattention, on the part of the true owner, in the assertion of his rights.

Courts of equity, it would seem, do not grant active relief in favor of a bona fide purchaser, making permanent meliorations and improvements by sustaining a bill brought by him against the true owner, after he has succeeded in recovering the property at law. 6 Paige, 390, 403, 404, 405; 1 Story, 495; 8 Wheat. 81, 82.

The civil law in this respect is more liberal, and provides a remedy in behalf of the purchaser, even beyond an abatement of the rents and profits for such expenditures as have enhanced the value of the estate (cases above); and, indeed, generally applies the principle in favor of any bona fide possessor of property

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who has in good faith expended his money for 539*] its preservation *or amelioration; otherwise, it is said, the true owner appropriates unjustly the property of another to himself. Touillier, 3 B. tit. 4 ch. 1 secs. 19, 20.

Now, in the case before us, Oliver, in 1825, purchased this share in the Baltimore Company for the consideration of $2,000, its full value at the time. The purchase was made from the insolvent trustee of Williams, whom all parties concerned believed had the power to sell and transfer the title. Williams, down till his death in 1836, set up no claim to it, nor did his representative after his death till August, 1852, when this bill was filed. Oliver and his executors had been in the undisturbed possession, so far as respects any claim under the present right, for the period of twenty-seven years, and although it may be said in excuse for any remissness, and by way of avoiding the consequences of delay, that Williams, and those representing him, had no knowledge of the defect in the title till the decision of the Court of Appeals of Maryland; it may be equally said, on the other hand, that Oliver and his executors were alike ignorant of it, and had in good faith expended their time and money in recovering the claim against the Government of Mexico, and afterwards in defending it against a long and expensive litigation.

It is difficult to present a stronger case for the protection of a bona fide purchaser from loss, who has expended time and money in enhancing the value of the subject of the purchase, or a case in which the principle more justly applies, that where the true owner seeks the aid of a court of equity to enforce such a title, the court will administer that aid only when making compensation to the purchaser. We are, therefore, of opinion that the court below was right in allowing in the account, the costs and fees paid to counsel by the executors in the defense of the suits.

In respect to the thirty-five per cent allowed for the prosecution of the claim against the Government of Mexico, it stands, in principle, upon the same footing as other services and expenses incurred in protecting and preserving the fund after possession was obtained. The amount of compensation depends upon the proofs in the case as to the value of the service, and which must, in a good degree, be governed by the usual and customary charges allowed for similar services and expenses. As this claim was prosecuted with others by Oliver when he supposed and believed that he was the owner, and that he was acting on his own behalf, and not as trustee for Williams, the rate of compensation must rest upon all the facts and circumstances attending the service. There could have been no agreement as to the compensation. And for the same reason, it 540*] cannot *be expected that an account of the service and expenses was kept so as to enable the court to arrive with exactness at the proper sum to be allowed, as might have been required, if Oliver had been chargeable with notice of the trust. The proofs show that Oliver appointed agents to represent him at the Government of Mexico as early as March, 1825, and that these agencies were continued from thence down till his death in 1834; and that during all this time he kept up an active correspondence with them and others, and with our ministers at Mexico, and with his own government, on the subject. The justice of these claims had been acknowledged by the Government of Mexico as early as 1823-24, but no provision was made for their payment. They were regarded as of very little value, from the hopelessness of their recovery; and it is perhaps not too much to say, upon the evidence, that in the absence of the vigorous and efficient prosecution of them by Oliver, they would have been worthless. In the result, for the share in question, which was sold in 1825 for $2,000, there was realized from the Government of Mexico, under the Treaty of 1839, the sum of $41,306.41. The estate of Williams has never expended a dollar towards recovering it; nor has Oliver ever received any compensation for his services. The amount may seem large, but we cannot say the court below was not warranted in allowing it upon the proofs in the case of the great service rendered, and of the customary charges in similar cases.

It has been urged by the executors of Oliver, that they had paid over three eighths of the fund in the distribution of the estate before the filing of the bill in this case, and that they are not, therefore, liable for that portion of the fund. It is claimed that it was shown before the master that this portion was paid over in the regular courts of administration, and as in duty bound by the laws of the State of Maryland. If this had appeared when the cause was heard upon the merits, and the question as to the right to this fund was determined, the ground now taken might possibly have been a good defense to that portion of the fund; and the complainant would have been sent to the distributees to recover it. This, however, may not be entirely certain; for there is authority for saying, that a trustee having notice that it is doubtful if the trust fund should be distributed according to the trusts under which he holds it, he should apply to the court for its direction before he executed the trust, by paying over the fund. 27 E. L. & Eq., p. 302. In this case, the executors of Oliver had notice of the defect of the title of their testator after the decision of the Court of Appeals. But be this as it may, we think the question of liability to the extent of the whole of the fund, *was disposed of in the case when before [*541 us on the merits, and was not reserved for the hearing on the adjustment of the accounts before the court below, on the coming down of the mandate. 17 How. 257.

An objection has been made by the counsel for the appellant, Williams, in respect to the order of the court below, permitting a supplemental answer. We suppose this question rather a matter of practice than otherwise, resting in the discretion of the court below, and as a matter of inconvenience preparatory to the taking of the account before the master. The answer —and, for aught we see, the object in view might as well have been attained by a petition to the court, stating the facts—was put in for the purpose of bringing to the notice of the court the matters relied on in the adjustment of the accounts, and by way of charges to be deducted from the amount claimed. The proceeding enabled the court to give in advance directions to the master in making the settle-

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ment, and thereby narrow the grounds of controversy before him, and facilitate the hearing. It could work no prejudice to either party, for no claim by way of abatement of the account thus set up in the answer or petition should be allowed by the court, but what was pertinent to the subject of examination before the master.

Upon the whole, we are satisfied the decree of the court below was right, and ought to be affirmed.

Dissenting, Mr. Justice Grier.

WILLIAM PINKNEY WHYTE, Admr. de bonis non of John Gooding, Deceased, Appellant,

v.

ROBERT M. GIBBES and Charles Oliver, Surviving Executors of Robert Oliver, Deceased,

and

ROBERT M. GIBBES and Charles Oliver, Surviving Executors of Robert Oliver, Deceased, Appellants,

v.

WILLIAM PINKNEY WHYTE, Admr. de bonis non of John Gooding, Deceased.

(See S. C. 20 How. 541, 542.)

Williams v. Gibbs, ante, affirmed—residence of parties to bill of revivor, when immaterial—objection to jurisdiction, too late after mandate.

This case, in principle, is similar to the case of Williams v. Gibbes, ante.

No want of jurisdiction appeared on the face of the original bill, and the defendants appeared and defended; and, as the bill of revivor is but a continuance of that suit, the residence of the parties at the time it was filed is altogether immaterial.

The objection that the court had not jurisdiction in the original suit, comes too late after the mandate has gone down to the court below.

Argued Apr. 23, 1858. Decided May 18, 1858.

APPEALS from the Circuit Court of the United States for the District of Maryland.

This case is here on cross appeals from a decree of the Circuit Court of the United States for the District of Maryland. The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. Reverdy Johnson and J. Mason Campbell, for Oliver's executors.

Messrs. R. N. Martin, G. L. Dulany and H. W. Davis, for Gooding's administrator:

The objection to the jurisdiction on account of the character of the parties to the original bill comes too late after the mandate.

Skiller's Exrs. v. May's Exrs. 6 Cranch, 267; Ex parte Story, 14 Pet. 343; Washington Bridge v. Stewart, 3 How. 413, and even if it did not, there being at least apparent jurisdiction upon the averments of the original bill, the objection to the jurisdiction on account of the character of the parties, could only be availed of under a plea of abatement, and in this case there is no such plea.

Wickliffe v. Owings, 17 How. 47; Dred Scott v. Sandford, 19 How. 393.

*Mr. Justice Nelson delivered the [*542 opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Maryland.

The case, in principle, is similar to the case of Williams v. The Executors of Robert Oliver, in which the opinion has just been delivered, ante, 535, with the exception of a question made upon a bill of revivor.

The suit was originally brought by John Gooding, Jr., administrator de bonis non of the estate of John Gooding, Sr. After the determination of the cause by this court, reversing the decree below, and sending it back with directions to enter a decree for the complainant, and to take an account, the complainant died. Thereupon Whyte, the present complainant, was appointed administrator de bonis non, and filed a bill of revivor of the original suit, and presented a petition to the court, praying that, as defendants were residents of the City of New York, the subpœna may be served upon the counsel of the defendants in the original suit, which was granted. The defendants appeared, and filed an answer to the bill of revivor under protest, and insisted that the court had not jurisdiction of the original suit, as the complainant in that suit was a citizen and resident of Virginia, and the defendants were residents of New York. There does not appear to have been any order of the court upon the question presented in this answer; but the cause proceeded before the master, where it was pending at the time of filing the bill of revivor and answer to the same.

The point is now taken, that as it appears the defendants were citizens and residents in New York at the time of the filing of the original bill, and also the bill of revivor, the court below had no jurisdiction in the case.

The answer to this objection is, that no want of jurisdiction appeared on the face of the original bill, and the defendants appeared and defended the suit; and, as the bill of revivor is but a continuance of that suit, the residence of the parties at the time it was filed is altogether immaterial.

This question arose in the case of Clarke v. Mathewson et al. 12 Pet. 164, and was decided in conformity with the rule above stated.

In respect to the other objection, that the court had not jurisdiction in the original suit, we may add, in addition to what we have said, it comes too late after the mandate has gone down to the court below. 3 How. 413.

The decree of the court below, affirmed.

Dissenting, Mr. Justice Grier.

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543*] *THOS. A. SNOW and Oliver Palmer, Managers of the Ocean Towboat Company, Claimants and owners of the steam towboat Star and Oliver Palmer, Appts.,

v.

CHAS. HILL et al. Owners of the ship Ocean Queen and George Law, Marshall O. Roberts and Bowes R. McIlvaine, Trustees of the U. S. Mail Steamship Company, Claimants and Owners of the steamship Crescent City.

(See S. C. 20 How. 543-552.)

Collision in river—boat descending not in fault —ascending vessel in fault.

A boat descending in the middle of a river, more than twenty-four hundred feet in width, cannot be required to keep out of the way of a vessel ascending the river close to the shore, a thousand feet from the descending boat, which should change its course to a direction across the river, out of its proper course, and with the view of crossing the bow of the descending boat.

The ascending vessel was wholly in fault, and the decree for the damages should have been against her.

Argued Dec. 16, 1857. Reargued Apr. 29, 1858. Decided May 18, 1858.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

This case grew out of a collision on the Mississippi River, below New Orleans.

Three libels were filed:

1. Hill and others, owners of the ship Ocean Queen injured by the collision, filed a libel against the steamship Crescent City and the steam towboat Star, to recover indemnity therefor.

2. George Law and others, owners of The Crescent City, she having sustained injury, filed a libel against The Ocean Queen and The Star.

3. The towboat Star having sustained damage, her owners filed a libel against The Crescent City, to recover for the injury The Star had received.

The three cases were heard together in the court below, having been consolidated.

The District Court, in which the libels were filed, decided against the towboat. On appeal to the Circuit Court this decree was affirmed in favor of the Ocean Queen; but all the damages resulting from the collision were apportioned between The Crescent City and The Star, on the ground of mutual fault.

The owners of The Crescent City and the owners of the Star, both appealed generally from this decree.

Hill and others, owners of The Ocean Queen, appealed from so much of the decree as exonerated The Crescent City from liability to them.

A further statement of the case appears in the opinion of the court.

Mr. J. P. Benjamin, for Snow et al. claimants of the towboat Star.

Mr. C. Cushing, for Hill et al. owners of The Ocean Queen.

Messrs. F. B. Cutting, William H. Hunt and Owen & Vose, for the United States Mail Steamship Co. claimants of the steamship Crescent City.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in admiralty from the Circuit Court for the Eastern District of Louisiana.

Hill and others, as claimants in their libel, state that The Ocean Queen, being duly enrolled registered and equipped, left the port of New Orleans on a voyage to Liverpool, England, having a cargo of about 2,780 bales of cotton; that on the 5th of November, 1852, about half past nine o'clock P. M. under the tow of the towboat Star on the larboard side, the ship Charles and Jane on the starboard, and a brig in tow astern, were proceeding down the river Mississippi for the Balize; that at about midnight on the same evening, twenty miles below New Orleans, the steamship Crescent City, then ascending the river, came in collision with The Ocean Queen on her larboard bow, cutting her to the bends, breaking her planking, timbers and knees, and so injured the ship as to *disable her from the prosecution [*546 of her voyage, and compelled her to return to New Orleans to refit; and that the costs of repairs and expenses amounted to the sum of $25,000; and a lien on the Crescent City and The Star, for the above sum, is jointly and severally claimed.

The answer of the United States Mail Steamship Company, a body corporate, owner, says The Crescent City was ascending the Mississippi River to the port of New Orleans, and was at a point in the river just below the English Turn, when, at about midnight, the pilot and crew discovered a towboat, which proved to be The Star, with The Ocean Queen and two other vessels, a short distance in front, and close to the eastern bank of the river; that there was not sufficient room to pass between the tow and the bank; that the towboat and her tow were out of the usual course of vessels descending the river, and that The Crescent City was in her proper position; that The Ocean Queen had not a light set in her rigging or elsewhere, visible to those on board the Crescent City; that the towboat failed to ring her bell or stop her engines and float in the manner pointed out by law; that The Crescent City had slowed her engines on approaching the towboat, and receiving no signal that she was descending the river, put the helm of The Crescent City to the starboard, so as to pass outside of and clear of The Star and her tow; that she was heading to the western bank of the river, and as they approached her The Crescent City stopped her engines and then backed, and was backing when the Ocean Queen and the towboat Star ran into the starboard bow of The Crescent City, striking her about twelve feet from her stern, and causing great damage.

That the pilot, officers and crew of The Crescent City, managed their boat with great care and skill; that the collision was caused by

NOTE.—Collision. Rights of steam and sailing vessels with reference to each other, and in passing and meeting—see note 13 L. ed. U. S. 537.

Rules for advoiding collision—see notes, 14 L. ed. U. S. 68; 25 L. ed. U. S. 168; 35 L. ed. U. S. 453; 41 L. ed. U. S. 1053.

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negligence and want of care of the towboat Star and The Ocean Queen, in not keeping their proper position of the river, in not ringing their bell, etc.

The answer of the Towboat Company to the libel was filed, denying the allegations it contained, and charging the fault on The Crescent City.

As the decision of the court must be governed by the evidence, it is not important to refer to the other pleadings in the case.

David Kelly, a witness, after describing the towboat and the other vessels fastened to her, as stated in the libel, said, when they started from New Orleans The Ocean Queen had one of her own men at her helm; afterwards The Star sent a man who took charge of it. They proceeded down the river, as near the middle as possible. In about an hour, one of the 547*] *men from the towboat Star came on board and set the wheel again. They continued about the middle of the river until twelve o'clock at night. At this time the witness was on the lookout, when he saw The Crescent City ascending the river at a great distance. The tow was about the middle of the river, a little nearer the western than the eastern shore. The night was clear, so that one could see all over the river. Witness stood on the forecastle forward waiting for The Cresent City, supposing that she would keep clear of them, as there was plenty of room of the larboard side; but she approached so near that witness hailed her, and the towboat stopped her engines and rang her bell, but to no purpose; The Crescent City did not alter her course; she came so close that witness could see all over her forecastle forward, where her lookout should have been, but he saw no one on the lookout. He staid in his position until The Crescent City struck the ship Ocean Queen on her larboard bow. Witness then jumped off the forecastle and ran aft, but returned in a few minutes, and saw, for the first time, one or two men on the forecastle of the Crescent City. She struck the Ocean Queen on her larboard bow, and stove everything in forward; carried away the larboard cathead entirely, so that the anchor went down the full length of the chain, and parted all the fastenings of the Ocean Queen to the towboat, carried away the guards of the Star, and bent her smoke pipe. The towboat brought The Ocean Queen back to the city. The witness was the only person on watch on the Ocean Queen. There were no lights hung out on the vessel, but he supposes her lights in the cabin must have been visible through the windows. Witness knew the river well; took particular notice, and is confident, when The Crescent City approached the tow, it was about the middle of the river. The Star did not alter her course. When he first saw The Crescent City, she was about half a mile distant; when he first hailed her, she was about four or five times her length from the tow. Witness thinks, when The Crescent City struck, she was going ahead fast. The towboat Star stopped her engine, and rang her bell; her light hung between the smoke pipe and her forward fires.

John Marston was standing on the deck of The Ocean Queen when he first saw The Crescent City; she was about five times her length off. The night was clear, and he could distinctly see both shores. The towboat was heading down the river, as near the middle of it as possible. She was running about seven knots an hour; he thinks The Crescent City was running some eight or ten knots an hour when she struck The Ocean Queen. There were two signal lights on The Star.

*Henry Crowell, a witness, was on the [*548 deck of The Ocean Queen; saw The Crescent City half a mile off; as she approached, he hailed her. The tow was in the middle of the river, rather nearer to the western than the eastern shore; of this he is confident. Richard Matthews was master of The Ocean Queen. The night was clear and starlight; could see both shores. The Ocean Queen was nearer the western than the eastern shore. Soon after the collision, she drifted to the western shore.

Henry J. Whitney was master of the towboat; he has been engaged in that business eight or ten years; heard the bell ring; came immediately on deck; ran aft, and directed the hawser of the brig to be let go, in order that he might back. The tug was near the middle of the river, nearest to the eastern shore. He is positive as to this fact.

Witness has heard Captains Disney, Chapman, Brown, Laplace, Phillips, and others, say that Captain Foote, the pilot of The Crescent City, is not considered as a pilot, and especially among masters of towboats. Peter Curran was pilot of The Star, and on duty when the collision occurred. The Star had her full complement of men; was nearer to the western than the eastern shore. On seeing The Crescent City coming, he rang the bell to stop the engines; than rang the big bell hard, three or four times. The Crescent City seemed to come towards them, on the larboard side, till she got nearly abreast the ship's bow; then she hauled as witness thought, nearly square across, until she hit the ship between the cathead and the stern, and hove her over on the guards of the towboat, which were broken. The bow of The Ocean Queen was a little ahead of the towboat. Witness watched the lights of The Crescent City when she turned her bow westward. At that time she was about a mile and a half from the tow. She appeared to be heading all the time westward, till she came, abreast of the Ocean Queen, when she seemed to turn suddenly, as if she had her helm hard a-starboard to turn towards the western shore.

Asa Payson corroborates the above witnesses as to the tow being in the middle of the river, and the direction taken by The Crescent City across the river.

Foote, the pilot of The Crescent City, says he was ascending the river as near the eastern bank as it was prudent and usual to run. He described the towboat, being on the lookout, from the top of the pilothouse; there was a man on the watch forward, Mr. Ranshaw, and also one on the deck. When he first saw the light, it was about a point on his port bow. He told the man at the helm there was a tow ahead, and to keep close *in to the east- [*549 ern bank for that was his position. As he approached the tow, an order to slow the engines was given, and at the same time witness said there was a tow ahead, either bound up or at

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anchor. The engines were slowed. The wheelsman said he could see no opening between the tow and the shore. Witness then directed him to put his helm to the starboard, and go outside of the tow. As soon as witness perceived the tow was descending the river, the engines were ordered to be stopped and backed. This order was obeyed, but it did not prevent the collision. The Crescent City was not going with force when the collision occurred. Captain Davenport appeared just after the collision, when the bows of the boats were still together. This was, he thinks, about twice the length of the boat from the eastern bank. He is confident, when he first saw the tow, it was not in the middle of the river. If he could have seen between the tow and the eastern shore, he should have kept near the shore; but not seeing an opening, he took a western direction, which was his proper course.

Several witnesses were examined, who were on board The Crescent City, all of whom, more or less, corroborated the impression of the pilot, that they were very near the eastern shore, and that between the tow and that shore there was not room for The Crescent City to pass.

From what has been stated in the pleadings and testimony, it will be seen that in this, as in other cases of collision, the theories of the respective parties are in conflict. Both cannot be true; and if either be so to the extent claimed, the right and the wrong are established.

The claimants allege that The Ocean Queen in charge of the steam towboat Star, with two other vessels, was descending the River Mississippi, about twenty miles below New Orleans, being near the middle of the river, rather nearer to the western than the eastern bank, was run into by The Crescent City, and injured as described.

Some eight or ten witnesses called in behalf of the claimants—some of them experienced pilots, and well acquainted with the river—being on board The Star towboat, or one of the boats fastened to it, and several of them witnessed the collision, a part of whose testimony is above stated, and they all conduce to establish the allegations in the libel. They show that the towboat was in her proper course in the middle of the river, or rather nearer to the western than the eastern shore, and this all the witnesses admit was the usual and proper course. They also show that The Star had lights, and that there was no want of care in her management. Her course down the middle of the river was continued, and on the approach 550*] of The *Crescent City, so as to threaten a collision, the hawser which fastened the brig to the stern was thrown off, so that the towboat might back; the engines were stopped, and the approaching boat was hailed, the bells rang, and The Star was inclined still further to the western shore. More than this could not be done, nor required of the towboat with her towage. Being in her right position, The Star had no reason to apprehend a collision until the danger became imminent. And when this was apparent, nothing more could be done by the towboat than was done. It would be a strange rule of navigation to require a boat descending in the middle of a river, more than twenty-four hundred feet in width, to keep out of the way of a vessel ascending the river close to the shore, a thousand feet from the descending boat, which should change its course to a direction across the river, out of its proper course, and with the view of crossing the bow of the descending boat. No stronger case could be put or imagined, to show fault in the ascending boat.

The theory of The Crescent City is unreasonable, and is unsustained by the evidence. It was ascending, as alleged, the eastern shore of the river, as near to it as could safely be navigated, until the light of the towboat was discovered, which was directly ahead, and so close to the shore as not to give room for the ascending boat to pass between it and the shore. This is untrue, if the facts be true as to the position of the towboat.

The position of the towboat is proved by experienced pilots and river men, well acquainted with the river for many years, and whose character for truth has not been questioned. They say that they could see both shores, and that from their knowledge of the river they cannot be mistaken. To counteract this proof, there is nothing but the statements of the pilot of The Crescent City, who is proved to be ignorant and incompetent, and two or three witnesses on board that vessel, who were not shown to have a knowledge of the river. The pilot directed the helm to the starboard, with the view of passing the tow on the western side. And this course was continued until the collision occurred, by striking the larboard bow of The Ocean Queen. This bow was a little in advance of The Star.

Whilst one or two of the witnesses speak favorably of Foote, the pilot, the greater number speak of him as ignorant of his duties, and not fit for a pilot. And in addition to this, it seems he was not acquainted with the river. This is shown to some extent, as he seems to have relied more on the opinion of the man at the helm, than on his own knowledge and judgment.

*The place of collision, as appears [*551 from a survey of the river, is 2,420 feet wide; and if the tow was in the middle of the river, there were twelve hundred and ten feet between the tow and the eastern shore, which afforded room for three vessels to pass abreast, of the capacity of The Crescent City.

The statement of Foote is conclusive against his theory. He starboarded his helm, to pass the western side of the tow. His approach was seen by those on board The Star, and the other vessels connected with her, some time, and preparations were made to avoid the collision. This shows that Foote was mistaken as to the position of the tow, and this mistake was fatal. Whether it resulted from his ignorance of the course of the river, or of his duties as a pilot, or from both, is immaterial. It shows that The Crescent City was in fault as the colliding vessel.

It is alleged that The Ocean Queen had no lights, and that on the approach of The Crescent City The Star did not stop her engines and float, as the Statute of Louisiana requires of the descending boat. The Ocean Queen was passive, following in the tow of The Star; her lights were not required to be hung out. The towboat Star was responsible for her safe navigation, so far as skill and knowledge of the

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river were concerned; but it was not responsible for the wrongs of other boats, which could not, reasonably, be avoided.

The Statute of Louisiana referred to, we think, is not in the case; from the facts proved, its requirements could have had no application.

The Ocean Queen was bound to a foreign country; The Crescent City was carrying on an intercourse between New Orleans and the Atlantic States. The agency of the towboat did not change the character of the commerce in which the vessels were engaged. The Ocean Queen was propelled by steam, and whether the power be located in the tug or in the ship, can be of little or no importance. It was subject to the admiralty jurisdiction, and to the rules applied to vessels having the same motive power.

The Circuit Court decreed against the Towboat Company in solido, the sum of $19,465.79 damages, with interest thereon at the rate of five per cent per annum from the 10th of January, 1853, till paid, and costs of suit; and that the Towboat Company, upon the payment of the above sum, shall have and recover from the Mail Steamship Company, etc. $9,732.89, the one half of the sum decreed as above.

In this decree we think there is error. The towboat was not in fault. Her equipments and crew were such as the law required, and the usage of the service. In nothing did the 552*] *towboat fail, which in the least conduced to the disaster. The Crescent City was wholly in fault, and the decree for the damages suffered by The Ocean Queen should have been against the colliding boat. The decree of the Circuit Court is, therefore, reversed, and the cause is remanded to that court, with directions to enter a decree for the above damage against the Mail Steamship Company, their sureties, etc. and also the sum of $208.97 for the damage done to the towboat, and also for costs.

WILLIAM HOLCOMBE, Plff. in Er.,

v.

JOHN McKUSICK, Jonathan E. McKusick, Christopher Carle, Horace K. McKinstry, Elias McKean, and Jos. C. York.

(See S. C. 20 How. 552-555.)

Where whole cause not disposed of, writ of error will not lie—Minnesota Statute cannot govern this court.

Where the whole of the cause in the court below was not disposed of, and no final judgment rendered, a writ of error from this court will not lie.

The Statutes of Minnesota have provided for an appeal from the District to the Supreme Court, on an interlocutory order affecting the merits; (Stat. Minn. p. 414, sec. 7;) it was, therefore, properly taken to the Supreme Court of the Territory. But that practice cannot govern this court in revising the judgment of the court below.

Argued May 7, 1858. Decided May 18, 1858.

IN ERROR to the Supreme Court of the Territory of Minnesota.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. Lawrence, Brisbin, Bradley and Stevens, for plaintiff in error.

Messrs. Gillet, Horn and Cushing, for defendants in error.

The arguments are not here given, as they are to the merits.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Supreme Court of the Territory of Minnesota.

The suit in the court below was brought to recover damages for wrongfully entering the plaintiff's dwelling-house at Stillwater, Minnesota Territory, and doing great injury to the same, removing it from its foundations, damaging and destroying the personal property therein, etc.

The defendants, in their answer, set forth an Act of the Legislature of the Territory of Minnesota, incorporating the City of Stillwater, and conferring upon the municipal authorities the usual powers for the well government of the inhabitants thereof; the organization of the government of the city under its charter, and the election of its officers, and among others, that one of the defendants, J. E. McKusick, was elected Marshal. The answer set forth, also, an ordinance passed by the City Council, in pursuance of authority given by the charter, which, among other things, provided for the removal of obstructions *in the public [*553 streets and landing places, and conferred authority upon the Marshal to remove such obstructions.

The answer then sets forth that the plaintiff's dwelling was erected upon Main Street in the city, and obstructed the free use of the same, and had become a public nuisance; and that the Marshal removed the said obstruction, in pursuance of the authority conferred upon him by the ordinance, which is the act complained of by the plaintiff; and that the other defendants were called in to his assistance in the performance of this duty. The answer then denies the special damage set up in the complaint.

The plaintiff, in reply to the new matter set forth in the answer, denies, according to the formula prescribed by the Minnesota Code, the existence of the charter of the City of Stillwater, set forth in the answer, and avers that no act of incorporation was ever published, as prescribed by the laws of the Territory. The plaintiff then sets out at large a charter of the City, which was published according to law; denies the election of the municipal authorities under the charter, also the existence of any city ordinance passed by the City Council; and the election of the defendant, McKusick, his qualification in the office, or that he ever entered upon his duties. The plaintiff also denies that his dwelling-house was erected on Main Street, or that it obstructed the same.

There is also a long statement respecting the title to the land embraced within the corporate limits of Stillwater, which it is not material to set forth. The plaintiff further denies that, in making the removal of the dwelling-house, the defendants used proper care and caution to prevent unnecessary damage.

The defendants have demurred to all that portion of the reply which commences with denying the existence of the Act of Incorporation of the City of Stillwater, and including the charter set forth in the answer. They demur

NOTE.—What is "final decree" or judgment from which appeal lies. See note to Gibbons v. Ogden, 5 L. ed. U. S. 302.

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also to the allegation in the answer, stating that the dwelling-house was erected prior to the 12th day of September, 1848; and also, to all that part of the answer relating to the title to the land embraced within the City of Stillwater.

The defendants also made a motion to strike out certain portions of the reply, which was granted, but it was not material to notice the portions particularly.

The District Court of the Territory sustained the demurrer of the defendants to the portions of the plaintiff's reply above referred to, with leave to the plaintiff to amend. No amendment having been made, judgment upon the demurrer was made absolute, with costs. An ap- [*554] peal was taken to the Supreme Court of the Territory, where the judgment below was affirmed, with costs. The case is now here on a writ of error to this court.

The portions of the reply demurred to, and also those stricken out on motion, must be regarded as disposed of, and it will be necessary to look at those portions left, which have neither been demurred to nor stricken out, and therefore remain unanswered. One portion of the reply in this predicament is as follows: "And the plaintiff denies that the said dwelling house obstructed Main Street, in the City of Stillwater, or that the same was kept or maintained as a public nuisance."

Another is, a denial of the existence of the ordinance of the City Council of Stillwater, conferring authority upon the Marshal to remove obstructions in the public streets; also a denial that the defendant, J. E. McKusick, was elected Marshal, or had qualified as such; and further, a denial by the plaintiff of the allegation in the answer, that the removal of the dwelling-house was made, doing no unnecessary damage, etc.

All these matters, in reply to allegations in the answer, constitute issues of fact upon the record undisposed of; and it is quite clear, until disposed of in favor of the defendants, the plaintiff would be entitled to recover. They put in issue the authority of the defendants to remove the dwelling-house, which is set up in the answer; and also present a case, in which, if the general authority to remove obstructions from streets existed, it would not protect the defendants, as the dwelling-house was not within the limits of the street as claimed; also, if within it, unnecessary force was used, and unnecessary damage done to the building in the act of removal.

On the trial before the jury, the defendants would be obliged to meet these several issues, and maintain the allegations in their answer, before they would be entitled to a verdict, as either of them, if found for the plaintiff, would have displaced the justification set up in the answer.

The whole of the cause, therefore, in the court below, was not disposed of, and no final judgment rendered, upon which a writ of error from this court would lie. It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional and does not authorize the court below to send up the case, unless all the matters between the parties to the record have been determined. The cause is not to be sent up in fragments.

11 How. 32; 21 Wend. 667.

The Statutes of Minnesota have provided for an appeal from the District to the Su- [*555] preme Court, on an interlocutory order affecting the merits, Stat. Minn. p. 414, sec. 7. It was therefore properly taken to the Supreme Court of the Territory; but that practice cannot govern this court in revising the judgments of the court below in this court.

We have rarely in our experience examined a case, which in its principles is common and readily understood, so complicated and confused by the mode of pleading which has been pursued, and which it is understood is in conformity with the system adopted in this Territory. The pleadings raise many immaterial and even trivial questions of fact and law, which have nothing to do with the substantial merits of the case, and seem in practical operation, whatever may be the system in theory, to turn the attention of courts and counsel to small matters of serious import, which are undeserving a moment's consideration, overlooking or disregarding the most material and controlling questions involved.

The demurrers are put into detached statements in the answer, the statements thus demurred to, loosely made, and often incongruous in themselves, and upon which no principle of law can be raised or applied to govern the decision.

The system is anomalous and involves the absurd and impracticable experiment of attempting to administer common law remedies under civil law modes of pleading, and these very much complexed and complicated by emendations and additions.

The case must be dismissed for want of jurisdiction, there being no final judgment in the court below.

THOMAS McCARGO, Plff. in Er.,
v.
JOHN L. CHAPMAN.

(See S. C. 20 How. 555–557.)

Judiciary Act—decision on motion, cannot be reviewed by this court.

The Judiciary Act of 1789 authorizes this court to revise final judgments by a writ of error.

A decision of the court below, upon a rule or motion to quash an execution, is not of that character.

Argued May 6, 1858. Decided May 18, 1858.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Messrs. A. H. Lawrence and Joseph H. Bradley, for plaintiff in error:

The bill of exceptions shows a final judgment, by which the plaintiff is deprived of his remedy in the proceedings under an execution regularly issued, from which a writ of error will lie. See authorities cited in Boyle v. Zacharie, 6 Pet. 656.

Messrs. George E. Badger and J. M. Carlisle, for defendant in error:

The quashing or refusing to quash an execution cannot be assigned for error. Mountz

NOTE.—See note to Holcombe v. McKusick, infra. 1020.

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v. Hodgson, 6 Cranch, 324; see, also, Boyle v. Zacharie, 6 Pet. 656; Toland v. Sprague, 12 Pet. 300; Early v. Rogers, 16 How. 599.

The order quashing the execution was justified, and indeed required, because all further proceedings on the judgment by execution or otherwise were barred, independently of any rules of practice known to the common law, or adopted by the court below. "An Act to amend the several Acts of Limitations." Hutch. Miss Code, pp. 830, 831; Dig. of 1857, p. 400, art. 8; Ross v. Duvall, 13 Pet. 45; McElmoyle v. Cohen, 13 Pet. 312.

Mr. Justice McLean delivered the opinion of the court:

This case is brought before us by a writ of error to the Circuit Court for the Southern District of Mississippi.

556*] *On the 14th of May, 1855, the defendant moved to quash an execution issued in the above case, on two grounds: first, because the same issued more than seven years after a prior execution; second, because the same issued more than seven years after the return of the last preceding execution, in said cause.

On this motion the defendant read to the court the record of the judgment in the Circuit Court, which was entered for the sum of $2,109, and costs; on which an execution was issued the 15th of June, 1843, and was returned, no property found; and afterwards, an alias fi. fa. was issued, the 20th of April, 1855, which was levied on lots 3 and 6, section 35, township 14, range 6 west, as the property of the defendant, which was not sold for want of time.

It appeared that no other execution ever issued upon the above judgment, and the court sustained the motion and quashed the execution, to which an exception was taken. This writ of error is intended to bring before us the question, whether the motion to quash the execution was properly sustained. A preliminary question, however, arises, whether a writ of error can be maintained, on the decision of the above motion.

The Judiciary Act of 1789 authorizes this court to revise final judgments by a writ of error. And this court say, in Toland v. Sprague, 12 Pet. 300, that a decision of the court upon a rule or motion is not of that character. And in Boyle v. Zacharie, 1 Pet. 648, the court say: "In modern times, courts of law exercise a summary jurisdiction, upon motion, over executions, and quash them, without putting a party to his writ of audita querela; but these motions are addressed to the sound discretion of the court, and their refusal is not a ground for a writ of error." In Mountz v. Hodgson, 4 Cranch, 324, it is said: "A refusal of the court below to quash the execution on motion, is, by some of the judges, supposed not to be a judgment to which a writ of error will lie. Others are of opinion that a writ of error will lie to that decision of the court; but that the writ of error is not to the judgment of the Circuit Court, but to that of the justices." In the case of Early v. Rogers et al. 16 How. 599, it is said: "Whether a court will quash an execution on account of proceedings against the debtor, as the garnishee of the creditor, is a question appealing to the discretion of the court below, and a court of error cannot revise its decision thereon."

In Brooks v. Hunt, 17 Johns. 484, a motion was made to the Supreme Court of New York to set aside a fieri facias, on the *ground [*557 that the party was discharged under the Insolvent Laws of the State. The court refused the motion; and, on error brought, the Court of Errors of New York quashed the writ of error. Mr. Chancellor Kent, on behalf of the court, assigned as one of the grounds for quashing the writ of error, that the rule or order denying the motion was not a judgment within the meaning of the Constitution or laws of New York.

And yet it is said in Co. Litt. 288 b, that a writ of error lieth when a man is grieved by an error in the foundation, proceeding, judgment, or execution in a suit. But it is added in the same authority, "without a judgment, or an award in the nature of a judgment, no writ, of error doth lie." And the court say, in the case of Boyle v. Zacharie: "If, therefore, there is an erroneous award of execution, not warranted by the judgment, or erroneous proceedings under the execution, a writ of error will lie to redress the grievance."

Whatever discrepancies may be found in decisions on this subject, we think a writ of error will not lie on any judgment, under the Act of 1789, which is not final, in whatever form it shall be given. This may be illustrated by the case before us. In this case, the Circuit Court quashed the execution; and, by a writ of error, we are called on to revise that decision. What will be the effect of an affirmance? May not the Circuit Court issue another execution on the same judgment? In short, is the action of the Circuit Court final as to anything except the particular motion before it? May it not be followed by another motion of the same import? If the writ of error may be allowed to one party, it cannot be denied to the other. And to what motions shall it be limited?

It has uniformly been held that error will not lie, without a statutory provision, on a motion for a new trial, to amend the pleadings, or any other motion which depends upon the discretion of the court.

If, in the langauge of this court in Boyle v. Zacharie, an execution should be issued not authorized by the judgment, the court, on motion, would set it aside or quash it; and should it refuse to do so, a mandamus would seem to be the proper remedy. It is a writ which may be issued to inferior courts and magistrates, to require them to execute that justice which the party is entitled to, and which, by law, they are enjoined to do, and where there is no other remedy.

This writ of error is dismissed, for want of jurisdiction.

GEORGE R. SAMPSON and Lewis W. Tappan, doing business under the Style and Firm of Sampson & Tappan, Plffs. in Err.,

v.

CHARLES H. PEASLEE, Collector of Customs, etc.

(See S. C. 20 How. 571–580.)

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Duties to be on value, not on charges and commissions—date of sailing of vessel from foreign port is true period of exportation—Secretary's instructions as to revenue laws, binding—each invoice to be separately appraised—entry conclusive—what examination of appraisers, sufficient.

Under the Act of July 30th, 1846, 9 Stat. at L. 42, 43, the twenty per centum ad valorem is to be on the appraised value only, without being assessed upon the charges and commissions.

The period prescribed by the Secretary, the date of the sailing of the vessel from the foreign port for her destination in the United States, was the true period of exportation.

The Secretary's instructions relative to the revenue laws, are binding and conclusive upon the officers of the customs whenever a difficulty shall arise as to the true construction of those laws.

The court's ruling, also, that the date of the sailing of the vessel was the true period of exportation is correct according to the Act of March 3d, 1851.

Each invoice and entry was to be deemed and treated as a separate transaction for appraisement and for the assessment of duties.

When an entry has been made, it is conclusive upon the importer as to the contents, and declared value of the invoice.

If the examination of the hemp, made by the merchant appraiser, was such as is usually made in buying and selling the article, and was satisfactory to the merchant appraiser, it was not open to the plaintiffs to show that he adopted a mode of examination insufficient to detect fraudulent packing or diversities in the qualities of the different parts of the bales of hemp.

Argued Apr. 20, 1858. Decided May 18, 1858.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This suit was brought in the court below by the plaintiffs in error against the Collector of the port of Boston, to recover back certain duties alleged to have been illegally exacted on a cargo of hemp.

The plaintiffs being dissatisfied with the amount of the judgment in their favor, rendered by the court below, have brought the case here on a writ of error.

Messrs. Griswold, Bartlett and Johnson, for the plaintiffs in error:

The plaintiffs in error will contend:

1. The appraisement of the hemp was illegal and invalid and insufficient to displace the value declared on entry.

First. Because the appraisers estimated the value as of the day of the sailing of the vessel; whereas they should have estimated it at the period of actual shipment, or date of the bill of lading.

Tariff Act, March 3, 1851, ch. 38, sec. 1; 9 Stat. at L. 629; Act Aug. 30, 1842, ch. 270, sec. 16; 5 Stat. at L. 564; Treasury Circulars, July 6, 1847, July 5, 1850; 10 How. pp. 236, 238, 242, 245, 255.

The Tariff Act of March 10, 1851, was passed in consequence of these decisions. It is to be presumed the interpretation which the Department had given to the term "period of exportation," and recognized by this court as correct, must have been known and understood by Congress when it adopted the same language in this Act. Congress then intended to, and did use the language in this Statute, in the same sense in which it had so long been used and understood by the Treasury Department, by this court, and the whole mercantile community.

Treasury Circulars, March 27, 1851; November 24, 1851; Gant v. Peaslee, 2 Curt. C. C. 251; Adams v. Bancroft, 3 Sumn. 387.

Second. Because the examination of the hemp made by the merchant appraisers, was not a substantial compliance with the statutes providing for and regulating appraisement of imported merchandise.

5 Stat. at L. 503, 505; Greely v. Burgess, 18 How. 415; Greely v. Thompson, 10 How. 225; 9 Stat. at L. 629.

2. The additional duty was illegally exacted because the appraised value of the whole importation of hemp did not exceed, by ten per cent. the value declared on entry.

The whole quantity of the hemp must be regarded and treated as one importation, as it was one order and one purchase. The record so finds the fact.

3. If the penalty or additional duty of 20 per cent. was rightly assessable upon the appraised value of the hemp, it should have been computed upon the hemp alone, and not upon the charges and commissions, because those items in the invoice are not appraised.

Grinnell v. Lawrence, 1 Blatchf. 350; Treasury Circulars, Dec. 26, 1848; Aug. 25, 1853.

Mr. J. S. Black, Atty-Gen. for the United States:

Congress must have intended by the word "exportation," to indicate some simple fact, easily proved and not open to fraud or imposture.

There can be no dispute about the day when the vessel sails. All the events which precede it, may be easily falsified.

2. The true and only meaning of export is to carry out. Goods taken from one place to another in the same country, are not exported. They are not exported when they are placed on board a vessel lying in a harbor of the country where they were produced. The law speaks of the time when they were actually exported, not of preparations to export, nor of intent to export, nor readiness to export.

3. Exportation and importation are correlative terms. If the latter takes place at the end of the ship's voyage, the former occurs at the beginning. This court has twice held, that merchandise is imported when the vessel which brings them arrives in port.

U. S. v. Vowell, 5 Cranch, 368, 372; Arnold v. U. S., 9 Cranch, 109, 119.

4. The decision and uniform practice of the Treasury Department, are entitled to respect.

See remarks of Ch. J. Marshall in The U. S. v. Vowell.

5. The Act of 1842, sec. 23, gives to the Secretary of the Treasury, power to make such rules and regulations as may be necessary to secure a just appraisement of merchandise imported.

See 5 U. S. L. 566.

I. One of the regulations made in pursuance of this Statute is, that the sailing of a vessel is the exportation of the goods with which it may be laden.

Treasury Decisions, p. 23.

We maintain that this is binding, and has the force of law.

II. The cargo of hemp was divided into two invoices and two bills of lading, for the convenience of the importers. After the several invoices had been treated as several entries by

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themselves, and by all the revenue officers with their acquiescence, they moved the court to instruct the jury that two entries were one entire entry.

It is submitted that the court correctly refused to give this instruction.

III. The examination of the hemp, as made by the merchant appraiser, was sufficient. It was not until the trial that the objection to the appraisement was made. It appears that the importers were satisfied when the examination was made. They offered no evidence that bales inside were other than they seemed to be from the outside, and the inference is, that they knew it was all right.

Mr. Justice Wayne delivered the opinion of the court:

This case has been brought to this court by a writ of error from the Circuit Court of the United States for the District of Massachusetts.

It is an action for money had and received. It was sued out by the plaintiffs against the 572*] defendant, the Collector of Customs *for the port of Boston, to recover the sum of $14,-206.10, with the interest thereon, which the plaintiffs allege was illegally exacted from them by the defendant in his official character, and which was paid by them under protest, as the law permits that to be done.

The aggregate amount sued for is made by several items:

First, $1,624.25, being an amount of duty exacted on an importation of Manilla hemp, over and more than the duty on the value declared on the entry of it. Second, the sum of $12,067.60, for an additional duty of twenty per cent., exacted under the 8th section of the Tariff Act of 1846, on the appraised value of one of the invoices of the hemp; and the sum of $524.25 on another invoice of hemp, which the plaintiffs allege to be a portion of the same importation.

The plaintiffs recovered in the Circuit Court the sum of $1,022.75 damages and costs of suit, but being dissatisfied therewith, and with the rulings of the court, have brought this writ of error.

The plaintiffs were engaged in trade with China, Manilla, and the East Indies. They wrote to their agents in Manilla, in March, 1854, to purchase, and ship by the ship Telegraph, four thousand bales of Manilla hemp. The agent bought the hemp, and began to ship it on board of The Telegraph, from lighters, on the 23d of June, 1854, the ship then being in the roadstead, three or four miles from the shore. Each lighter received a permit from the custom-house to be laden and to leave for the ship. The export duty to which the hemp was liable became due and payable as each lighter was laden, and before it could leave for the vessel. But when it is known that the shippers are in good credit, the export duty is allowed to remain unpaid until the whole cargo has been shipped. In this instance, the whole cargo had been shipped by the 29th June. On the 30th it was all on board of the ship and under deck, and a bill of lading was signed for two thousand five hundred and twenty bales of it. On the 1st of July, a bill of lading was signed for the residue of the cargo. On the 1st July, the hatches of the ship were calked down by noonday, and in the afternoon the ship was cleared at the custom-house and ready for sea, but not having the wind, did not sail; nor did she sail on the 2d July, the master of the ship having objected to do so on the Sabbath. On Monday, the 3d, the ship went to sea.

The cargo was bought with Brown Brothers & Co.'s credit, and paid for by bills on London. It is a common practice at Manilla, when the shipment is large, to make of the whole two or more invoices, it being difficult to negotiate a bill for a whole cargo when it is of a large amount, as they frequently are, and *as this cargo was, the hemp alone hav- [*573 ing cost over $80,000. When the cargo is divided into different invoices for the purpose of negotiating the bills by which it has been bought, the invoices for the separate parts are sent with a bill of lading with the bills intended to be negotiated.

The Telegraph's cargo amounted to more than $95,000. In conformity with the practice, and for the purpose just mentioned, it was separated into two invoices. One of them contained two thousand five hundred and twenty bales of hemp, and other merchandise, amounting to $58,772.69; it was dated June 30th, with bill of lading of the same date. The other invoice was for fifteen hundred and twenty-eight bales, and a quantity of loose hemp, amounting to $36,367.03; it was dated June 30th, with bill of lading dated July 1.

On Sunday, July 2d, the day that the captain of The Telegraph refused to sail, the overland mail from England arrived at Manilla; it brought news of the war with Russia. The consequence was, an immediate and material advance in the market price of hemp the next day, July 3d, that being the day when The Telegraph went to sea.

Upon the arrival of The Telegraph at Boston, the plaintiff entered her cargo; a part for consumption, and the residue on bond, each invoice being separately entered at the custom-house. It was appraised by the United States appraisers at $11 per picul, excepting eighty bales of red hemp and two hundred and eighteen and sixty two hundredths loose piculs, which were appraised at $10.50 per picul. The Collector, by the directions of the Secretary of the Treasury, informed the merchant appraiser and the general appraiser that the cargo was to be appraised with reference to what was its value at Manilla on the day that the ship sailed, that day being the period of its exportation to the United States. The Act under which that direction was given is: "That in all cases where there is or shall be imposed any ad valorem rate of duty on any goods, wares, or merchandise, imported into the United States, it shall be the duty of the collector, within whose district the same shall be imported or entered, to cause the actual market value or wholesale price thereof at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported into the United States, to be appraised, estimated, and ascertained; and to such value or price shall be added all costs and charges, except insurance, and including in every case a charge for commissions at the usual rates, as the true

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value at the port where the same may be entered, upon which duties shall be assessed."

It also appears that the appraiser's valuation 574*] of the hemp *exceeded by ten per centum the value declared on the entry of the 2,520 bales, but it did not exceed by ten per centum the value declared on the entry of the 1,528 bales. Nor did it exceed by ten per centum the value of the aggregate of the two invoices, constituting, as the plaintiffs claimed, the importation of 4,000 bales. An additional duty of 20 per centum was assessed on the appraised value of the 2,520 bales, also on the charges and commissions.

Manilla hemp comes in bales about twenty inches square by three feet in length, pressed hard together, is covered with matting, and is bound closely with ratan bands at short distances apart.

The examination of the hemp for appraisement was made in this wise: Slits were cut in the matting, which covered the bales that were examined, so that different parts of the outside surface of the hemp could be seen, but the ratan bands holding the bales together were not cut. It is said, had they been cut, the appraisers could have examined the inside of the bales. The difficulty of binding the bales together again is the reason given by the appraisers for not cutting the ratan bands. Though slits were cut in the matting, the principal part of it was not removed; the slits disclosed only small parts of the surface of the bales, and no attempt was made to open the hemp for the purpose of ascertaining its quality beneath the exterior. In fact, no more than the surface was seen. However, the merchant appraiser testifies that the examination was such as is usual in buying or selling hemp in bales.

Upon this statement of the case, the plaintiffs' counsel contended that the appraisement was illegal and invalid, and insufficient to negative or displace the value declared on the entry, because the appraisers did not exercise any judgment or discretion in regard to the period of the exportation of the hemp to the United States, but merely obeyed the instructions of the Secretary of the Treasury, to take the date of the sailing of the vessel as the rule to guide them. And the court was asked to instruct the jury accordingly. The court refused to do so, but did instruct them, that if the period so prescribed by the Secretary was the true period of exportation, the objection was untenable; and did further instruct the jury, that the date of the sailing of the vessel from the foreign port for her destination in the United States was the true period of exportation. The plaintiffs excepted to this ruling.

The plaintiffs' counsel then moved the court to instruct the jury, that, upon the facts proved, all the hemp imported was to be taken to be one entire entry at the custom-house, for the purpose of declaring and appraising the value for the levy of duties.

575*] *The court refused, and did rule and instruct the jury, "that each entry was to be deemed as a separate transaction for the purpose of appraisement and the assessment of duties thereon." To this ruling the plaintiffs excepted.

Then the plaintiffs offered to prove that hemp was of various qualities and values. That it was impossible to determine the qualities of all the packages by such an examination as was testified to by the merchant appraiser. That, for the last three years or more, much of the Manilla hemp imported has been "muzzled" in the bale, and that it was impossible to tell whether it was so or not, without cutting the bands and removing all of the matting, opening the bale, and examining the inside of it. That the outside of the bale sometimes appears to be and is of good and current quality, while the inside of it may be filled with refuse or inferior. That it is often so tangled or "muzzled" as to render the bale from ten to twenty per centum less valuable than if it were all of the same quality as the outside of the bale. That, besides being muzzled, there are usually three or more grades in the same bale, differing in value from one to three cents per pound. That, in order to determine the proportion of each, which makes up a bale, it is necessary to see and compare its contents in the inside of it with the rest. That it is the custom of the trade to make an allowance of from one to three cents per pound, on all muzzled or inferior hemp found on opening the bale after purchase. But it was admitted that the examination made of The Telegraph's cargo, by the appraisers, was such as is usually made on buying or selling hemp. Upon this the court ruled, that if the examination made by the merchant appraiser was that usually made in buying or selling hemp, and had been satisfactory to the merchant appraiser, it was not open to the plaintiffs to show that he adopted a mode of examination, for the levy of duties, insufficient to detect fraudulent packing or diversities in the qualities of the different parts of a bale of hemp. To this ruling and instructions the plaintiffs also excepted.

One other ruling of the court was given upon the prayer of the plaintiffs, to which the defendant excepted. It was this: that so much of the additional duty of twenty per centum as was levied upon the charges and commissions, and paid by the plaintiffs under protest, was unauthorized by law. This ruling of the court is a correct interpretation of the 8th section of the Act of July 30th, 1846, 9 Stat. at L. 42, 43. It declares, if the appraised value of imports which have actually been purchased shall exceed by ten per centum or more the value declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty *of [*576 twenty per centum ad valorem on such appraised value. In other words, the twenty per centum ad valorem is to be on the appraised value only, without being assessed upon the charges and commissions.

We now proceed to the other points in the case to which the plaintiffs excepted to the rulings of the court.

The first in order is, that the appraisement of the hemp was illegal and invalid, and insufficient to displace the value declared on the entry, because the appraisers were instructed to appraise and estimate the value of the hemp as of the 3d day of July, the day of the sailing of the vessel; whereas they should have estimated and appraised it at the period of actual shipment, or date of bill of lading. The point

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is stated as it was made by the counsel of the plaintiffs in his argument of the case in this court. But whilst it comprehends one subject of the prayer of the plaintiffs and the gist of the court's instruction, it omits a part of the first, which we do not think it immaterial to notice, to prevent in future the proposition which it involves, as to the independence of the appraisers of the customs, from being made again. The court was asked to instruct the jury, that the appraisement in this instance was invalid and illegal, for the reason that the appraisers did not exercise their judgment and discretion in regard to the period of exportation, but that they obeyed the instructions of the Secretary of the Treasury, to take the date of the sailing of the vessel as the rule to guide them. The court refused to give the instruction as it was asked, but did instruct the jury, that if the period so prescribed by the Secretary was the true period of exportation, the objection was untenable, and that the date of the sailing of the vessel from the foreign port for her destination in the United States was the true period of exportation. We concur in the correctness of the instruction. Besides, its having been made the duty of the Secretary of the Treasury, from time to time, to establish rules and regulations, not inconsistent with the laws of the United States, to secure a faithful appraisal of all goods and merchandise imported into the United States, the Collectors and other officers of the customs are directed to execute the Secretary's instructions relative to the revenue laws; and his decision is declared to be binding and conclusive upon all of them, whenever a difficulty shall arise as to the true construction of those laws. Secs. 23, 24, Stat. at L. 563.

The court's ruling, also, that the date of the sailing of the vessel was the true period of exportation, is correct. The Secretary's interpretation of the Act of the 3d March, 1851, is in conformity with the letter and spirit of it, and 577*] cannot be *controlled by different interpretations and instructions which may have been given by his predecessors to the words, "at the period of the exportation to the United States." Though, as we have read the circulars of the Secretaries of the Treasury in respect to those words in the Revenue Act, as to the time when duties shall be assessed upon the value of imports, we do not perceive any difference in them, which may not be readily accounted for by the different Acts to which the instruction or direction to the collector was meant to be applied. The same remark may be made of the decisions made by this court, whenever it has been necessary for it to determine at what date duties should be assessed upon imported merchandise, subject to an ad valorem rate of duty.

Nor have we been able to bring ourselves to the conclusion—ingeniously put, and ably urged by the plaintiffs' counsel here—that Congress, in passing the Tariff Act of March 3, 1851, meant to use the words "period of exportation" in the sense in which they had been understood by the Treasury Department in its construction of previous Revenue Acts, and as that construction may have been sanctioned by this court. There had been uncertainties of opinion and in practice in the Treasury Department, and also in several ports of the United States in respect to the time when the dutiable value of imported goods should be estimated. Some of the Collectors made the estimate at the date of the purchase, whenever that may have been. Other Collectors made their estimate at the date of the shipment. Mr. Secretary Walker, in his circular of July 6, 1846, meaning to establish a uniform rule, states the varying practice, and directs the valuation to be made "at the date of the shipment." He says it is the true construction of the law, long since declared by the Department, and adopted generally throughout the Union. He adds, that the proviso of the 16th section of the Act of August 30, 1842, is clear and emphatic upon the subject, and prescribes the date with reference to which the value is to be estimated, as the period of exportation to the United States. But Mr. Secretary Meredith, three years afterwards, in his circular of the 5th July, 1850, eight months before the Act of the 3d March, 1851, was passed, observes, that the appraisers had been restrained in the discharge of their duties by the result of frequent appeals from their decisions. And in order to secure a just, faithful and impartial appraisal of all goods, wares and merchandise, imported into the United States, he declares—

1. That the period of the exportation of merchandise is the time at which the value of any article is to be fixed by the appraisers.

*2. That in ordinary cases the date of [*578 the bill of lading may be regarded as the "period of exportation."

This court decided, in the cases Greely v. Thompson, 10 How. 225, and in Maxwell v. Griswold, 10 How. 242, in the year 1850, before the Act of the 3d March, 1851, had passed, that under the 16th and 17th sections of the Tariff Act of 30th August, 1842, 5 Stat. at L. 563, the value of merchandise at the time of procurement is to be ascertained, not its value at the time of exportation. Congress, with these differences in view, and particularly in consequence of the decision of this court in the cases just before cited, passed the Act of March 3d, 1851. This court, in 1855, in Stairs et al. v. Peaslee, 18th How. 521, 524, 525, in considering the Act, uses this language, which is decisive of the time when the value of goods subject to an ad valorem duty is to be estimated: "The language of this Act of Congress is general, and embraces all importations of goods that are subject to an ad valorem duty, and directs that their value shall be estimated and ascertained by the wholesale price at the period of exportation to the United States in the principal markets of the country from which they are imported. The time and the place to which the appraisers are required to look when making their appraisement are both distinctly specified in the law, the time being the period of exportation, and the place the country from which they were imported into the United States. It makes no reference to their value in the country of production or the time of purchase. And as there is no ambiguity in the language of the Act, and it embraces all goods subject to an ad valorem duty, the court would hardly be justified in giving a construction to it, narrower than its words fairly import." Though this extract was written with reference to the first point certified in that case, which was, whether the Act of the 3d

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March, 1851, repealed so much of all former laws as provided that merchandise, when imported from a country other than that of production or manufacture, should be appraised at the market value of similar articles at the principal markets of the country of production and manufacture "at the period of the exportation to the United States," the court adds, that the law, taken by itself, will admit of but one construction; and that is, the appraisement must be made by the value of the goods in the principal markets of the country from which they are exported, at the time of such exportation to the United States."

The case of Stairs v. Peaslee, considered in connection with what this court had decided under the Revenue Acts in Greely v. Thompson, and in Maxwell v. Griswold, 10 How. 242, shows whatever may have been the practice in 579*] computing the time *for the assessment of duties, that this court viewed the Act of the 3d March, 1851, as having fixed the rule to be the time or date of the exportation, as that might be shown by the day of the vessel's sailing from the foreign port to the United States. Indeed, from the phraseology of the Act, without reference to preceding Acts upon the same subject, or what had been their construction, the same conclusion must be reached.

The word "period" has its etymological meaning, but it also has a distinctive signification according to the subject with which it may be used in connection. It may mean any portion of complete time, from a thousand years, or less, to the period of a day; and when used to designate an act to be done, or to be begun, though its completion may take an uncertain time, as, for instance, the act of exportation, it must mean the day on which the exportation commences, or it would be an unmeaning and useless word in its connection in the Statute.

The ruling of the court upon the first prayer of the plaintiffs is not subject to the exception taken.

We proceed to the second exception taken by the counsel of the plaintiffs to the ruling of the court upon their prayer. It was, that the court would instruct the jury, upon the facts proved, that all the hemp imported by the plaintiffs was to be taken to be one entire entry, for the purpose of declaring and appraising the value for the levy of duties.

No facts in the case were proved, upon which such an instruction could have been given. The proof is, that the plaintiffs were purchasers in Manilla of four thousand bales of hemp, which were put by them into two invoices for their own convenience; one containing two thousand five hundred and twenty bales, the other one thousand five hundred and twenty, and a quantity of loose hemp; the first valued at $58,772.69, the second at $36,367.03, for each of which a separate bill of lading was taken. The plaintiffs entered them separately at the custom-house, and they were separately appraised without any objection at the time from the defendant. But it turned out, upon the appraisement, that the appraised value of the first exceeded by ten percentum the value of it declared upon the entry, which made it liable, under the 8th section of the Act of the 30th July, 1846, to the additional duty of twenty per centum ad valorem on the appraised value. But the appraisement of the second invoice of one thousand five hundred and twenty-eight bales did not exceed by ten per centum the value declared on the entry of it; nor did the appraised value of the two invoices, constituting the importation of four thousand bales, exceed by ten per centum the aggregate of their separate values declared in the entries of them.

*Now, the plaintiffs seek to be re- [*580 leased from the twenty per cent. additional upon the appraised value of the first invoice, because the second invoice was not subject to it, and because the aggregate of the values of both, as declared upon the entries of them, were not exceeded by ten per cent. upon the appraisement.

Upon such a state of facts, the court rightly instructed the jury, that each invoice and entry was to be deemed and treated as a separate transaction for appraisement, and for the assessment of duties.

An importer of merchandise is bound by the law to make his entry at the custom-house according to his invoice, either by himself, the consignee, or their agent, and not otherwise than by invoice verified by oath, unless it shall be done conditionally, either under the 10th section of the Act of March 1st, 1823, or under the 2d section of the same Act, permitting entries to be made of imported merchandise, subject to ad valorem duties upon appraisement without invoice. 3 Stat. at L. 729.

When an entry has been made, it is conclusive upon the importer as to the contents, and declared value of the invoice; and for all of those consequences which the law may impose upon the examination and appraisement of it, and for any deficiency or non-compliance with the revenue laws regulating the entries of imported merchandise, or for any violation or substantial departure from directions which may have been given by the Secretary of the Treasury for the entry and appraisement of foreign goods, and for the collection of duties upon the same. See general regulations under United States Revenue Laws, by Mr. Secretary Guthrie, of February 1, 1857.

As to the third exception taken by the plaintiffs to the rulings of the court, we think it was right in telling the jury, that if the examination of the hemp made by the merchant appraiser was such as is usually made in buying and selling the article, and was satisfactory to the merchant appraiser, it was not open to the plaintiffs to show that he adopted a mode of examination insufficient to detect fraudulent packing or diversities in the qualities of the different parts of the bales of hemp.

The importance of this case in respect to the collection of the revenue under the Act of the 3d March, 1851, and under the regulations of the Secretary of the Treasury upon it, have induced us to give to the different points in the case our mature consideration, and we are of the opinion that the judgment of the Circuit Court should be affirmed.

It is ordered accordingly, and that the appellants shall pay the costs which have been incurred in the prosecution of their writ of error.

Dissenting, Mr. Justice Grier.

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JAMES L. and SAML. L. TAYLOR, Administrators, of Robert Taylor, Deceased, Plffs in Er.,

v.

NATHAN T. CARRYL, who survived Wm. J. Ward.

(See S. C. 20 How. 583–617.)

Prior sale by sheriff—when gives better title than sale by Marshal—property levied on, not subject to another jurisdiction.

Where a vessel was seized in Philadelphia under a foreign attachment, from a state court, by creditors against her owner, and sold by order of the court; after being so attached, and while the proceedings for the sale was pending in the State Court, the vessel was attached and ordered sold on a libel issued by the District Court of the United States, for seamen's wages, and sold by the Marshal under order of the latter court subsequently to the former sale; held, that the District Court had no jurisdiction over the vessel when its order of sale was made, and that the sale by the Marshal was inoperative, and the purchaser at the attachment sale had the better title than that of the purchaser under the Marshal's sale.

Property once levied on, remains in the custody of the law, and is not liable to be taken by another execution or process in the hands of a different officer, and especially by an officer acting under another jurisdiction.

Argued Dec. 14, 1857. Reargued Apr. 14, 1858. Decided May 18, 1858.

THIS was an action of replevin brought in the Supreme Court for the Eastern District of Pennsylvania, to recover the barque Royal Saxon. The cause was tried before a jury, who found a verdict for the plaintiffs below. Upon exceptions at the trial, the cause was heard before the Supreme Court in bank, and judgment given for the plaintiffs; whereupon the defendant brought the cause to this court on a writ of error, under the 25th sec. of the Judiciary Act.

The case is fully stated in the opinion of the court.

Messrs. **John Cadwalader and Samuel Hood**, for plaintiffs in error:

Under the Constitution and laws of the United States, the District Court of the United States has jurisdiction over, and power to enforce, a claim for mariners' wages, by a proceeding in rem against the vessel, in the admiralty, notwithstanding the pendency of a writ of foreign attachment in a common law court, and the seizure of the vessel under it by the sheriff.

The District Court of the United States is declared to have exclusive, original cognizance of all causes of admiralty and maritime jurisdiction. Act of Congress of Sept. 24, 1789, sec. 9. The obvious meaning of this section is, that the jurisdiction of the District Court is exclusive, whenever the holder of a maritime lien invokes the cognizance of that court.

Waring v. Clark, 5 How. 460; The Golden Gate, 5 Am. Law Reg. 142, 148.

A maritime lien for seamen's wages is not devested by a sale of the vessel under a writ or order from a common law court, made in a suit of foreign attachment brought by a creditor against the owner, especially where such sale is made while proceedings in rem against the vessel for the recovery of seamen's wages were actually pending in the admiralty; and the purchaser at the sheriff's sale, takes the vessel incumbered with the lien for seamen's wages.

The Seabird v. Beehler, 12 Mo. 569; Devinney v. The Memphis, 2 Am. Law Reg. 666; The Buccleugh, 22 Eng. L. & Eq. 72; Freeman v. Caldwell, 10 Watts, 10; Hopkins v. Forsyth, 14 Pa. St. 34.

As to the extent to which the proper jurisdiction of the federal tribunals is protected from interference by state legislation, or proceedings of state courts.

See, generally, Wayman v. Southard, 10 Wheat. 1; Bronson v. Kinzie, 1 How. 314; Ogden v. Saunders, 12 Wheat. 213, 358; Shaw v. Robbins, 12 Wheat. 369, note; Boyle v. Zacharie, 6 Pet. 635, 643; Story v. Livingston, 13 Pet. 359, 365, 368; Gaines v. Relf, 15 Pet. 9; 2 How. 619; 6 How. 550.

In Harmer v. Bell, 22 Eng. L. & Eq. 69, it was held that the pendency of a foreign attachment under which a vessel had been arrested, could not be pleaded to a proceeding in rem, instituted by the same party against the same vessel.

See, also, Smith v. Miln, Abb. Adm. 373, 233; I Conk. Adm. 478, note a.

If these be correct views of the respective jurisdictions of the State and Admiralty Courts, the following propositions may be deduced:

1. That over all maritime liens for seamen's wages, the District Court of the United States has exclusive cognizance, whenever invoked by the seamen, and the state courts have no jurisdiction over such liens.

2. Although a state court has no jurisdiction whatever over a maritime lien, yet that court will afford to a seaman, if he choose to resort to it, a remedy by personal action against the owner or master of the vessel on the contract for wages, or, perhaps, by permitting him to intervene in a personal action already pending; but the cognizance of the state court does not attach, unless specially invoked by the seaman.

3. That the existence of one or more remedies for a seaman to recover his wages in a state court, does not oust the cognizance of the Admiralty Court over his lien against the vessel. The seaman may pursue either of these remedies only, or both together.

That the pendency of proceedings in foreign attachment in a state court against the vessel at the suit of a general creditor of the owner, and the seizure and sale of the vessel by the sheriff under such proceedings, do not oust the admiralty jurisdiction of the District Court of the United States over liens for the wages of the seamen, if invoked by them, nor prevent the Admiralty Court from enforcing such liens against the vessel in specie, by proceedings in rem.

5. That the sale of the vessel under a writ or order of a common law court, does not, under the general maritime law of the United States, devest the lien of a seaman for his wages so as to prevent its enforcement against the vessel in specie by the District Court of the United States, under proceedings in rem in the admiralty.

6. That a sale of a vessel under a writ or order of the District Court of the United States, proceeding in rem against the vessel in the admiralty not appealed from nor reversed, passes

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to the purchaser a title to the vessel discharged of all liens and incumbrances whatever.

7. That where a vessel, subject to maritime liens for seamen's wages, is seized by the sheriff under a writ from a state court, and subsequently, a proceeding in rem is commenced in the admiralty to enforce these liens, it would be an usurpation of admiralty jurisdiction by the state court, if, after being informed of the existence of said liens and proceedings, the state court ordered a sale of the vessel as perishable and chargeable on the ground, inter alia, of the accruing daily expenses of the said mariner's wages.

8. The legal custody of the vessel claimed for the admiralty in this case will not necessarily lead to conflict between the United States and state courts and their respective officers; but on the contrary, will tend to prevent such conflicts, by maintaining each in the legitimate exercise of its jurisdiction and powers.

If the doctrine laid down in this case by the Supreme Court of Pennsylvania, and on which the judgment of that court can alone be sustained, are to be adopted as the maritime and admiralty law of the United States, the privileged lien heretofore supposed to belong to mariners is, in effect, taken away. It will be in the power of the master or owner of a vessel in every case, to prevent seamen from availing themselves of their lien.

This may be effected by procuring a constable to seize the vessel and hold her in custody until she is about to sail, and then release her. It only requires a fi. fa. or attachment to issue, on a judgment confessed before a justice of the peace for a small amount, to a real or pretended creditor; because, according to doctrine of the Supreme Court of Pennsylvania, there is no peculiar potency in admiralty process in rem against ships—"in substance, the proceeding by a justice of the peace against a stray cow, is exactly equivalent."

Taylor v. Carryl, 24 Pa. St. 261.

By the seizure of the ship, therefore, whether by sheriff or constable, the whole custody of her is in the state tribunal, and any action or decree afterwards by the admiralty, in order to enforce the mariner's lien against the "ship would be in relation to a subject over which it had no control, and would consequently be void."

Taylor v. Carryl, 24 Pa. St. 269.

The questions involved in Taylor v. Carryl were carefully examined and elaborately discussed in the case of The Golden Gate, Newberry's Adm. 296, 308; 5 Am. Law Reg. 148, 160; and afterwards, on appeal to the Circuit Court of the United States for the District of Missouri.

6 Am. Law Reg. 273, 304.

The main points raised in Taylor v. Carryl would seem to have been directly decided in these cases.

The Supreme Court of Pennsylvania have decided that, by the law of that State, a seaman may come into her courts and enforce his maritime lien for wages, against the proceeds of a vessel sold by the sheriff. Although this be a doctrine unknown to the common law, yet there would be no reason to complain of it, if that court had not come farther, and decided that the seaman's only remedy in such case was in the State court, and that he had no longer a right to enforce his lien in admiralty.

Mr. **William M. Evarts**, for defendant in error:

1. The court has no jurisdiction of the cause.

The appellate jurisdiction conferred by the 25th section of the Judiciary Act, requires that some one of the questions stated in the decision did arise in the court below, and that a decision was actually made thereon by the same court, in the manner required by the section. It is not sufficient to show that such a question might have occurred, or such a decision might have been made by the court below. It must be demonstrated that they did exist and were made. This must appear by the record itself.

U. S. Statutes, Vol. I. p. 85; Williams v. Norris, 12 Wheat. 117; Crowell v. Randell, 10 Pet. 368; Ocean Ins. Co. v. Polleys, 13 Pet. 157; Armstrong v. Treasurer, etc., 16 Pet. 281; Commercial Bank v. Buckingham, 5 How. 317; Poydras de la Lande v. Treasurer, 18 How. 192; Calcote v. Stanton, 18 How. 243; Maxwell v. Newbold, 18 How. 511.

The whole question of law raised in the replevin below, viz.: whether an interlocutory sale of property as perishable, by a common law court having it in custody under process, prevails by priority of seizure and sale over an interlocutory sale of the same property, as perishable, by a court of admiralty in a suit whose first process finds the property in the custody of the common law court, and whose order of sale is made while the property remains in the same custody, in its nature involves no construction of any clause of the Constitution, or of any statute of the United States, nor the validity of any authority repugnant to such Constitution or such statute.

2. The appellate jurisdiction of this court, is to protect the authority of the Constitution and laws of the United States against diminution by the judgments of state tribunals. It is impossible to find any such diminution in the judgment brought up by this writ of error. Whatever other error may have intervened in the judgment below, cannot be regarded as a ground of reversal here.

3. The judgment below on the merits of the controversy, is free from error.

Plaintiff below, by his purchase at the Sheriff's sale, acquired a good title.

By the process of foreign attachment and the possession of the Sheriff under that process, the bark was in the custody of the law to abide, barred by the result of the suit in which process issued.

Act Penn. June 13, 1856, secs. 48-50; Act Penn. March 20, 1845, sec. 2; Morgan v. Watmough, 5 Whart. 125; Serg. For. Att. 1, 23.

Its sale pending the suit. as perishable property was regular and by authority of a competent court having jurisdiction.

The judicial sale of property as perishable, is in the nature of the procedure and from the same policy and necessity which occasion the sale, a conversion or transmutation of the thing itself, overriding every question of title and lien.

The motive and effect of the sale are to save from perishing, to the owner and lienor, his property or lien.

To say the court has this right to sell the thing in its custody and exercises this right,

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and yet the buyer at such sale does not take the thing sold but only the right, title or interest of some particular person or persons, is insensible and subversive of the whole doctrine of sales by necessity.

Foster v. Cockburn, Park. (Exch.) 70; Jennings v. Carson, 4 Cranch, 26, 27; Grant v. McLachlin, 4 Johns. 34; The Tilton, 5 Mas. 465.

The defendant below, by his purchase at the Marshal's sale, acquired no title to the bark.

On the attachment and monition issued in the admiralty suit, the bark was in the custody of the Sheriff of the County of Philadelphia, and so continued until after the order for its sale as perishable. The Marshal never had custody, nor the District Court possession of the bark, to support any jurisdiction to sell as perishable.

The Robert Fulton, 1 Paine, C. C. 625, 626; Hagan v. Lucas, 10 Pet. 403; Jennings v. Carson, 4 Cranch, 26, 27.

The jurisdiction to sell and the title conveyed, depend on the court's possession of the suit and of the perishable property, and not at all on the event of the suit, or the nature of the claim or lien prosecuted.

Harmer v. Bell, 22 Eng. L. & Eq. 71.

The whole question is between the two sales by the two courts, as to which passed the title. And the title of the defendant below derives no special validity from the peculiar privilege among admiralty liens accorded to wages.

The sale by the Sheriff gave to the purchaser a title discharged of all liens, which thereafter attached only to the fund produced by the sale.

The nature of the lien for seamen's wages is neither a jus in re nor a jus ad rem; it is a right of action to be enforced by judicial procedure, and with the special remedy of being satisfied by means of such procedure out of the ship.

The Mary, 1 Paine, C. C. 184; The Nestor, 1 Sumn. 80; Ex parte Foster, 2 Story, 144; Harmer v. Bell, 22 Eng. L. & Eq. 72.

Whatever prevents the judicial process from reaching the ship, postpones or defeats the enforcement of his right of action against the ship. If the ship be locally without the jurisdiction of the process, this postpones or defeats the remedy. If the ship be withdrawn from the jurisdiction of the process by a previous subjection to the process of another jurisdiction, this postpones or defeats the remedy.

The Robert Fulton, 1 Paine, C. C. 625; Hagan v. Lucas, 10 Pet. 403.

A conversion of a ship into proceeds by a lawful exercise of dominion over it by paramount authority or through judicial sentence, defeats the remedy against the ship.

The familiar rule that seamen's claims attach for their satisfaction to the proceeds of such sale, proves that the ship is discharged from their claims.

Presb. Corp. v. Wallace, 3 Rawle, 150; Sheppard v. Taylor, 5 Pet. 675; Brown v. Lull, 2 Sumn. 441; Trump v. The Thomas, Bee, 86; The St. Jago De Cuba, 9 Wheat. 414, 419.

Upon these considerations, the defendant in error insists:

1. That the cause should be dismissed for want of jurisdiction.

2. That if the court have jurisdiction of the cause, no error has intervened which can be regarded by the court "as a ground of reversal," under the special jurisdiction.

3. That on the whole merits of the case, the judgment below should be affirmed by this court.

Mr. Justice Campbell delivered the opinion of the court:

This cause comes before this court by writ of error to the Supreme Court of Pennsylvania, under the 25th section of the Judiciary Act of the 24th September, 1789.

The defendants (Ward & Co.) instituted an action of replevin in the Supreme Court of Pennsylvania, for the barque Royal Saxon.

Upon the trial of the cause at nisi prius, it appeared that the barque arrived at the port of Philadelphia in October, 1847, on a trading voyage, and was the property of Robert McIntyre, of Londonderry, in Ireland. In November, 1847, she was seized by the Sheriff of Philadelphia County, under a writ of foreign attachment that was issued against her owner and another, at the suit of McGee & Co., of New Orleans, from the Supreme Court; and at the same time her captain was summoned as a garnishee. On the 15th January, 1848, those creditors commenced proceedings in the Supreme Court to obtain an order of sale, because the barque was of a chargeable and perishable nature, suffering deterioration from exposure to the weather, and incurring expenses of wharfage, custody fees, etc., etc. This application was opposed by the captain of the barque, but was allowed by the court on the 29th of January, 1848. The vessel was duly sold by the Sheriff under this order, the 9th February, 1848, to the plaintiffs in the replevin, Ward & Co.

On the 21st January, 1848, while the writs of attachment were operative, and a motion for the sale of the barque was pending in Supreme Court, the seamen on board the barque filed their libel in the District Court of the United States for the Eastern District of Pennsylvania, sitting in admiralty, for the balances and wages due to them, respectively, up to that date, *and prayed for the process of attach- [*592 ment against the barque, according to the practice of the court. This was issued, and, on the same day, the Marshal returned on the writ, "Attached the barque Royal Saxon, and found a sheriff's officer on board, claiming to have her in custody." The captain appeared to this libel, and filed an answer admitting the demands of the seamen.

On the 25th January he exhibited a petition to the District Court, in which he represented the pendency of the suits in attachment and in admiralty; that the barque was liable to him for advances; that she was subject to heavy charges, and could not be employed to carry freight; and therefore he, with the approbation of the British Consul, which accompanied the petition, solicited an order of sale for the benefit of all persons interested. This order was granted by the District Court, after due inquiry, on the 9th February, 1848, and was executed the 15th of February, 1848, by the Marshal of the court, at which time the defendant in the replevin was the purchaser, who took the possession of the vessel, and held her until

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retaken in this replevin suit of Ward & Co. Upon the trial of the replevin cause at nisi prius, the defendant solicited instructions to the jury, which were refused by the court, and the court instructed the jury unfavorably to his title. From the instructions asked, and the charge delivered, a selection is made, to exhibit the questions decided. The court was requested to charge—

3. "That when the lien of a mariner for wages is sought to be enforced in the admiralty by libel, and the Marshal has attached the vessel under such proceedings, the vessel so attached is in the exclusive custody of the admiralty until the claims of the libelants have been adjudicated, or the vessel relieved by order of the court, on stipulation or otherwise; and such exclusive custody exists, notwithstanding a previous foreign attachment from a court of law served on the vessel by the Sheriff."

5. "That a foreign attachment is not properly a proceeding in rem; but an attachment from the admiralty on a libel for mariners' wages is in rem; and the legal possession acquired by the Sheriff, on service of the writ of foreign attachment, is ended, superseded, or suspended, by the service of such attachment from the admiralty."

8. "That when, on the 21st of January, 1848, The Royal Saxon was attached under the process issued on the libel for mariners' wages, she came by virtue of that attachment into the exclusive custody of the Court of Admiralty; and such exclusive legal custody continued from the 21st January, 1848, until the sale by the Marshal, by order of that court, on the 15th February, 1848."

593*] *10. "That the legal possession of the vessel being exclusively in the Admiralty Court, from the 21st January, 1848, till the sale made, by order of that court, on the 15th February, 1848, the sale by the sheriff on the 9th February, 1848, gave no title to the purchaser as against the sale by the Marshal."

The court refused so to instruct the jury, but charged them: "That the Court of Admiralty could not proceed against the vessel while she remained in the custody of an independent and competent jurisdiction; that the presence of the Marshal on the ship did not prove his custody, for the sheriff's officer was there before him; that the Marshal did not dispossess the sheriff, but prudently retired himself, and informed the court in his return that the vessel was in the custody of the sheriff, that if the sheriff first took possession of the vessel, and maintained it until she was sold to the plaintiffs, they had the better title; and that the fact of the continuing possession of the sheriff was for the jury." A verdict was returned in favor of the plaintiffs, upon which a judgment was rendered in the Supreme Court in their favor, confirming the opinion of the judge as expressed to the jury at nisi prius.

The judgment of the District Court allowing the order of sale, proceeded upon the grounds: "That the suits in attachment in the Supreme Court applied to alleged interests in the vessel, not to the vessel itself. The attachment creditor, if he succeeds in his suit, obtains recourse against the thing attached just so far as his defendant had interest in it, and no farther. The rights of third parties remain in both cases unaffected. The bottomry creditor, residing, it may be, in a foreign country, is no party to either proceeding, and loses none of his rights. His contract was with the thing, not the owner, and it is therefore not embarrassed, and cannot be, by any question or contest of ownership. So, too, seamen, whoever owns the vessel, or how often soever the ownership may be changed, wherever she may go, whatever may befall her, so long as a plank remains of her hull, the seamen are her first creditors, and she is priviledged to them for their wages," etc., etc.

Again: "What interest in the ship," asks the District Court, "does the sheriff propose to sell? Not a title to it, but the defendant's property in it, whatever it may be. Not so in the admiralty. Here the subject-matter of the controversy is the res itself. It passes into the custody of the court. All the world are parties, and the decree concludes all outstanding interests, because all are represented. Here they are marshaled in their order of title and privilege. There is no difficulty in allowing an arrest by the admiralty, notwithstanding the vessel or some interest in it has passed into the *custody of the sheriff. He retains all [*594 his rights, notwithstanding the Marshal's intervention. The proceedings against the vessel, the thing, the subject of the property or title, may still go on in the admiralty. The sheriff's vendee of the ship may intervene there, as the defendant might have done in this court; he may make defense to the proceeding there as the successor to the defendant's rights, and may be substituted ultimately before the judge of the admiralty as a claimant of the surplus fund."

This cause has been regarded in this court as one of importance. It has been argued three different times at the bar, and has received the careful consideration of the court. The deliberations of the court have resulted in the conviction that the question presented in the cause is not a new question, and is not determinable upon any novel principle, but that the question has come before this and other courts in other forms, and has received its solution by the application of a comprehensive principle which has recommended itself to the courts as just and equal, and as opposing no hindrance to an efficient administration of the judicial power.

In Payne v. Drewe, 4 East, 523, Lord Ellenborough said: "It appears to me, therefore, not to be contradictory to any cases nor any principles of law, and to be mainly conducive to public convenience and to the prevention of fraud and vexatious delay in these matters, to hold that where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, that they shall be considered as effectually and for all purposes, bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed."

This rule is the fruit of experience and wisdom, and regulates the relations and maintains harmony among the various superior courts of law and of chancery in Great Britain.

Those courts take efficient measures to maintain their control over property within their

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custody, and support their officers in defending it with firmness and constancy. The Court of Chancery does not allow the possession of its receiver, sequestrator, committee or custodee, to be disturbed by a party, whether claiming by title paramount or under the right which they were appointed to protect, Evelyn v. Lewis, 3 Hare, 472; 5 Madd. 406, as their possession is the possession of the court. Noe v. Gibson, 7 Paige, 513. Nor will the court allow an interfering claimant to question the validity of the orders under which possession was obtained, on the ground that they were improvidently made. Russell v. East Anglien R. Co. 3 McN. & 595*] *Gord. 104. The courts of law uphold the right of their officers to maintain actions to recover property withdrawn from them, and for disturbance to them in the exercise of the duties of their office.

But it is in this court that the principle stated in Payne v. Drewe, 4 East. 523, has received its clearest illustration, and been employed most frequently, and with most benignant results. It forms a recognized portion of the duty of this court to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same Constitution, laws and federal obligations. The decisions of this court that disclose such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that are always imparted to magistrates, of whatever class, by the approbation and confidence of those submitted to their government. The decision in the case of Hagan v. Lucas, 10 Pet. 400, is of this class. It was a case in which a sheriff had seized property under valid process from a state court, and had delivered it on bail to abide a trial of the right to the property, and its liability to the execution. The same property was then seized by the Marshal, under process against the same defendant. This court, in their opinion, say: "Where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy by the order of the court. But the same rule does not govern when the executions, as in the present case, issue from different jurisdictions. The Marshal may apply moneys collected under different executions, the same as the sheriff. But this cannot be done as between the Marshal and the sheriff; a most injurious conflict of jurisdiction would be likely often to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken on the process of the other. The Marshal or the sheriff, as the case may be, by a levy acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution by the Marshal and the sheriff, does this special property vest in one or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction." The principle *contained in this extract from the [*596 opinion of the court was applied by this court to determine the conflicting pretensions of creditors by judgment in a court of the United States, and an administrator who has declared the insolvency of his estate, and was administering it under the orders of a probate court, (8 How. S. C. 107) in a controversy between receivers and trustees holding under a court of chancery, and judgment creditors seeking their remedy by means of executory process (14 How. S. C. 52, 368) and to settle the priorities of execution creditors of distinct courts. Pulliam v. Osborne, 17 How. 471.

In a case not dissimilar in principle from the present, the principle was applied in favor of the Executive Department having property in custody whose possession was disturbed by a State officer under judicial process. An attachment from a State court was levied upon merchandise imported, but not entered at the custom-house, and the validity of the levy was the question involved. Harris v. Dennie, 3 Pet. 292. The court say: "From their arrival in port, the goods are, in legal contemplation, in the custody of the United States. An attachment of such goods presupposes a right to take the possession and custody, and to make such possession and custody exclusive. If the officer attaches upon mesne process, he has the right to hold the possession to answer the exigency of the writ. The Act of Congress recognizes no such authority, and admits of no such exercise of right." To the argument that the United States might hold for the purpose of collecting duties, and the sheriff might attach the residuary right subject to the prior claim, the court say: "The United States have nowhere recognized or provided for a concurrent possession or custody by any such officer."

A recognition of the same principle is to be found in Peck v. Jenness, 7 How. S. C. 612. An Act of Congress had conferred on the courts of the United States exclusive jurisdiction "of all suits and proceedings of bankruptcy," and had provided that the Act should not be held to impair or destroy existing rights, liens, mortgages, etc., etc., on the estate of the bankrupt. A District Court of the United States decided that its jurisdiction extended to administer the entire estate of the Bankrupt Court, and that the liens on the property, whether judicial or consensual, must be asserted exclusively in that court, and that all other jurisdictions had been superseded. This court denied the pretension of the District Court, and affirmed, "That when a court has jurisdiction, it has a right to decide every question which occurs in the cause: and when the jurisdiction of the court and the right of the plaintiff to *prosecute his [*597 suit has once attached, that right cannot be arrested or taken away by proceedings in another suit. These rules have their foundation not merely in comity, but in necessity; for if one may enjoin, the other may retort, by injunction; and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for

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this would produce a conflict extremely embarrassing to the administration of justice."

The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision. A limited number of cases exist, in which a party sued in a state court may obtain the transfer of the cause to a court of the United States, by an application to the state court in which it was commenced; and this court, in a few well-defined cases, by the 25 sec. of the Judiciary Act of 1789, may revise the judgment of the tribunal of last resort of a State. In all other respects the tribunals of the State and the Union are independent of one another. The courts of the United States cannot issue "an injunction to stay proceedings in any court of a State," and the Judiciary Act provides that "writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." "Thus, as the law now stands," say this court, "an individual who may be indicted in a circuit court for treason against the United States is beyond the power of the federal courts and judges, if he be in custody under the authority of a State." Ex parte Dorr, 3 How. S. C. 103. And signal instances are reported in verification of the above statement. Ex parte Robinson, 6 McLean, 355.

This inquiry will not be considered as irrelevant to the question under the consideration of the court. The process of foreign attachment has been for a long time in use in Pennsylvania, and its operation is well defined, by statute as well as judicial precedents. The duties of the sheriff, under that process, are identical with those of a Marshal, holding an attachment from the District Court sitting in admiralty. "The goods and chattels of the defendant, in the attachment (such is the language of the Statute), in the hands of the garnishee, shall, after such service, be bound by such writ, and be in the officer's power; and if susceptible of 598*] seizure or manual occupation, *the officers shall proceed to secure the same, to answer and abide the judgment of the court in that case, unless the person having the same shall give security. Purdin's Dig. 50, sec. 50; 5 Whart. Carryl v. Taylor, 12 Harr. 624.

It follows by an inevitable induction from the cases of Harris v. Dennie, 3 Pet. 299; Hagan v. Lucas, 10 Pet. 400; and Peck v. Jenness, 7 How. 612, that the custody acquired through the "seizure or manual occupation" of the Royal Saxon, under the attachment by the Sheriff of Philadelphia County could not legally be obstructed by the Marshal, nor could he properly assert a concurrent right with him in the property, unless the Court of Admiralty holds some peculiar relation to the state courts or to the property attached, which authorized the action or right of its Marshal. The relation of the District Courts, as courts of admiralty, is defined with exactness and precision by Justice Story in his Commentaries on the Constitution. He says: "Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the Constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of common law and admiralty are concurrent (as in cases of possessory suits, mariners' wages and marine torts), there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, upon general reasoning, to contend for it. The reasonable interpretation," continues the commentator, "would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law jurisdiction." 3 Story's Com. sec. 1666, note.

In conformity with this opinion, the habit of courts of common law has been to deal with ships as personal property, subject, in the main, like other personal property, to municipal *authority, and liable to their remedial [*599 process of attachment and execution, and the titles to them, or contracts and torts relating to them, are cognizable in those courts.

It has not been made a question here that The Royal Saxon could not be attached, or that the title could not be decided in replevin. But the District Court seems to have considered that a ship was a juridical person, having a status in the courts of admiralty, and that the admiralty was entitled to precedence whenever any question arose which authorized a judicial tribunal to call this legal entity before it. The District Court, in describing the source of its authority, says of the contract of bottomry, that "it is made with the thing, and not the owner," and that the contract of the mariners is similar; that the res "represents" in that court all persons having a right and privilege, while the rights of the owner are treated there as something incorporeal, separable from the res, and which might be seized by the sheriff, even though the res might be in the admiralty. This representation is not true in matter of fact, nor in point of law. Contracts with mariners for service, and other contracts of that kind, are made on behalf of owners who incur a personal responsibility; and if lenders on bottomry depend upon the vessel for payment, it is because the liability of the owner is waived in the contract itself. "In all causes of action," says the judge of the Admiralty of Great Britain, "which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship, where the owners were

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not themselves personally liable, or where the liability had not been given up." The Druid, 1 Wm. Rob. 399. And the opinion of this court in The Schooner Freeman v. Buckingham, 18 How. 133, was to the same effect.

In courts of common law, the forms of action limit a suit to the persons whose legal right has been affected, and those who have impaired or injured it. In chancery, the number of the parties is enlarged, and all are included who are interested in the object of the suit; and as the parties are generally known, they are made parties by name and by special notice.

In admiralty, all parties who have an interest in the subject of the suit—the res—may appear, and each may propound independently his interest. The seizure of the res, and the publication of the monition or invitation to appear, is regarded as equivalent to the particular service of process in the courts of law and equity. But the res is in no other sense than this the representative of the whole world. But it follows, that to give jurisdiction in rem, there must have been a valid seizure and an actual control of the ship by the Marshal of the court, 600*] *and the authorities are to this effect. Jennings v. Curson, 4 Cranch, 2; 2 Ware's Adm. 362. In the present instance, the service was typical. There was no exclusive custody or control of the barque by the Marshal, from the 21st of January, 1848, to the day of the sale; and when the order of sale was made in the District Court, she was in the actual and legal possession of the sheriff.

The case of The Oliver Jordon, 2 Curtis, 414, was one of a vessel attached by a sheriff in Maine, under process from the Supreme Court. She was subsequently libeled in the District Court of the United States, upon the claim of a material-man. The District Court sustained the jurisdiction of the court. But on appeal the exception to the jurisdiction was allowed, and the decree of the District Court reversed. Mr. Justice Curtis observed: "This vessel being in the custody of the law of the State, the Marshal could not lawfully execute the warrant of arrest." In the case of The Ship Robert Fulton, 1 Paine, C. C. 620, the late Mr. Justice Thompson held that the warrant from the admiralty could not be lawfully executed under similar circumstances, and that the District Court could not proceed in rem. The same subject has been considered by state courts, and their authority is to the same effect. Keating v. Spink, 3 Ohio R. N. S. 105; Carryl v. Taylor, 12 Harr. 624.

Our conclusion is, that the District Court of Pennsylvania had no jurisdiction over The Royal Saxon when its order of sale was made, and that the sale by the Marshal was inoperative.

The view we have taken of this cause renders it unnecessary for us to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable or perishable upon them.

Our opinion is, that there is no error in so much of the record of the Supreme Court of Pennsylvania as is brought before this court by the writ of error, and the judgment of the court is, consequently, affirmed.

Mr. Chief Justice Taney, dissenting:

I dissent from the opinion of the court. The principle upon which the case is decided is so important, and will operate so *widely, [*601 that I feel it my duty to show the grounds upon which I differ. This will be done as briefly as I can; for my object is to state the principles of law upon which my opinion is formed, rather than to argue them at length.

The opinion of the court treats this controversy as a conflict between the jurisdiction and rights of a state court, and the jurisdiction and rights of a court of the United States, as a conflict between sovereignties, both acting by their officers within the spheres of their acknowledged powers. In my judgment, this is a mistaken view of the question presented by the record. It is not a question between the relative powers of a State and the United States, acting through their judicial tribunals, but merely upon the relative powers and duties of a court of admiralty and a court of common law in the case of an admitted maritime lien. It is true that the Court of Admiralty is a court of the United States, and the court of common law is a court of the State of Pennsylvania. But the very same questions may arise, and, indeed, have arisen, where both courts are created by and acting under the same sovereignty. And the relative powers and duties of a court of admiralty and a court of common law can upon no sound principles be different, because the one is a court of the United States and the other the court of a State. The same rules which would govern under similar circumstances, where the process of attachment or a fieri facias had issued from a Circuit Court of the United States exercising a common law jurisdiction, must govern in this case. The Court of Admiralty and court of common law have each their appropriate and prescribed sphere of action, and can never come in conflict, unless one of them goes outside of its proper orbit. And a court of common law, although acting under a State, has no right to place itself within the sphere of action appropriated peculiarly and exclusively to a court of admiralty, and thereby impede it in the discharge of the duties imposed upon it by the Constitution and the law.

There are some principles of law which have been so long and so well established that it is sufficient to state them without referring to authorities.

The lien of seamen for their wages is prior and paramount to all other claims on the vessel and must be first paid.

By the Constitution and laws of the United States, the only court that has jurisdiction over this lien, or authorized to enforce it, is the Court of Admiralty, and it is the duty of that court to do so.

The seamen, as a matter of right, are entitled to the process of the court to enforce payment promptly, in order that they *may not [*602 be left penniless, and without the means of support on shore. And the right to this remedy is as well and firmly established as the right to the paramount lien.

No court of common law can enforce or displace this lien. It has no jurisdiction over it, nor any right to obstruct or interfere with the lien, or the remedy which is given to the seaman.

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A general creditor of the ship owner has no lien on the vessel. When she is attached (as in this case) by process from a court of common law, nothing is taken, nor can be taken, but the interest of the owner remaining after the maritime liens are satisfied. The seizure does not reach them. The thing taken is not the whole interest in the ship. And the only interest which this process can seize is a secondary and subordinate interest, subject to the superior and paramount claims for seamen's wages; and what will be the amount of those claims, or whether anything would remain to be attached, the court of common law cannot know until they are heard and decided upon in the Court of Admiralty.

I do not understand these propositions to be disputed.

Under the attachment, therefore, which issued from the common law court of Pennsylvania, nothing was legally in the custody of the sheriff but the interest of the owner, whatever it might prove to be, after the liens were heard and adjudicated in the only court that could hear and determine them. The common law process was not and could not be a proceeding in rem, to charge the ship with the debt, for the creditor has no lien upon her, and the court had no jurisdiction over anything but the owner's residuum.

The whole ship could not be sold by them, so as to convey an absolute right of property to the purchaser. And even what was seized was not taken to subject it to the payment of the debt, but merely to compel the owner to appear personally to a suit brought against him in personam in the court which issued the process of attachment. It was ancillary to the suit against him personally, and nothing more. The vessel would be released from the process, and restored to him, as soon as he gave bail and appeared to the suit; and she would be condemned and sold only upon his refusal to appear. But, according to the laws of the State and the practice of the common law court, twelve months or more might elapse before the vessel was either sold or released from the process.

The question, then, is simply this: can a court of common law, having jurisdiction of only a subordinate and inferior interest, shut the doors of justice for twelve months or more against the paramount and superior claims of 603*] seamen for wages *due, and prevent them from seeking a remedy in the only court that can give it? I think not. And if it can be done, then the paramount right of seamen for wages, so long and so constantly admitted, is a delusion. The denial of the remedy for twelve months or more after the ship has arrived is equivalent, in its effect upon them, to a denial of the lien; substantially and practically it would amount to the same thing. And it is equally a denial of the right of the Court of Admiralty to exercise the jurisdiction conferred on it by the Constitution and laws of the United States.

Now it is very clear, that if this ship had been seized by process from a common law court of the United States for a debt due from the owner, the possession of the Marshal under that process would have been superseded by process from the admiralty upon a preferred maritime lien. This I understand to be admitted. And if it be admitted, I do not see how the fact that this process was from a common law court of a State, and served by its own officer can make any difference; for the common law court of a State has no more right to impede the admiralty in the exercise of its legitimate and exclusive powers, than a common law court of the United States. And the sheriff, who is the mere ministerial officer of the court of common law, can have no greater power or jurisdiction over the vessel than the court whose process he executes. He seizes what the court had a right to seize; he has no right of possession beyond it; and if the interest over which the court has jurisdiction is secondary and subordinate to the interest over which the admiralty has exclusive jurisdiction, his possession is secondary and subordinate in like manner, and subject to the process on the superior and paramount claim. It is the process and the authority of the court to issue it that must determine who has the superior right. And if the one is to enforce a right paramount and superior to the other, it is perfectly immaterial whether the first process was served by a sheriff or the Marshal. Nor does it make any difference when they are served by different officers of different courts. In the case of The Flora, 1 Hagg. 298, the vessel had been seized by a sheriff upon process from the Court of King's Bench. She was afterwards, and while in possession of the sheriff, arrested upon process from the admiralty of a prior maritime lien, and was sold by the Marshal while the sheriff held her under the common law process. The sale by the Marshal was held to be valid by the King's Bench. It is true, that the creditor at whose suit the vessel was seized by the sheriff consented to the sale, and claimed to come in for the surplus after paying the maritime lien. But if the Marshal could not lawfully arrest *while she was in the possession of the [*604 sheriff, he could not lawfully sell under that arrest, nor while the sheriff still held possession, and no consent of parties would make it a valid marshal's sale, and give a good title to the purchaser, if the sale was without authority of law. The validity of these proceedings was brought before the courts by the ship owner, and earnestly litigated. The Court of King's Bench sanctioned the sale, not upon the ground that the creditor consented to it, but upon the ground that the Marshal acted under a court of competent authority (see note 301), and they refused to interfere with the surplus which remained after payment of seamen's wages, which had been paid into the registry of the admiralty, even in behalf of the creditor who had seized under their own process. The King's Bench did not seem to have supposed that there was any conflict of jurisdiction in the case, or that their process or officer had been improperly interfered with by the Marshal, nor did the King's Bench hold that there was any incongruity in the possession of the Sheriff and the Marshal at the same time. On the contrary, it was conceded on all hands that the possession of the sheriff was no obstacle to the arrest by the Marshal, nor any impediment in the way of the admiralty, when exercising its appropriate and exclusive jurisdiction, in enforcing claims prior and superior to that of the

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attaching creditor. Is there any substantial difference between that case and the one before us? I can see none.

Chancellor Kent, in his Commentaries, states the principle with his usual precision and clearness, and in a few words. In vol. 1st, 380, speaking of the lien for seamen's wages, he says: "The admiralty jurisdiction is essential in all such cases, for the process of a court of common law cannot directly touch the thing in specie." And, in my judgment, the process of the court of common law in this case did not touch the interest of the seamen in the ship.

But it seems, however, to be supposed, that the circumstance that the common law court was the court of a State, and not of the United States, distinguishes this case from that of The Flora, and is decisive in this controversy. And it is said that the Royal Saxon, being in possession of an officer of a state court, under process from the court, she was in the possession of an officer of another sovereignty, and was in the custody of its law, and that no process could be served upon her, issuing from the court of a different sovereignty, without infringing upon the rights of the State, and bringing on unavoidably a conflict between the United States and the State.

If, by another and different sovereignty, it is meant that the power of the State is sovereign within its sphere of action, as 605*] *marked out by the Constitution of the United States, and that no court or officer of the United States can seize or interfere with property in the custody of an officer of a state court, where the property and all the rights in it are subject to the control of the judicial authorities of the State, nobody will dispute the proposition. But if it is intended to say that, in the administration of judicial power, the tribunals of the States and the United States are to be regarded as the tribunals of separate and independent sovereignties, dealing with each in this respect upon the principles which govern the comity of nations, I cannot assent to it. The Constitution of the United States is as much a part of the law of Pennsylvania as its own Constitution, and the laws passed by the General Government pursuant to the Constitution are as obligatory upon the courts of the States as upon those of the United States; and they are equally bound to respect and uphold the acts and process of the courts of the United States, when acting within the scope of its legitimate authority. And its courts of common law stand in the same relation to the courts of admiralty, in the exercise of their judicial powers, as if they were courts of common law of the United States. The Constitution and the laws, which establish the admiralty courts and regulate their jurisdiction, are a part of the supreme law of the State; and the State could not authorize its common law courts to issue any process, or its officers to execute it, which would impede or prevent the Admiralty Court from performing the duties imposed upon it, on exercising the power conferred on it by the Constitution and laws of the United States. The State courts have not, and cannot have, any jurisdiction in admiralty and maritime liens, to bring them into conflict with the courts of the United States. This principle appears to me to rest on the clear construction of the Constitution, and has been maintained by eminent jurists.

Precisely the same question now decided came before the Circuit Court of Massachusetts twenty years ago, in the case of Certain Logs of Mahogany, Thomas Richardson, Claimant, reported in 2d Sumn. 589; and also before the District Court of the State of Maine, thirty years ago, in the case of Poland v. The Freight and Cargo of the Brig Spartan, reported in 1 Ware, 143; and in both of these cases the point was fully considered and decided by the court; and in both it was held that a previous seizure under a process of attachment from a state court could not prevent the admiralty from proceeding in rem to enforce the preferred liens of which it has exclusive jurisdiction.

In the case in the Circuit Court of Massachuchusetts, Mr. Justice *Story says: "A [*606 suit in a state court by replevin or by attachment can never be admitted to supersede the right of a court of admiralty to proceed by a suit in rem, to enforce a right against that property, to whomsoever it may belong. The admiralty does not attempt to enter into any conflict with the State court, as to the just operation of its own process; but it merely asserts a paramount right against all persons whatever, whether claiming above or under the process. No doubt can exist that a ship may be seized under admiralty process for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending. The same thing is true as to the lien on a ship for seamen's wages, or a bottomry bond."

I quote the words of Mr. Justice Story, because he briefly and clearly states the principle upon which the jurisdiction of the respective courts is regulated, and upon which I think this case ought to be decided. The Constitution and laws of the United States confer the entire admiralty and maritime jurisdiction expressly upon the courts of the General Government. And admiralty and maritime liens are, therefore, outside of the line which marks the authority of a common law court of a State, and excluded from its jurisdiction. And if a common law court sells the vessel to which the lien has attached, upon condemnation, to pay the debt, or on account of its perishable condition, it must sell subject to the maritime liens, and they will adhere to the vessel in the hands of the purchaser, and of those claiming under him.

Upon what sound principle, then, of judicial reasoning can it be maintained, that although the process of a common law court cannot reach the maritime liens, yet, by laying hold of some other interest, it can withdraw them from admiralty for an indefinite period of time? It cannot issue its mandate to the admiralty, not to proceed upon those liens: but according to the present decision, it may take the lien out of its power and out of its jurisdiction. I cannot be persuaded that a court which, by the Constitution of the United States, has no jurisdiction over the subject-matter—that is, the maritime lien—can directly or indirectly prevent or delay the court which, by the Constitution, has exclusive jurisdiction, from fulfilling its judicial duty, or the seamen from pursuing their remedy, where alone they can obtain it.

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But the decision of this court in the case of Hagan v. Lucas, 10 Pet. 400, it is said, is the same in principle, and must govern the case now before us. If this were the case, I should yield to its authority, however reluctant I might feel to do so. But in my judgment, the point decided in that case has no analogy whatever to the questions arising in this.

607*] *In the case of Hagan v. Lucas, 10 Pet. 400, a judgment had been obtained in the State Court of Alabama against certain defendants, and an execution issued, upon which certain slaves were seized by the sheriff as the property of the defendants. Lucas, the defendant in this writ of error, claimed the property as belonging to him; and, under a statute of Alabama, the property was restored to him by the sheriff, upon his giving bond for the forthcoming of the slaves, if it should be found that they were the property of the persons against whom the execution was issued. And proceedings were thereupon had, to try before the court the right of property, according to the provisions of the State law. Pending these proceedings, a judgment was obtained in the District Court of the United States against the same defendants, and an execution issued, which the Marshal levied on the same property that had been seized by the sheriff. Lucas thereupon appeared in court, and again claimed the slaves as belonging to him, and at the trial exhibited proof that the proceedings to try the right of property under the sheriff's levy were still pending and undetermined in the State court. Both the court below and this court held, that under these circumstances the property could not be taken in execution by the Marshal upon process from the District Court of the United States.

But what was the principle upon which that case turned? And what resemblance has it to the questions we are now called on to consider?

Here were two courts of common law, exercising the same jurisdiction, within the same territorial limits, and both courts governed by the same laws. Neither court had any peculiar or exclusive jurisdiction over the property in question, nor of any peculiar right or lien upon it. The State court had the same power with the District Court to hear and decide any question that might arise as to the rights of property of any person, and to protect any liens and priorities of payment to which the property or its proceeds were liable. In a word, they were courts of concurrent and co-ordinate jurisdiction over the subject-matter; and if the plaintiff in the District Court had any preferred interest in the property, or any superior or prior claim, he could have asserted that claim in the state court, and have obtained there the same remedy and the same protection of his rights, and as effectually and speedily, as the court of the United States could have afforded him.

And this court, in deciding the case, did nothing more than adhere to a rule which, I believe, is universally recognized by courts of justice—that is, that between courts of concurrent jurisdiction, the court that first obtains

608*] possession of the controversy, *or of the property in dispute, must be allowed to dispose of it finally, without interference or interruption from the co-ordinate court. And this rule applies where the concurrent jurisdictions are two courts of the United States or two courts of a State, or one of them the court of a State and the other a court of the United States. It was no new question when the case of Hagan v. Lucas came before this court; but an old and familiar one, upon which courts of concurrent jurisdiction have necessarily uniformly acted, in order to prevent indecorous and injurious conflicts between courts in the administration of justice. Indeed, this principle seems hardly to have been disputed in that case. The arguments of counsel are not given in the report. But, judging from the opinion delivered by the court, the main question seems to have been, whether the slaves were not released from execution by the bond given by Lucas, and the bond substituted in their place. The court, under the authority of a case decided in the State Court of Alabama, held that they were not released from the sheriff's levy, and therefore applied the familiar rule in relation to courts of concurrent jurisdiction.

But how can the case of Hagan v. Lucas influence the decision of this? If Pennsylvania had an admiralty or any other court with jurisdiction over maritime liens, and the attaching creditor had proceeded in that court, undoubtedly the same principle would apply. But the State has no such court, and can have none such under the Constitution of the United States. The jurisdiction of the District Court is exclusive on that subject, and the line of division between that and the courts of common law is plainly and distinctly drawn. And when the District Court proceeded to enforce the lien for seamen's wages, it interfered with no right which the creditor had acquired under the process of attachment, nor with any right of property subject to State jurisdiction; and when the District Court, acting within its exclusive and appropriate jurisdiction, proceeded to enforce the preferred and superior right of seamen's wages, it claimed no superiority over the State court; it merely exercised a separate and distinct jurisdiction. It displaced no right which the attaching creditor had acquired under the state process, nor in any degree lessened his security. Nor did it interfere with any right over which the state court had jurisdiction. If the liens were paid without sale, his attachment still held the ship. If she was sold, his right, whatever it was, adhered to the surplus, if any remained after discharging the liens. And if the state court passed judgment of condemnation in his favor, he would be entitled to receive from the registry of the admiralty whatever was awarded him by the state court, *if there was surplus en- [*609 ough after paying the superior and preferred claims for maritime liens. I can see no conflict of jurisdiction; nor can there be any, if each tribunal confines itself to its constitutional and appropriate jurisdiction.

But my brethren of the majority seem to suppose, that the principle decided in Hagan v. Lucas, 10 Pet. 400, goes farther than I unstand it; and that it has established the principle, that where a ship, within the limits of a State, is attached by an officer of a State, under process from a state court, no process can be served upon it from a District Court of the

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United States, while it is held under attachment by the sheriff; and that the sheriff might repel the Marshal, if he attempted to serve a process in rem, although it was issued by the District Court of the United States, to enforce a paramount and a superior claim, for which the ship was liable, and which the District Court had the exclusive right to enforce, and over which the state court had not jurisdiction.

If this be the principle adopted by this court, and be followed out to its necessary and legitimate results, it must lead them further, I am convinced, than they are prepared to go. For it might have happened, that after this vessel was seized by the sheriff, and while she remained in his possession, it was discovered that she was liable to forfeiture, or had incurred some pecuniary penalty which was by law a lien upon her, and process issued by the District Court to arrest her, in order to enforce the penalty or forfeiture. In such a case, no one, I presume, would think that the sheriff had a right to keep out the Marshal, and prevent him from arresting the ship; nor would such an arrest, I presume, be regarded as a violation of the sovereignty of the State, nor an illegal interference with the process or jurisdiction of its courts. Yet, if it be admitted that the Marshal may under such process lawfully take possession and control of the vessel, upon what principle of law does it stand? Simply upon this: that the rights of the United States under the Constitution are paramount and superior to the right of the attaching creditor. And as the District Court has exclusive jurisdiction to decide upon them, and enforce them, and the state court no jurisdiction over them, the state court cannot lawfully interfere with the process of the District Court, when exercising its exclusive jurisdiction to enforce and maintain this paramount and superior right.

But is not the claim for mariners' wages superior and paramount to the claim of the general creditor, at whose suit the attachment issued? Has not the District Court the exclusive power to enforce and maintain this right, and is not the state court without jurisdiction 610*] upon the subject? It is true, that *the seaman's right is not regarded as of equal dignity and importance with the rights of the United States. But if the proposition be true, that after the vessel was seized by the sheriff she was in the custody of the law of the State, and no process from the District Court would authorize the Marshal to arrest her, although it was issued upon a higher and superior right, for which the ship was liable, and over which the State court had no jurisdiction, the proposition must necessarily embrace process to enforce the superior and prior rights of the United States, as well as the superior and privileged rights of individuals; for the District Court has no right to trespass upon the sovereign and reserved rights of a State, or to interfere unlawfully with the process of its courts, because the United States are the libelants, and the process issued at their instance. In this respect, the United States have no greater right than an individual. And if the Royal Saxon might have been arrested by the Marshal to enforce the higher and superior right of the United States in the appropriate court, I can see no reason why he might not, upon the same grounds, make the arrest to enforce and protect the higher and superior right to mariners' wages. I think it will be difficult to draw any clear line of distinction between them, and, in my opinion, the process may be lawfully executed by the Marshal in either case. I agree with the majority of my brethren in regarding it as among the first duties of every court of the United States carefully to avoid trespassing upon the rights reserved to the States, or interfering with the process of their courts when they are exercising either their exclusive or concurrent jurisdiction in the matter in controversy. And with the high trusts and powers confided by the Constitution to the Supreme Court, it is more especially its duty to abstain from all such interference itself, and to revise carefully the judgments of the inferior courts of the United States whenever that question arises, and to reverse them if they exceed their jurisdiction. But I must add, that while in my judgment this court should be the last court in the Union to exercise powers not authorized by the Constitution, it should be the last court in the Union to retreat from duties which the Constitution and laws have imposed.

It has been suggested that this was a foreign ship, and the seamen foreign seamen, and that they are not, therefore, embraced in the Act of Congress which gives a lien upon the vessel for seamen's wages. But this provision of the law was nothing more than an affirmance of the lien which was given by the maritime law in England from the earliest period of its commercial jurisprudence, and indeed by the maritime law of every nation engaged in commercial adventures. And the *English law [*611 was brought with them by the colonists when they migrated to this country, and was invariably acted on by every admiralty court, long before the Act of Congress was passed.

It is true, that it is not in every case obligatory upon our courts of admiralty to enforce it in the case of foreign ships, and the right or duty of doing so is sometimes regulated with particular nations, by treaty. But as a general rule, where there is no treaty regulation, and no law of Congress to the contrary, the admiralty courts have always enforced the lien where it was given by the law of the State or nation to which the vessel belonged. In this respect, the admiralty courts act as international courts, and enforce the lien upon principles of comity. There may be, and somtimes have been, cases in which the court, under special circumstances, has refused to interfere between the foreign seamen and ship owner; but that is always a question of sound judicial discretion, and does not affect the jurisdiction of the court, and, like all questions resting in the judicial discretion of the court below (such as granting or refusing a new trial, continuing a case, or quashing an execution), it is not a subject for revision here, and furnishes no ground for appeal, or for impeaching the validity of the judgment. The District Court undoubtedly had jurisdiction of the case, if in its discretion it deemed it proper to exercise it.

Indeed, there appears to have been no special circumstances brought to the notice of the court to induce it, upon international considerations, not to interfere. There was no objection on the part of the foreign ship owner or

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master; but, on the contrary, a general desire that the court should do so. And certainly this circumstance was not even adverted to in the State or District Court, and had no influence upon the opinions of either.

It is perhaps to be regretted that this question of jurisdiction did not arise between two courts of common law, but has arisen between the admiralty courts of the United States and a common law court of the State. I am sensible, that among the highest and most enlightened minds, which have been nurtured and trained in the studies of the common law, there is a jealousy of the admiralty jurisdiction, and that the principles of the common law are regarded as favorable to personal liberty and personal rights, and those of the admiralty as tending in a contrary direction. And under the influence of this opinion, they are apt to consider any restriction upon the power of the latter as so much gained to the cause of free institutions. And as there is no admiralty ju- [*612 risdiction reserved *to the States, and the administration of justice in their courts is confined to questions of common law and chancery, the studies and pursuits of the jurists in the States do not generally lead them to examine into the history and character of the admiralty jurisdiction; nor to inquire into its usefulness, and indeed necessity, in every country extensively engaged in commerce. Their opinions are naturally formed from common law decisions, and common law writings and commentaries. And no one has contributed more than Lord Coke to create these opinions. His great knowledge of the common law, displayed in his voluminous writings, has made him a high authority in all matters concerning the administration of justice. And everyone who in early life has passed through the usual studies of the common law, feels the influence of his opinions afterwards, in all matters connected with legal inquiries. The firmness with which he resisted the encroachments of the Crown upon the liberty of the subject, in the reigns of James I. and Charles I., has added to the weight of his opinions, and impressed them more strongly and durably upon the mind of the student. But before we receive implicitly his doctrines on the admiralty jurisdiction, it may be well to remember that in the case of Smart v. Wolfe, 3 T. R., 348, where the opinions of Lord Coke were referred to upon a question of admiralty jurisdiction, Mr. Justice Buller said: "with respect to what is said relative to the admiralty jurisdiction, in 4 Inst. 135, that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, the jurisdiction."

I need not speak of the weight to which this opinion is entitled, when judicially pronounced by Mr. Justice Buller in the King's Bench, in deciding a well considered case then before the court.

Everyone who has studied the history of English jurisprudence generally, and who has not confined his researches to the decisions of the common law courts, and the commentaries or writers trained in them, is aware that a very grave contest existed for a long time, as to the relative jurisdictions of the Court of King's Bench and the admiralty after the passage of the Statutes of Richard II., which are so often referred to. And this controversy was continued with unabated zeal on both sides after the passage of the Statutes of Henry IV., and Henry VIII., on the same subject.

It is not my purpose to discuss the points on which the courts differed. I refer to the controversy merely to show that the construction given to the English Statutes by the *King's Bench, and which finally nar- [*613 rowed so much the jurisdiction of the English admiralty, was earnestly disputed at the time by many of the most distinguished jurists of the day. Indeed, the decisions of the King's Bench were by no means uniform, and the opinions of common law judges on the subject widely differed. This appears by the opinion of the twelve judges, given to the King in Council, according to the usage of the English Government at that period of its history, and also by the Ordinance of the Parliament in 1648, both of which materially differed from the decisions made before and afterwards in the King's Bench. I refer to these opinions particularly because they show, past doubt, that the construction placed upon the English Statutes, now so confidently assumed to have been the admitted one at the time, was, in fact, for several generations, earnestly disputed by legal minds of the highest order, and was at length forced on the admiralty by the controlling power of the King's Bench; for, whatever justice or weight of argument there might be on the part of the construction of the admiralty judges, the power was in the King's Bench. It exercised not merely the ordinary appellate authority of a superior court, but it issued its prohibition, forbidding any other court to try a suit brought in it where the Judges of the King's Bench denied the jurisdiction of the inferior court, and claimed the right to have the case tried before themselves.

How and under what influences, such a power would be exercised, from the reign of Richard II., to that of Henry VIII., we may readily imagine. It was a period when England was divided by the rival claims of the houses of York and Lancaster to the Crown, and was often convulsed by civil wars, not upon questions of civil liberty or national policy, but merely to determine which of the claimants should be their king; and when the monarch who succeeded in fighting his way to the throne, framed his policy, and appointed the officers, civil as well as military, with a view to maintain his own power, and destroy the hopes of his adversary, rather than with any desire to promote the liberties of the people, or establish an enlightened and impartial administration of justice in his courts. And as the King was presumed to preside in person in the King's Bench, and the judges held their offices at his pleasure, no reader of history will doubt the temper and spirit in which power was exercised.

But we are not left to conjecture on that subject. The same efforts and means that were successfully used to break down the Court of Armiralty, were also used at the same time, and by the same men, to restrict the powers of the Court of Chancery, *but not with the [*614 like success. And the same reasons were assigned for it—that is, that it proceeded upon

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the principles and adopted the practice of the civil law, and had no jury, and was on that account unfavorable to the principles of civil liberty, whilst the proceedings at common law supported and cherished them. These hostile efforts against the chancery continued until the reign of James I., and were made with renewed vigor in the time of Lord Ellesmere, who was appointed Lord Keeper by Queen Elizabeth, and Chancellor by James I.

A brief passage from the life of Lord Chancellor Ellesmere, by Lord Campbell, will tell us how far the earlier decisions of the Courts of King's Bench on the Statutes of Richard II., Henry IV., and Henry VIII., which are so often pressed upon us, ought to be respected as just interpretations of these Statutes, and also how far we ought to regard those judges as high and impartial jurists, seeking only to maintain free institutions when they give judgments restraining the jurisdiction of other courts.

The passage I quote from Lord Campbell is in his 2d vol. Lives of the Chancellors, 184, 185 (London ed. of 1845), where, after stating that few of his (Lord Ellesmere's) judgments had come down in a shape to enable us to form an opinion of their merits, but that they were said to have been distinguished for sound learning, lucid arrangement, and great precision of doctrine, he proceeds in the following words:

"The only persons by whom he was not entirely approved were the common law judges. He had the boldness to question and correct their pedantic rules more freely than Lord Keeper Puckering, Lord Keeper Bacon, or any of his predecessors, had done, and not unfrequently he granted injunctions against executions on common law judgments, on the ground of fraud in the plaintiff, or some defect of procedure by which justice had been defeated. He thus not only hurt the pride of these venerable magistrates, but he interfered with their profits, which depended mainly upon the number of suits brought before them, and the reputation of their respective courts. These jealousies, which begun so soon after his appointment, went on constantly increasing, till at last, as we shall see, they produced an explosion which shook Westminster Hall to its center.

We need nothing further to show what respect is due to the opinions of judges actuated by such motives.

The legislation of England, however, in the present age, when the principles of civil liberty and enlightened jurisprudence are better understood, shows that the restrictions upon 615*] *the admiralty jurisdiction, imposed by the King's Bench, have been found unsuitable to the wants of a great commercial people, and that the enlargement of that jurisdiction is not regarded, at the present day, as adverse to the march of liberal and free institutions. And the decisions of the King's Bench having been too firmly established, by repeated adjudications, to be removed by judicial authority, Parliament interposed, and by the Statute of 3d and 4th Victoria, passed in 1840, restored to the court many of the most important powers in civil cases that had been wrested from it by the decisions in the King's Bench. The courts of common law proved to be far less suited for such controversies. And it is no small evidence of the soundness of the doctrines heretofore upheld by this court, that with the powers restored by Parliament, the English admiralty now exercises nearly the same jurisdiction which this court had previously maintained to be the appropriate and legitimate power of a court of admiralty. A synopsis of the jurisdiction of the English admiralty, as now established, is stated in 1 Kent's Com. 371, 372, in the notes. But it is proper to remark, that in stating in these notes the admiralty jurisdiction as recognized in the United States, I think it is stated too broadly—broader than this court has sanctioned; for, as regards the jurisdiction in policies of insurance, I believe it has never been asserted in any circuit but the first, and certainly has never been brought here for adjudication.

This brief review of the long contest in England, between the Courts of King's Bench and the admiralty, seemed to be necessary, as it shows past doubt that the efforts of the former to take away the jurisdiction of the latter, and to compel the suitors to seek redress in the King's Bench, did not arise from any anxiety to preserve free institutions, and that the charges made against the admiralty, of favoring despotic principles, and usurping powers which did not belong to it, are without foundation. It shows, moreover, that the persevering encroachments of the King's Bench, and its unwarranted construction of the English Statutes, were constantly disputed and opposed by enlightened jurists. The contest was carried on to a very late period, with varying decisions, in the Court of King's Bench itself, upon the subject, and no certain and definite line of jurisdiction in admiralty appears to have been fixed and established, even at the period of the American Revolution, and indeed not until the passage of the late Act of Parliament.

And if we are to look to England for an example of enlightened policy in the government, and a system of jurisprudence suited to the wants of a great commercial nation, or a just and impartial administration of the laws by judicial tribunals upon *principles most [*616 favorable to civil liberty, I should not look to the reigns of Richard II., or of Henry IV., or Henry VIII., for either. And I should rather expect to find examples worthy of respect and commendation in the England of the present day, in her Statute of 3d and 4th of Victoria, in the elevated and enlightened character of its present courts of justice, and in their mutual respect and consideration for the acts and authority of each other, without any display of jealousy or suspicion.

As to the unfavorable tendencies of the admiralty jurisdiction, it is perhaps sufficient to say, that under the Constitution of the United States it has no criminal jurisdiction; nor is the suitor without the protection of a trial by jury, if the legislative body which creates the court and regulates its powers think proper to give the right. There is nothing in the character and proceedings of the admiralty, incompatible with the trial by jury. And, indeed, it has already been given to a certain extent by the Act of Congress of 1845, and may at the will of Congress be given in every case, if it is supposed the purposes of justice require it.

I can therefore see no ground for jealousy or

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enmity to the admiralty jurisdiction. It has in it no one quality inconsistent with or unfavorable to free institutions. The simplicity and celerity of its proceedings make a jurisdiction of that kind a necessity in every just and enlightened commercial nation. The delays unavoidably incident to a court of common law, from its rules and modes of proceeding, are equivalent to a denial of justice where the rights of seamen, or maritime contracts or torts are concerned, and seafaring men the witnesses to prove them; and the public confidence is conclusively proved by the well known fact, that in the great majority of cases, where there is a choice of jurisdictions, the party seeks his remedy in the Court of Admiralty in preference to a court of common law of the State, however eminent and distinguished the state tribunals may be.

The opinions of Lord Coke, in all matters relating to the laws and institutions of England, were deeply impressed upon the English nation, and for a long time exercised a controlling influence. But with the advance of knowledge, and a more enlightened judgment in the science of government and jurisprudence, the courts of justice have not shut their eyes to errors committed under the influence of prejudice or passion. This is evident from the language of Mr. Justice Buller hereinbefore mentioned, by the respect shown to the jurisdiction and authority of the admiralty in the case of The Flora, in 1 Hagg. 298, and by the recent Act of Parliament; and I can see no good *reason for [*617 fostering in the common law courts of this country, whether state or federal, opinions springing from prejudices which arose out of the conflicts of the times, and which tend to create jealousies and suspicions on their part, and produce discord instead of harmony and mutual good feeling in the tribunals of justice. These jealousies and suspicions of Lord Coke undoubtedly grew out of the vehement conflicts, personal as well as political, in which he was so prominently engaged during all his lifetime. They have been discarded and disowned in the courts of the country from which we derived them, and also emphatically repudiated by the Stat. of 3 and 4 of Victoria.

And believing, as I do, upon the best consideration I am able to give to the subject, that the decision and the principle upon which the opinion of the court founds itself is inapplicable to the case before us, and that if it is carried out to its legitimate results it will deprive the admiralty of power, useful, and indeed necessary, for the purposes of justice, and conferred on it by the Constitution and laws of the United States, I must respectfully record my dissent.

Messrs. Justices Wayne, Grier and Clifford, also dissent, and concur fully in the preceding views expressed by the Chief Justice.

END OF VOLUME 61.

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